



Report of judgments,
orders and advisory opinions of the
African Court on Human and Peoples' Rights

African Court Law Report Volume 6 (2022)



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Editorial

This is the sixth volume of the *Report of judgments, orders and advisory opinions of the African Court on Human and Peoples' Rights*. This volume covers decisions of 2022.

The volume includes all the Judgments, including Separate and Dissenting Opinions, Rulings, Decisions, Procedural Orders and Orders for Provisional Measures adopted by the Court during the period under review.

Each case has a headnote setting out a brief summary of the case followed by keywords indicating the paragraphs of the case in which the Court discusses the issue. A subject index at the start of the reports indicates which cases discuss a particular issue. This index is divided into sections on general principles and procedure, and substantive issues.

User Guide

This sixth volume of the *African Court Law Report* includes 57 decisions of the African Court on Human and Peoples' Rights. Decisions are sorted chronologically with decisions dealing with the same case (eg procedural decisions, orders for provisional measures, merits judgments and reparations judgments) sorted together. A table of cases setting out the sequence of the decisions in the *Report* is followed by an alphabetical table of cases. The *Report* also includes a subject index, divided into sections on procedure and substantive rights. This is followed by lists of instruments cited and cases cited. These lists show which of the decisions include reference in the main judgment to specific articles in international instruments and case law from international courts and quasi-judicial bodies.

Each case includes a chapeau with a brief summary of the case together with keywords and paragraph numbers where the issue is discussed by the Court or in a separate opinion.

The year before *AfCLR* in the case citation indicates the year of the decision, the number before *AfCLR* the volume number (6), while the number after *AfCLR* indicates the page number in this *Report*.

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Cases cited

African Commission on Human and Peoples' Rights

Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of the Endorois Welfare Council) v Kenya (Commission)

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

Dabolorivhuwa Patriotic Front v South Africa

Diarra v Mali (ruling) (2022) 6 AfCLR 799

Forum of Conscience v Sierra Leone

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Mwita v Tanzania (judgment) (2022) 6 AfCLR 955

International Pen & Ors (on behalf of Saro-Wiwa) v Nigeria

Mwita v Tanzania (judgment) (2022) 6 AfCLR 955

Institute for Human Rights and Development in Africa & Ors v the DRC

Kouassi & Anor v Côte d'Ivoire (ruling) (2022) 6 AfCLR 726

International Pen & Ors (on behalf of Saro-Wiwa) v Nigeria

Henerico v Tanzania (judgment) (2022) 6 AfCLR 1

Interights and Ditshwanelo v Botswana

Iguna v Tanzania (judgment) (2022) 6 AfCLR 826

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Noudehouenou v Benin (provisional measures) (2022) 6 AfCLR 390

ILC, Malawi African Association et al v Mauritania

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Open Society Justice Initiative v Côte d'Ivoire

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Social Economic Rights and Accountability Project v Nigeria

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

Sudan Human Rights Organization and Center on Housing Rights and Evictions (COHRE) v Sudan

Mornah v Benin & Ors (judgment) (2022) 6 AfCLR 561

World Organisation against Torture & Ors v Zaire

Mornah v Benin & Ors (judgment) (2022) 6 AfCLR 561

African Court of Human and Peoples' Rights

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Actions pour la Protection des Droits de l'Homme v Côte d'Ivoire (merits)

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Mornah v Benin & Ors (judgment) (2022) 6 AfCLR 561

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African Commission on Human and Peoples' Rights, Open Society Justice Initiative v Côte d'Ivoire

Sangaré & Ors v Mali (judgment) (2022) 6 AfCLR 359

African Commission on Human and Peoples' Rights v Kenya (merits)

Belguith v Tunisia (judgment) (2022) 6 AfCLR 412

Dabo & Ors v Mali (ruling) (2022) 6 AfCLR 786

Fundumu v Tanzania (ruling) (2022) 6 AfCLR 463

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African Commission on Human and Peoples' Rights v Libya (merits)

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Mornah v Benin & Ors (judgment) (2022) 6 AfCLR 561

Touray & Ors v The Gambia (ruling) (2022) 6 AfCLR 183

African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya (provisional measures)

Kchouk v Tunisia (provisional measures) (2022) 6 AfCLR 1059

Zayd v Tunisia (provisional measures) (2022) 6 AfCLR 1067

Akwasi Boateng & Ors v Ghana (jurisdiction)

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Kouassi & Anor v Côte d'Ivoire (ruling) (2022) 6 AfCLR 726

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Alex Thomas v Tanzania (merits)

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Henerico v Tanzania (judgment) (2022) 6 AfCLR 1

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Muwinda & Ors v Tanzania (judgment) (2022) 6 AfCLR 150

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Noudehouenou v Benin (ruling) (2022) 6 AfCLR 694

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Rutakikirwa v Tanzania (judgment) (2022) 6 AfCLR 165

Sangaré & Ors v Mali (judgment) (2022) 6 AfCLR 359

Yusuph v Tanzania (judgment) (2022) 6 AfCLR 198

Alfred Agbesi Woyome v Ghana (merits and reparations)

Fory v Côte d'Ivoire (ruling) (2022) 6 AfCLR 810

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Mornah v Benin & Ors (judgment) (2022) 6 AfCLR 561

US military intervention in Grenada

Mornah v Benin & Ors (judgment) (2022) 6 AfCLR 561

Víctor Rosario Congo

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

Inter-American Court of Human Rights

Aloeboetoe et al v Suriname

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

Bayarri v Argentina

Msuguri v Tanzania (judgment) (2022) 6 AfCLR 884

Castillo Páez v Peru

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

Forneron and daughter v Argentina

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

Genie Lacayo v Nicaragua

Fory v Côte d'Ivoire (ruling) (2022) 6 AfCLR 810

Gonzales & Ors (Cotton Field) v Mexico

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

Indigenous Community Yakye Axa v Paraguay

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

Kalina and Lokono Peoples v Suriname

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

Kichwa Indigenous People of Sarayaku v Ecuador

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

Martínez Coronado v Guatemala

Iguna v Tanzania (judgment) (2022) 6 AfCLR 826

Msuguri v Tanzania (judgment) (2022) 6 AfCLR 884

Massacre of Caloto v Colombia

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

Mayagna (Sumo) Awas Tingni Community v Nicaragua

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

Moiwana Community v Suriname

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

Pagdayawon Rolando v Philippines

Iguna v Tanzania (judgment) (2022) 6 AfCLR 826

Plan de Sanchez Massacre

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

Restrictions to the Death Penalty

Iguna v Tanzania (judgment) (2022) 6 AfCLR 826

Saramaka People v Suriname

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

Sawhoyamaya Indigenous Community v Paraguay

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

Street Children (Villagrán Morales et al) v Guatemala

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

Trujillo Oroza v Bolivia

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

Velásquez Rodríguez v Honduras

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

Yakye Axa Indigenous Community v Paraguay

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

International Court of Justice

Advisory Opinion on Chagos Archipelago

Mornah v Benin & Ors (judgment) (2022) 6 AfCLR 561

Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

Mornah v Benin & Ors (judgment) (2022) 6 AfCLR 561

Advisory Opinion on Western Sahara

Mornah v Benin & Ors (judgment) (2022) 6 AfCLR 561

Barcelona Traction, Light and Power Company, Limited, Second Phase (Belgium v Spain)

Mornah v Benin & Ors (judgment) (2022) 6 AfCLR 561

Concessions in Palestine and Jerusalem, Greece v United Kingdom

Mwambipile & Anor v Tanzania (ruling) (2022) 6 AfCLR 925

East Timor (Portugal v Australia)

Mornah v Benin & Ors (judgment) (2022) 6 AfCLR 561

Gabčíkovo-Nagymaros Project (Hungary v Slovakia)

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

Mornah v Benin & Ors (judgment) (2022) 6 AfCLR 561

Mavrommatis Palestine Concessions (Greece v Britain)

Mornah v Benin & Ors (judgment) (2022) 6 AfCLR 561

Papamichalopoulos & Ors v Greece

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

Phosphates of Morocco (Italy v France)

Mornah v Benin & Ors (judgment) (2022) 6 AfCLR 561

Munthali v Malawi (judgment) (2022) 6 AfCLR 326

Right of Passage in Indian Territory (Portugal v India)

Mwambipile & Anor v Tanzania (ruling) (2022) 6 AfCLR 925

South West Africa, Ethiopia and Liberia v South Africa

Mornah v Benin & Ors (judgment) (2022) 6 AfCLR 561

Temple of Preah-Vihear (Cambodia v Thailand)

Mornah v Benin & Ors (judgment) (2022) 6 AfCLR 561

United States Diplomatic and Consular Staff in Tehran, Iran v United States

Mornah v Benin & Ors (judgment) (2022) 6 AfCLR 561

Permanent Court of International Justice

Certain German Interests in Polish Upper Silesia

Mwambipile & Anor v Tanzania (ruling) (2022) 6 AfCLR 925

Corfu Channel, United Kingdom v Albania

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

Opinion in the Lusitania (United States v Germany)

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

Pecuniary claims of Danzig railway employees who have entered Polish service against the Polish railway administration

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

Iguna v Tanzania (judgment) (2022) 6 AfCLR 826

Msuguri v Tanzania (judgment) (2022) 6 AfCLR 884

The Factory at Chorzow (jurisdiction)

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

Permanent Court of Arbitration

SA, Isle of Palmas, United States v The Netherlands

ACHPR v Kenya (reparations) (2022) 6 AfCLR 232

United Nations Human Rights Committee

Eversley Thompson v St. Vincent & the Grenadines

Henerico v Tanzania (judgment) (2022) 6 AfCLR 1

Mwita v Tanzania (judgment) (2022) 6 AfCLR 955

Faure v Australia

Mariko v Mali (judgment) (2022) 6 AfCLR 75

G. Campbell v Jamaica

John v Tanzania (judgment) (2022) 6 AfCLR 477

Kavanagh v Ireland

Diarra v Mali (ruling) (2022) 6 AfCLR 799

Kazantzis v Cyprus

Mariko v Mali (judgment) (2022) 6 AfCLR 75

Kivenmaa v Finland

Touray & Ors v The Gambia (ruling) (2022) 6 AfCLR 183

Philip Afuson Njaru v Cameroon

Mornah v Benin & Ors (judgment) (2022) 6 AfCLR 561

Poliakov v Belarus

Touray & Ors v The Gambia (ruling) (2022) 6 AfCLR 183

Popova v Russian Federation

Touray & Ors v The Gambia (ruling) (2022) 6 AfCLR 183

Powell and Rayner v United Kingdom

Mariko v Mali (judgment) (2022) 6 AfCLR 75

RS v Trinidad and Tobago

Mwita v Tanzania (judgment) (2022) 6 AfCLR 955

Sekerko v Belarus

Touray & Ors v The Gambia (ruling) (2022) 6 AfCLR 183

Other Courts

Strickland v Washington

Henerico v Tanzania (judgment) (2022) 6 AfCLR 1

Henerico v Tanzania (judgment) (2022) 6 AfCLR 1

Application 056/2016, *Gozbert Henerico v United Republic of Tanzania*

Judgment, 10 January 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSOUOLA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant, a citizen of the Respondent State, had been convicted and sentenced to death for murder. He was awaiting execution of the death sentence at the time he filed this Application. The Applicant alleged that by his trial, conviction and sentencing, the Respondent State had violated some of his Charter protected rights. The Court found that the Respondent State had violated the Applicant's rights to dignity and life as well as aspects of his right to a fair trial. Accordingly, the Court granted some of the reparations sought by the Applicant.

Jurisdiction (material jurisdiction, 38, 40-41; appellate jurisdiction 38; effect of withdrawal of article 34(6) declaration, 44; temporal jurisdiction, 45)

Admissibility (exhaustion of local remedies, 60-62)

Fair trial (trial within a reasonable time, 82, 86-89; effective free legal representation, 106-109, 112-114; trial by a competent court or tribunal, 120; right to interpreter, 126-128, 130)

Life (mandatory death sentence, 145, 148-149)

Dignity (death penalty and persons with mental disabilities, 156, 160; execution of death sentence by hanging, 169)

Reparations (basis for, 172; forms of, 173; moral damage, 174; currency for award, 176; material prejudice, 180; moral prejudice, 185-186, 188; indirect victims)

Declaration: TCHIKAYA

Life (mandatory death sentence, 6)

Joint Declaration: KIOKO and CHIZUMILA

Judgment (framing of operative part, 9-1, reference to previous judgment, 12)

I. The Parties

1. Gozbert Henerico, is a national of Tanzania, who, at the time of filing the Application, was at Butimba Central Prison, Mwanza Region, awaiting the execution of the death sentence, following his conviction and sentence for the offence of murder. He alleges the violation of his rights to fair trial, life and dignity.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as “the Respondent State”), which became a Party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and the Protocol on 10 February 2006. It further deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol through which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration. The Court held that this withdrawal did not have any effect on pending cases as well as new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period one (1) year after its deposit.¹

II. Subject of the Application

A. Facts of the matter

3. It emerges from the record that on 27 May 2008, at Nyakaka Buturage village within Bukoba District, Kagera Region, following the sale of land by the Applicant’s brother, Respick Henerico, the Applicant who had been drinking heavily and was inebriated on drugs, stormed into the home of his relatives, who were also his neighbours. He injured three (3) of them with a panga (machete) by slashing them on the shoulders, head, neck and hands. During the attack, he also killed his nephew (late brother’s son) who at the time was being carried by the grandmother on her back.
4. Following the attack, the surviving relatives raised the alarm compelling the Applicant to flee the crime scene to the home of the area chairman who was also his relative. The Applicant was apprehended and taken to the police station, while the injured were rushed to the hospital.
5. The Applicant was arrested on 27 May 2008 and subsequently charged with the offence of murder, under Criminal Case No 7 of 2012 before the High Court of Tanzania at Bukoba. His arraignment was conducted on 21 May 2012, followed by the preliminary hearing on 5 June 2014 and the commencement of the trial on

¹ *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application No 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.

16 February 2015. Subsequently, the High Court convicted the Applicant and sentenced him to death, by its judgment of 22 April 2015.

6. The Applicant appealed his conviction and sentence by filing Criminal Appeal No 114 of 2016 before the Court of Appeal of Tanzania sitting at Bukoba. On 26 February 2016, the Court of Appeal dismissed his appeal for lack of merit.

B. Alleged violations

7. The Applicant alleges the following:
 - i. That the Respondent violated his right to a fair trial under Article 7 of the Charter:
 - a. When it detained him for an unreasonably long period of time before trying him;
 - b. When it failed to provide him with effective legal representation;
 - c. When it failed to acknowledge that his trial was tainted by actual or perceived bias due to the assessors having cross-examined the Applicant; and
 - d. When the Respondent State failed to provide him with adequate access to an interpreter.
 - ii. That the Respondent violated his right to life under Article 4 of the Charter by imposing a mandatory death penalty upon finding the Applicant guilty of murder:
 - a. When it failed to take into account his specific circumstances;
 - b. That the alleged offence fell outside the narrow category of the “most serious” offences to which the death penalty can be lawfully applied; and
 - c. That the Respondent State imposed a death penalty despite failing to ensure that he received a fair trial.
 - iii. That the Respondent violated his right to dignity under Article 5 of the African Charter:
 - a. By imposing a capital punishment on him as a mentally ill person; and
 - b. By sentencing him to death by hanging, which is a cruel and inhuman way of administering the death sentence.

III. Summary of the Procedure before the Court

8. This Application was filed on 15 September 2016 and served on the Respondent State on 15 November 2016.
9. On 18 November 2016, the Court issued an Order for provisional measures for the Respondent State to refrain from executing the death penalty imposed on the Applicant pending the determination

of the Application.

10. On 6 February 2017, the Respondent State filed its Response to the Application and generally on reparations and this was served on the Applicant on 9 February 2017. The Applicant filed his Reply on 17 March 2017.
11. Pleadings were closed on 14 June 2017 and the Parties were duly notified.
12. On 13 March 2018, this Court requested the Applicant to file the Report of the medical examination of his mental health status undertaken at Isanga Mental Institution, Dodoma, following the order of the High Court of 21 May 2012. On 4 June 2019, the Applicant informed the Court that he was unable to obtain a copy of the report requested by this Court.
13. On 24 April 2018, the Pan African Lawyers Union (PALU) sought leave from the Court to represent the Applicant and to amend the Application and file further evidence pursuant to Rule 50 of the Rules of Court.
14. On 2 May 2018, the Court re-opened pleadings and granted leave to the Applicant to amend the pleadings and file additional evidence.
15. On 4 June 2018, the Applicant filed the amended Application, including a medical evaluation report dated 29 May 2018, which had been commissioned by PALU, on his mental health status of the Applicant. This amended application and medical evaluation report on the Applicant's mental health status were served on the Respondent State on 14 June 2018.
16. The Applicant filed submissions on reparations on 3 December 2018, which were served on the Respondent on 6 December 2018.
17. The Respondent State did not file a Response to the Applicant's amended Application, including on the medical evaluation report on the mental health status of the Applicant commissioned by PALU, and on reparations.
18. On 17 September 2018, Cornell University, Law School, Human Rights Clinic wrote to the Court expressing its interest to represent the Applicant. The request was communicated to PALU on 24 September 2018, and on 26 September 2018, it informed the Court that, it agreed to the collaboration.
19. On 4 October 2018, Cornell University, Law School, Human Rights Clinic wrote to the Court requesting its intervention with the Butimba Prison authorities to access the Applicant's prison file and health records, including the medical evaluation report on the mental health status of the Applicant which it deemed crucial in representing the Applicant. This medical evaluation report was

pursuant to the order of 21 May 2012, by the High Court, made after the taking of the Applicant's plea, that the Applicant should undergo a medical evaluation on his mental health status at the time of commission of the offence.

20. On 28 January 2019, the Applicant filed additional documents in support of his submission on reparations and these were served on the Respondent State on 7 February 2019.
21. On 28 March 2019, the Applicant requested for a public hearing in the matter to provide him with an opportunity to present the "complex factual issues that would benefit from examination of expert witness testimony, concerning the Applicant's mental capacity". The request was notified to the Respondent State on 29 March 2019, for its observations but it did not file its Response.
22. On 3 June 2019, PALU forwarded to the Registry for its information, a letter PALU had addressed to the Attorney General requesting access to the Applicant's Medical Report on his mental health status which was ordered by the High Court, after the taking of the Applicant's plea on 21 May 2012.² PALU also informed the Registry that, the Attorney General did not respond to their letter.
23. On 28 June 2019, PALU forwarded to the Registry, for information, an email addressed to the Attorney General's Office reminding it to provide the medical report which PALU had earlier requested.
24. On 18 May 2020, the Court suspended the time limits for proceedings before the Court due to the Covid-19 situation effective from 1 May to 31 July 2020. It deliberated on the request by the Applicant to compel the authorities of Butimba Prison to provide the medical evaluation report on the mental health status of the Applicant, following the Order of the High Court. It also deliberated on the request for a public hearing, filed by the Applicant on 28 March 2019. The Court decided not to intervene or hold a public hearing.
25. On 5 October 2020, the Court communicated to the Parties, the resumption of computation of time limits for proceedings before the Court, which had taken effect from 1 August 2020.
26. Pleadings were again closed on 18 March 2021, by which time the Respondent State had still not filed a Response to the amended Application, including on the report commissioned by PALU on the medical evaluation of the Applicant's mental health status.

2 The letter was written by PALU addressed to the Attorney General dated 4 June 2019, indicating that the Applicant had spent time at Isanga Mental Institution in Dodoma, sometime between June 2012 and November 2013, prior to the commencement of the trial proceedings and requesting the Attorney General to authorise release of the Applicant's Medical records by the Butimba Prison authorities.

By the same notice, the Parties were also informed about the decision of the Court not to have a public hearing.

IV. Prayers of the Parties

27. The Applicant prays the Court to find that:
 - i. That the Respondent has violated the Applicant's rights under Articles 4, 5, and 7 of the African Charter;
 - ii. That an Oral hearing be held in this matter, pursuant to Rules 27 and 71 of the Rules of the Court;³
 - iii. That the Respondent take appropriate measures to remedy the violations of the Applicant's Rights under the African Charter;
 - iv. That the Respondent set aside the death sentence imposed on the Applicant and remove him from the death row;
 - v. That the Respondent amend its Penal Code and related legislation concerning the death sentence to make it compliant with Article 4 of the African Charter;
 - vi. That the Respondent release the Applicant from prison; and
 - vii. That the Respondent pay reparations to the Applicant in such an amount as the Court deems fit.
28. The Respondent State prays the Court to find that:
 - i. The Court is not vested with the jurisdiction to adjudicate over the Application;
 - ii. The Application has not met the admissibility requirements stipulated under Rule 40(5) of the Rules of Court;
 - iii. The Application be declared inadmissible;
 - iv. That the Respondent has not violated Article 1 of the African Charter;
 - v. That the Respondent has not violated Articles 3(1) and (2) of the African Charter on the Applicants right to equality before the law and equal protection of the law;
 - vi. That the Respondent has not violated Article 5 of the African Charter on the Applicants right to dignity;
 - vii. That the Respondent has not violated Article 6 of the African Charter on the Applicants right to liberty and security of his person;
 - viii. That the Respondent has not violated Article 7(1) of the African Charter on the Applicants right to have his cause heard;
 - ix. That the Respondent has not violated Article 9(1) of the African Charter on the Applicants right to receive information;
 - x. That there are no errors in the judgment of the Court of Appeal which resulted into miscarriage of justice;

3 Applicant's Notice of Request for Oral hearing, Application 056/2016 *Gozbert Henerico v United Republic of Tanzania*, dated 28 March 2019 Paragraph 4.

- xi. That the Respondent proved its case beyond a reasonable doubt against the Applicant;
- xii. That the evidence adduced against the Applicant was credible and reliable;
- xiii. That the High Court and Court of Appeal complied with the laws in believing and acting on the evidence of the prosecution;
- xiv. That the High Court and Court of Appeal properly evaluated the defence of the Applicant;
- xv. That the Application be dismissed in its entirety for lack of merit; and
- xvi. The Application be dismissed with costs.

V. Jurisdiction

29. Pursuant to Article 3 of the Protocol:

- 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instruments ratified by the States concerned.
- 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

30. The Court further observes that pursuant to Rule 49(1) of the Rules, it “shall preliminarily ascertain its jurisdiction... in accordance with the Charter, the Protocol and these Rules”.⁴

31. On the basis of the above-cited provisions, the Court must ascertain its jurisdiction and dispose of objections to its jurisdiction, if there are any.

A. Objections to material jurisdiction of the Court

32. The Respondent State raises an objection on the material jurisdiction of the Court based, first, on the ground that the Court lacks jurisdiction to reverse the decisions of its Court of Appeal and, secondly, that it is being called upon to sit as a court of first instance.

4 Formerly, Rule 39(1), Rules of Court, 2 June 2010.

33. The Respondent State contends in the first place that, the Court has no jurisdiction to assess the evidence adduced in the course of the Applicant's trial and appeal since the Applicant is requesting it to quash his conviction and sentence. The Respondent State argues that the Court has no jurisdiction to do so, since both the conviction and sentence were upheld by the Court of Appeal, which is the highest Court of the Respondent State. The mandate of the Court is to make declaratory orders and not reverse the decisions of the Court of Appeal. It contends that for these reasons the Court lacks material jurisdiction to adjudicate over the matter and should dismiss the Application.
34. The Respondent State further submits that the Court is not a court of first instance to determine issues which were never considered by the domestic courts and are being raised by the Applicant for the first time before this Court. As such this Court, should find that it lacks jurisdiction to determine them. The issues allegedly raised for the first time are:
 - i. Discrepancies between evidence adduced by PW1 and PW7
 - ii. Violation of the Applicant's right to dignity
 - iii. Violation of the Applicant's right to information
 - iv. That the Applicant was not tried within a reasonable time.
35. The Applicant argues that the Court's material jurisdiction is established since the Respondent State is a party to the Charter, the Protocol and also deposited the Declaration under Article 34(6) of the Protocol.
36. He also contends that the subject matter of the Application involves alleged violations of the rights protected by the Charter, for which the Court has material jurisdiction and further cites the Courts jurisprudence in that regard.⁵

37. The Court recalls that under Article 3(1) of the Protocol, it has jurisdiction to examine any application submitted to it, provided that the rights of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the

5 *Kijiji Isiaga v United Republic of Tanzania*, ACTHPR, Application No 032/2015, Judgment of 21 March 2018 (merits), § 35.

Respondent State.⁶

38. The Court recalls, its established jurisprudence, “that it is not an appellate body with respect to decisions of national courts”.⁷ However “... this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned.”⁸ In this regard, therefore it would not be sitting as an appellate court, if it were to examine the allegations by the Applicant. This claim is therefore dismissed.
39. The Court further notes that the alleged violations relating to the proceedings before the domestic courts are of rights provided for in the Charter, rights to life, to dignity, and to a fair trial.
40. The Court recalls that, in accordance with its established case-law on the application of Articles 3(1) and 7 of the Protocol, it is competent to examine relevant proceedings before domestic courts to determine whether they comply with the standards set out in the Charter or any other instrument ratified by the State concerned.⁹ Consequently, the claim that the Court would be sitting as a court of first instance is, also dismissed.
41. As a consequence of the foregoing, the Court finds that it has material jurisdiction to consider the present Application and dismisses the Respondent State’s objection.

B. Other aspects of jurisdiction

42. The Court notes that its personal, temporal and territorial jurisdiction are not contested by the Respondent State. Nonetheless, in line with Rule 49(1) of the Rules,¹⁰ it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

6 See, for instance, *Kalebi Elisamehe v United Republic of Tanzania*, ACTHPR, Application No 028/2015, Judgment of 26 June 2020 (merits and reparations) § 18.

7 *Ernest Francis Mtingwi v Malawi (jurisdiction)* § 14.

8 *Kenedy Ivan v United Republic of Tanzania*, ACTHPR, Application No 25/2016, Judgment of 28 March 2019 (merits and reparations) § 26; *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 247 § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287 § 35.

9 *Ernest Francis Mtingwi v Malawi (jurisdiction)* (15 March 2013), 1 AfCLR 190 § 14.; *Kenedy Ivan v United Republic of Tanzania*, ACTHPR, Application No 25/2016, Judgment of 28 March 2019 (merits and reparations), § 26; *Armand Guehi v Tanzania* (merits and reparations) (7 December 2018), 2 AfCLR 477, § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35.

10 Formerly Rule 39(1) of Rules of Court, 2 June 2010.

43. In relation to its personal jurisdiction, the Court recalls as indicated in paragraph 2 of the judgment, that the Respondent State is a party to the Protocol and deposited the Declaration under Article 34(6) of the Protocol with the Chairperson of the African Union Commission. Subsequently, on 21 November 2019, it deposited an instrument withdrawing its Declaration.
44. The Court recalls its jurisprudence that the withdrawal of the Declaration does not apply retroactively and only takes effect twelve (12) months after the notice of such withdrawal has been deposited, in this case, on 22 November 2020.¹¹ This Application having been filed before the Respondent State deposited its notice of withdrawal, is thus not affected by it. Consequently, the Court holds that it has personal jurisdiction.
45. In respect of its temporal jurisdiction, the Court notes all the violations alleged by the Applicant are based on the judgments of the High Court and Court of Appeal rendered on 22 April 2015 and 26 February 2016, respectively, that is, after the Respondent State ratified the Charter and the Protocol, and deposited the Declaration. Furthermore, the alleged violations are continuing in nature since the Applicant remains convicted on the basis of what he considers an unfair process.¹² Consequently, the Court holds that it has temporal jurisdiction to examine this Application.
46. As for its territorial jurisdiction, the Court notes that the violations alleged by the Applicant happened within the territory of the Respondent State. In the circumstances, the Court holds that its territorial jurisdiction is established.
47. In light of all the above, the Court holds that it has jurisdiction to determine the present Application.

VI. Admissibility

48. Pursuant to Article 6(2) of the Protocol, “the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter.”
49. In line with Rule 50(1) of the Rules, “the Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these

11 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application No 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 35-39.

12 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197, §§ 71-77.

Rules.”¹³

- 50.** The Court notes that Rule 50(2) of the Rules, which in substance restates the content of Article 56 of the Charter, provides as follows:

Applications filed before the Court shall comply with all the following conditions:

- a. Disclose the identity of the Applicant notwithstanding the latter’s request for anonymity;
- b. Comply with the Constitutive Act of the Union and the Charter;
- e. Not contain any disparaging or insulting language;
- f. Not based exclusively on news disseminated through the mass media;
- g. Be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
- h. Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the Matter;
- i. Not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union.

C. Objection based on non-exhaustion of local remedies

- 51.** The Respondent State has raised an objection to the admissibility of the Application based on the requirement of exhaustion of local remedies.
- 52.** The Respondent State avers that the Applicant has not exhausted domestic remedies in respect of the new claims that he is raising before the Court. According to the Respondent State, “the said allegations have never been raised before the Courts in the United Republic of Tanzania, which is contrary to Rule 40(5) of the Rules of Court ...”¹⁴ The Respondent State cites the Court’s and Commission’s jurisprudence in support of its contention that since these claims are being raised before the Court for the first

13 Formerly Rule 40 Rules of Court, 2 June 2010.

14 Rule 50(2)(e) of the Rules of Court, 25 September 2020.

time, they are inadmissible.¹⁵

53. The Respondent State avers that the Applicant never raised the issue of the discrepancies between PW1 and PW7 and the alleged violation of the Applicant's right to dignity, as a ground for appeal before the Court of Appeal. In any case, the Applicant had the option to file a Constitutional Petition under the Basic Rights and Duties Enforcement Act, challenging the infringement of his rights during his trial in the High Court of Tanzania but the Applicant did not pursue this available remedy. As such the available remedies were never exhausted.
54. Additionally, if the Applicant believed that there were errors in the judgment of the Court of Appeal, he should have filed an application for review in the Court of Appeal under Rule 66(1)(a) of the Court of Appeal Rules, 2009, by virtue of which the Court of Appeal could review its judgment on the ground that the decision was based on a manifest error on the face of the record which resulted in a miscarriage of justice. The Respondent State argues that the Applicant did not pursue this available remedy.
55. The Respondent State concludes that these remedies are easily available and there was no hindrance or obstruction to the Applicant accessing and utilising them, therefore the Application should be declared inadmissible and duly dismissed.

56. The Applicant states that the Respondent' State's objections are "manifestly incorrect; they have been raised and rejected by this Court on previous occasions".
57. With regard to failure to file a Constitutional Petition, the Applicant states that the Court has held that an Applicant is only required to exhaust ordinary judicial remedies and that filing a constitutional petition, is an "extraordinary remedy which the Applicant was not required to exhaust prior to filing his application". The Applicant cites the Court's decision in *Kijiji Isiaga v United Republic of Tanzania* in this regard.

15 *Urban Mkandawire v Republic of Malawi*, ACTHPR, Application No 003/2011, Judgment of 13 March 2011 (jurisdiction & admissibility), § 38.1-38.2; *Peter Joseph Chacha v United Republic of Tanzania*, ACTHPR, Application No 003/2012, Judgment of 28 March 2014 (jurisdiction & admissibility), § 142-145 and African Commission on Human and Peoples' Rights' decision in *Article 19 versus Eritrea*.

58. The Applicant avers that similarly, with regard to filing an application for review of the judgment of the Court of Appeal, this is an extraordinary remedy in the Tanzanian judicial system, that the Applicant need not utilise before filing an application before this Court.
59. On the failure to raise the violation of the Applicant's right to dignity, in connection with the imposition of the death penalty despite the Applicant's mental illness and intellectual disability, and stipulating hanging as the means of execution, the Applicant avers that the Respondent State makes no suggestion that the Tanzanian Court of Appeal, has the power to substitute the death penalty for a lesser penalty, given that the death penalty is mandatory for murder cases in Tanzania. Thus, an application before the Court of Appeal seeking to declare the death sentence a violation of his right to dignity would have no real prospect of success. The Applicant cites the Commission's decision in *Jawara v The Gambia* in this regard. The Applicant concludes by calling on the Court to find the Application admissible.

60. The Court observes that pursuant to Article 56(5) of the Charter, whose requirements are mirrored in Rule 50(2)(e) of the Rules, any application filed before it shall fulfil the requirement of exhaustion of local remedies. The rule of exhaustion of local remedies aims at providing States the opportunity to deal with human rights violations within their jurisdictions before an international human rights body is called upon to determine the State's responsibility for the same.¹⁶
61. In the instant case, the Court notes that the Applicant's appeal before the Court of Appeal, the highest judicial organ of the Respondent State, was determined when that Court rendered its judgment on 26 February 2016. In light of this, the Court, considers therefore, that the Respondent State had the opportunity to address the violations allegedly arising from the Applicant's trial and appeals. Furthermore, the Court has previously held that the constitutional petition and an application for review at the

¹⁶ *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9 §§ 93-94.

Court of Appeal within the Respondent State's judicial system are extraordinary remedies which applicants are not required to exhaust before filing their applications before this Court.¹⁷

62. Consequently, the Court holds that the Applicant has exhausted local remedies as envisaged under Article 56(5) of the Charter and Rule 50(2)(e) of the Rules and therefore, it dismisses the Respondent State's objection.

D. Other conditions of admissibility

63. The Court notes that there is no contention regarding compliance with the conditions set out in Rule 50(2)(a), (b), (c), (d), (f) and (g) of the Rules. Even so, the Court must satisfy itself that these conditions have been met.
64. From the record, the Court notes that, the Applicant has been clearly identified by name in fulfilment of Rule 50(2)(a) of the Rules.
65. The Court notes that the claims made by the Applicant seek to protect his rights guaranteed under the Charter. It further notes that one of the objectives of the Constitutive Act of the African Union as stated in Article 3(h) thereof is the promotion and protection of human and peoples' rights. Therefore, the Court considers that the Application is compatible with the Constitutive Act of the African Union and the Charter, and thus holds that it meets the requirement of Rule 50(2)(b) of the Rules.
66. The Court further notes that the Application does not contain any disparaging or insulting language with regard to the Respondent State, which makes it compliant with the requirement of Rule 50(2)(c) of the Rules.
67. The Application is not based exclusively on news disseminated through mass media as it is based on court documents from the municipal courts of the Respondent State, thus it complies with Rule 50(2)(d) of the Rules.
68. The Court recalls that according to Article 56(6) of the Charter and Rule 50(2)(f) of the Rules, there is no specific time frame within which the case must be brought before the Court. In this regard, this Court, in Application No 013/2011, *Norbert Zongo and others v Burkina Faso*, concluded that the "...the reasonableness of the timeframe for seizure depends on the specific circumstances of

17 *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 477-478 §§ 63-65.

the case and should be determined on a case-by-case basis".¹⁸

69. The Court notes that the Applicant filed his Application before this Court on 15 September 2016, after the Court of Appeal had dismissed his appeal on 26 February 2016, that is, 6 (six) months and 20 (twenty) days after the said dismissal. The question therefore, is whether the period between the exhaustion of local remedies and the referral to the Court constitutes a reasonable time within the meaning of Article 40(6) of the Rules.¹⁹ The Court notes that in the instant case, the period of 6 (six) months and 20 (twenty) days is manifestly reasonable time.
70. The Court, therefore, finds that the Application was filed within a reasonable time in compliance with Rule 50(2)(f) of the Rules.
71. The Court observes that the Application does not concern a case which has already been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union in fulfilment of Rule 50(2)(g) of the Rules.
72. The Court, therefore, finds that all the admissibility conditions have been met and that this Application is admissible.

VII. Merits

73. The Applicant alleges that the Respondent State violated his rights to a fair trial, right to life and right to the respect of dignity.

A. Alleged violation of the right to a fair trial

74. The Applicant alleges that the proceedings leading to his conviction and sentencing for murder violated four (4) aspects of his right to a fair trial as follows:
 - i. The right to be tried within a reasonable time before arraignment at the High Court;
 - ii. The right to effective legal representation;
 - iii. The right to be tried by a competent court or tribunal; and
 - iv. The right to be provided with an interpreter.

18 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabé des droits de l'homme v Burkina Faso* (merits) (2014) 1 AfCLR 219, § 92. See also *Thomas v Tanzania* (merits), § 73.

19 Rule 50(2)(e) of the Rules of Court of 25 September 2020.

i. Alleged violation of the right to be tried within a reasonable time

75. The Applicant avers that he suffered an unreasonably long delay before he was convicted and sentenced, considering that the Respondent State detained him for approximately seven (7) years before commencing the trial. The Applicant states that the pre-trial period far exceeds periods that have been found to be “unreasonable” in cases decided by the Court such as *Alex Thomas v Tanzania*, and *Mariam Kouma and Ousmane Diabate v Mali* and several other cases,²⁰ more so since there were no factors that warranted such delay.
76. The Applicant avers that the case was not a complex one. It involved an allegation of murder, based on the evidence of eye witnesses and an examination of the murder weapon. No complex or advanced evidence was adduced such as DNA samples. The Applicant contends that the Respondent State has not provided an explanation as to why he was arrested and detained on 27 May 2008 and his arraignment where he took the plea was held on “21 May 2012, followed by the preliminary hearing on 5 June 2015” and subsequently, the commencement of the trial on 16 February 2015. The Applicant also states that he was “... arrested and taken before the Justice of the Peace in 2008 and was held approximately for seven years before being tried and convicted.”
77. The Applicant further avers that the delay was not attributed to him as he did not file multiple applications before the court or call any witnesses rather, during the appeal, the prosecution made only one application, to have the applicant medically examined to establish whether he was competent to stand trial. The Applicant contends that the delay itself is a weighty punishment on its own, warranting a more lenient sentence overall, not to mention the great anxiety it caused him regarding the uncertainty of his future. To underscore his argument, he cites the case of *Pratt and Morgan v Jamaica*²¹ and the Constitutional Petition of *Kigula and*

20 ECtHR, *Smirnova v Russia*, Application No 9157/04, Judgment of 15 October 2019; *Guchino v Portugal*, Application No 8990/80, Judgment of 10 July 1984; *Faith Tas v Turkey* (No3), Application No 4581/08, Judgment of 24 April 2018, HRC *Hendricks v Guyana*, Communication 838/1998, UN Doc. A/58/40, Vol II at 113 (2002)

21 Privy Council Appeal No10 of 1993,3 *WLR* 995, 143 *NLJ* 1639 (Nov 2 1993).

*Others v Attorney General*²² and the Malawi High Court case of *Republic v Bisket Kunitumba*.²³

78. Finally on this issue the Applicant observes that the undue delay was particularly prejudicial to him, since the prosecution's evidence was based exclusively on the account of six (6) prosecution witnesses who were asked to recall and testify on matters that occurred seven (7) years prior. That the extended and unwarranted passage of time, cast doubt on the credibility of the witness testimonies. The Applicant requests the Court to find that the Respondent State's conduct not only amounts to a violation of the Applicant's right, but also undermines the credibility of the overall proceedings.

79. The Respondent State avers that Article 7 of the African Charter has not been violated as alleged by the Applicant and that the proceedings during the trial were fair and all requirements were met as envisaged under this provision.
80. The Respondent State submits that "on the issues of the length of the trial each case is required to be decided on its own merit. The time required to finalise a case depends on a number of factors such as number of judges and investigators, financial resources and the nature of a particular case". The Respondent State further argues that "this issue was never raised in the domestic courts and therefore, should not be determined for the first time in this Court".

81. The Court notes that Article 7(1)(d) of the Charter provides that everyone has "the right to be tried within a reasonable time by an impartial court or tribunal".

22 Constitutional Appeal No03 of 2006 (21 January 2009) of the Uganda Supreme Court.

23 Sentence Rehearsal Cause No 59 of 2015 (unreported) at the Malawi High Court.

82. The Court recalls, as it has held in its earlier judgments, various factors are considered in assessing whether justice was dispensed within a reasonable time within the meaning of Article 7(1)(d) of the Charter. These factors include the complexity of the matter, the behaviour of the parties, and that of the judicial authorities who bear a duty of due diligence in circumstances where severe penalties apply.²⁴
83. The Court further notes that the timeframe that is being contested by the Applicant is the period he was detained after his arrest and before he was arraigned for trial at the High Court of Tanzania sitting in Bukoba. The record indicates that the Applicant was arrested on 27 May 2008, his police statement was recorded on 2 June 2008, following which he was then detained at Butimba Central Prison. The Court observes that the Applicant avers that he was taken before the Justice of the Peace in 2008, but does not specify the date when this happened.
84. The Court further, observes that the record shows that the Applicant first appeared before the High Court sitting at Bukoba on 21 May 2012, for the plea taking, followed by the preliminary hearing on 5 June 2014, and not 5 June 2015 as stated by the Applicant, and that the trial commenced on 16 February 2015. Nevertheless, the Court observes that this error by the Applicant on the date of the preliminary hearing does not have any effect on the timeframe under consideration, that is, the pre-trial period.
85. The Court notes that the pre-trial period ran from the time the Applicant was arrested on 27 May 2008, to the time the trial commenced on 16 February 2015, this being a period of six (6) years, eight (8) months and nineteen (19) days. The Court therefore has to determine whether this period before the hearing commenced can be considered as reasonable, taking into account the relevant factors.
86. The Court has previously held in the matter of *Armand Guehi v United Republic of Tanzania*, that where an Applicant is in custody, the Respondent State bears an obligation to ensure that the matter is handled with due diligence and expeditiously, more so where there are no impediments caused by the Applicant and the delay is not caused by complexities of the case.²⁵

24 See *Armand Guehi v Tanzania* (merits and reparations), §§122-124. See also *Alex Thomas v Tanzania* (merits), §104; *Wilfred Onyango Nganyi and Others v United Republic of Tanzania* (merits) (2016) 1 AfCLR 507, § 155; and *Norbert Zongo and Others v Burkina Faso* (merits) (2014) 1 AfCLR 219, §§ 92-97, 152.

25 *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 247 § 124.

87. The Court finds that, in the instant case, since the Applicant was in custody, the Respondent State had an obligation to ensure that the proceedings against him were handled with due diligence and expeditiously.
88. The Court notes that the Respondent State provides generic reasons to justify the delay in the commencement of the trial. The Respondent State argues, that the “time required to finalise a case depends on a number of factors such as number of judges and investigators, financial resources and the nature of a particular case”. The Court observes that the Respondent State has not elaborated on the specific factors that resulted in the Applicant’s trial commencing six (6) years, eight (8) months and nineteen (19) days after his arrest.
89. The Court also notes that there is nothing on the record to show that the Applicant impeded the progress of the investigations before his arraignment at the High Court. Therefore, the length of the pre-trial period cannot be considered as reasonable.
90. Consequently, the Court finds that the Respondent State violated the Applicant’s right to be tried within a reasonable time as provided for under Article 7(1)(d) of the Charter.

ii. Alleged violation of the right to effective legal representation

91. The Applicant argues that the right to effective legal representation is an integral part of the right to a fair trial and due process rights provided for under Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), which establishes the right “[t]o have adequate time and facilities for the preparation of his defence and to communicate with a counsel of his choosing” and Article 7 of the Charter. He cites a number of cases in support of his position.²⁶
92. The Applicant alleges that he was not visited by a defence counsel prior to the commencement of his trial. He states that he was provided four (4) different lawyers, at each stage of the proceedings, that is, during the taking of his plea, during the preliminary hearing, during the trial and at the appeal stage. The

26 Human Rights Committee: *Hendricks v Guyana*; *Brown v Jamaica*; *Aliboeva v Tajikistan*; *Said v Tajikistan*; *Aliiev v Ukrain*; *LaVende v Trinidad and Tobago*; *Kelly v Jamaica*; *Reid v Jamaica*; ECtHR: *Ocalan v Turkey*; *Nechiporuk and Yonkalo v Ukraine*; *Salduz v Turkey*; *Artico v Italy*; *Kamasinski v Austria*; *Sannino v Italy*; *Czekalla v Portugal*; *Falcao dos Santos v Portugal*; and African Commission: *Interights & Ditshwanelo v Republic of Botswana*.

Applicant states that all these lawyers had minimal or no contact with him, leading to an ineffective and inconsistent defence falling short of providing a “competent, capacitated and committed” defence. He alleges that all the lawyers failed to properly consult with him, took adverse and contradictory positions that were to his detriment and did not provide effective representation which is manifestly illustrated and “needs to be called out for correction”.

93. The Applicant avers that the first lawyer, Mr. Katabalwa, made adverse statements during his plea hearing that compromised his defence. The Applicant avers that Mr Katabalwa stated that the Applicant “attacked and injured three people and one child died” and that in his “application for the medical examination” of the Applicant, he further stated that the Applicant “committed the offence”. The Applicant avers that these statements made at the onset of the criminal proceedings were highly prejudicial and directly contradicted the Applicant’s plea at the trial, that he did not kill the victim.
94. The Applicant states that, during the preliminary hearing, the second lawyer, Mr. Nathan, objected to the admission into evidence of the caution statement recorded by the police on 2 June 2008, on the basis that the Applicant was tortured prior to recording the statement. However, at the trial before the High Court, the third lawyer Mr. Erasto did not object to admission of the caution statement as evidence, as a result of which it was subsequently read out loud before the court by the prosecution witness and considered as admissible evidence by the trial Judge and assessors.
95. The Applicant adds that, the caution statement was later expunged from the record by the Court of Appeal, on the basis that it was recorded in violation of the law, but not before it had been considered as part of the prosecution’s evidence that was presented to support his conviction. Further, that Mr. Erasto, his lawyer during the trial did not consult him before the trial at the High Court, where he was convicted and sentenced. The Applicant states that he only met with the lawyer one (1) hour before the trial begun. The Applicant considers that the lawyer did not get instructions from him or represent his interests during the trial, which denied him the right to a fair trial.
96. Furthermore, the Applicant alleges that, Mr Erasto, his lawyer during the trial at the High Court failed to call as witnesses any of the individuals in whose company he had been out drinking up to 8:00 pm on the day the alleged crime was committed. That this testimony could have cast doubt on the evidence of the prosecution witnesses, who claimed that the Applicant had visited

the site of the attack twice previously on the day in question. That, even after ten (10) years, the Applicant still maintains that he was out with friends on the fateful day and recalls their identity. The Applicant avers that the trial lawyer committed very basic errors that a minimally competent defence counsel would not have made, and yet the onus was on the Respondent State to provide the Applicant with effective representation.

97. The Applicant claims that he had been out drinking out with friends for an extended period on the day of the incident and “was drunk on that day”. The Applicant argues that intoxication is a potential defence for murder under the Tanzanian law. However, the trial lawyer, Mr. Erasto failed to mention the Applicant’s state of intoxication on the day of the incident or to plead intoxication as a defence in his closing submissions. This resulted in the defence of intoxication not being raised.
98. The Applicant states that, his lawyer during his appeal, Mr. Kabunga, did not consult with him when his caution statement was admitted as evidence. He further states that during his plea taking, his lawyer, Mr. Katabalwa, prayed the High Court to order that the Applicant undergo a medical examination to determine his mental health status at the time of committing the offence. The Applicant states that, the lawyer made the request because a medical examination ought to be undertaken before the commencement of the Applicant’s trial and because the lawyer was of the view that there was a possibility that the Applicant was of unsound mind at the time of the commission of the offence since the Applicant “believed that what happened was as a result of witchcraft”. Following the lawyer’s request, the High Court ordered that the Applicant be detained for medical examination at Isanga Mental Institution, Dodoma and the medical report be submitted to it.

99. The Respondent State avers that the Applicant was charged with murder and provided with four (4) defence counsels throughout the proceedings, namely; Advocates S.L Katabalwa, Nathan Alex and Lameck Erasto in the High Court and Aaron Kabunga before the Court of Appeal. That the Applicant through his defence counsel was given an opportunity to cross examine the prosecution witnesses and to also testify in the Court to defend himself.

100. The Respondent State further avers that the trial at the High Court was conducted in the presence of three (3) court assessors to ensure equal protection of the law. Furthermore, that the Applicant was able to appeal to the highest court within the Respondent State's justice system. For these reasons, the Respondent State argues that the Applicant's allegations should be deemed baseless, unsubstantiated and should be dismissed for lack of merit.
101. The Respondent State avers that the Applicant was prosecuted for an act which constituted a legally punishable offence at the time he committed it and the sentence meted out to him is in compliance with the laws of the land.
102. The Respondent State concludes its arguments by affirming that the Applicant was accorded his rights in compliance with the requirement of a fair trial and the allegations should be dismissed for lack of merit.

103. Article 7(1)(c) of the Charter provides that:
 1. Every individual shall have the right to have his cause heard. This comprises: ...
 - c. The right to defence, including the right to be defended by counsel of his choice.
104. The Court has held that Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR, guarantees for any one charged with a serious criminal offence, the right to be automatically assigned a counsel free of charge, where he does not have the means to pay him, whenever the interests of justice so require.²⁷
105. In the matter of *African Commission on Human and Peoples' Rights v Libya*, the Court held that "every accused person has a right to be effectively defended by a lawyer, which is at the heart of the notion of a fair trial".²⁸

27 *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR, 465 § 124.

28 *African Commission on Human and Peoples' Rights v Libya* (merits) (2016) 1 AfCLR 153 § 95.

106. The Court has previously considered the issue of effective representation in the matter of *Evodius Rutechura v United Republic of Tanzania*²⁹ where it held that the right to free legal assistance, comprises of the right to be defended by counsel, however the right to be defended by counsel of one's choice is not absolute when the counsel is provided through a free legal assistance scheme.³⁰ It further held that the important consideration is whether the accused is given effective legal representation rather than whether he or she is allowed to be represented by a lawyer of their own choosing.³¹ It is the duty of the Respondent State to provide adequate representation to an accused and intervene only when the representation is not adequate.³²
107. The Court considers that "effective assistance of counsel" comprises two aspects.³³ First, defence counsel should not be restricted in the exercise of representing his client. Second, even if there are no restrictions, counsel should not deprive a client of effective assistance by failing to provide competent representation that is adequate to ensure a fair trial or, more broadly, a just outcome.³⁴
108. The Court deems that a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes. The quality of the defence provided is essentially a matter between the client and his representative and the State should intervene only where the lawyer's manifest failure to provide effective representation is brought to its attention.³⁵
109. This Court notes that with regard to effective legal representation through a free legal assistance scheme it is not sufficient for a State to provide the counsel. States must also ensure that those who provide legal assistance under that scheme have enough time and facilities to prepare an adequate defence, and to provide

29 *Evodius Rutechura v United Republic of Tanzania*, ACtHPR, Application No 004/2016, Judgment of 26 February 2021 (merits and reparations) §73.

30 ECHR, *Croissant v Germany* (1993) App No13611/89 § 29, *Kamasinski v Austria* (1989) App No 9783/82, § 65.

31 ECHR, *Lagerblom v Sweden* (2003) App No 26891/95, §§ 54-56.

32 ECHR, *Kamasinski v Austria* (1989) App No 9783/82, § 65.

33 HRI/GEN/1/Rev9 (Vol. I) p 256, paragraph 333-335.

34 ECHR, *Strickland v Washington*, 466 U.S. 668, 686 (1984).336; *Lafler v Cooper*, 566 U.S. No 10-209, slip op. (2012) (erroneous advice during plea bargaining).

35 ECHR, *Vamvakas v Greece (No 2)*, Application No 2870/11 § 36; *Czekalla v Portugal*, §§ 65 and 71; *Czekalla v Portugal*, App. No 38830/97, ECHR 2002-VIII)

robust representation at all stages of the legal process starting from the arrest of the individual for whom such representation is being provided.

110. In the instant case, the question that arises, is whether the Respondent State discharged its obligation of providing the Applicant with effective free legal assistance and ensured that Counsel had adequate time and facilities to enable the preparation of the Applicant's defence.
111. The Court notes that the Respondent State provided four different lawyers to represent the Applicant during his arraignment, at the preliminary hearing; at the trial before the High Court and at the appeal before the Court of Appeal. These were Advocates S.L Katabalwa, Nathan Alex and Lameck Erasto at the High Court and Aaron Kabunga at the Court of Appeal, respectively.
112. The Court notes that there is nothing on the record to demonstrate that the Respondent State impeded the four Counsel who it designated to represent the Applicant, to access him and consult him on the preparation of his defence. The Court further notes that, there is nothing on the record to show that the Respondent State denied the designated Counsel adequate time and facilities to enable the Applicant prepare his defence.
113. The Court observes that, rather, the allegations relate to the Counsel not raising or objecting to certain evidentiary issues in relation to his defence. These are matters between him and his counsel which should not, in these circumstances, be imputed on the Respondent State.
114. The Court also finds that there is nothing on the record to demonstrate that the Applicant informed the High Court and the Court of Appeal of the alleged shortcomings in the Counsel's conduct in relation to his defence. The Applicant was free to raise with the respective courts, his discontent about the manner in which he was represented. The Court further notes that, the Court of Appeal granted the request by his Counsel Advocate Aaron Kabunga to have the Applicant undergo a mental medical examination to determine whether he was fit to stand trial as this was omitted before the trial at the High Court commenced.
115. In view of the above, the Court holds that the Respondent State discharged its obligation to provide the Applicant with effective free legal assistance. The Court therefore, finds that the Respondent State has not violated Article 7(1)(c) of the Charter.

iii. Alleged violation of the right to be tried by a competent court or tribunal

116. The Applicant states that “Section 3(3) of the Evidence Act [Cap1]” provides that a “court” includes all judges, magistrates and assessors and all persons, except arbitrators, legally authorised to take evidence. All trials involving murder, held before the High Court are to take place with the aid of assessors. The Applicant avers that in *Lucia Anthony v Republic*, the Court of Appeal found a breach of the right to fair trial where the assessors cross examined two prosecution witnesses and a defendant.
117. Furthermore, the Applicant avers that, during his trial, the assessors cross examined him and appeared to have given their judgment on the case immediately after the summing up by the Judge, indicating that they did not take time to consider the evidence adduced during the trial.

118. The Respondent State avers that the Applicant was tried by impartial and independent courts in accordance with the laws governing criminal trials. He was presumed innocent from the time he was arrested on 27 May 2008 until the prosecution proved its case beyond reasonable doubt and the High Court found him guilty of the offence of murder on 5 March 2015. The Respondent State argues that the Applicant was represented throughout his trials by counsel and he was given an opportunity, through his counsel, to cross examine the prosecution and to testify in court in his defence. The Respondent State further avers that the trial at the High Court was conducted in the presence of three (3) Assessors to ensure the principle of equality before the law and protection before the law, that he was sentenced according to the law, and finally that the Applicant filed an appeal at the highest court in the land.

119. Article 7(1) of the Charter provides: “Every individual shall have the right to have his cause heard”.
120. The Court observes from the record of proceedings at the High Court, that the three (3) assessors simply sought clarifications from the Applicant. The Court nevertheless, observes that the Applicant has not demonstrated how this violated his right to be heard by a competent tribunal and consequently dismisses this allegation.
121. From the foregoing, the Court finds that the Respondent State has not violated Article 7(1) of the Charter with regard to the right to be tried by a competent court or tribunal.

iv. Alleged violation of the right to be provided with an interpreter

122. The Applicant cites Article 14(3)(f) of the ICCPR which provides for the free assistance of an interpreter, where an accused cannot speak or understand the language used during criminal proceedings. The Applicant cites several cases from the European Court³⁶ and the African Commission’s Principles and Guidelines to a Fair Trial and Legal Assistance in Africa, which set out this principle.
123. The Applicant avers that at the very minimum, he was entitled to be provided an interpreter from the early investigative stage of the proceedings since he speaks only Kihaya and is illiterate. The Applicant states that the Court records do not indicate whether an interpreter was made available either at the arraignment when the Applicant took the plea or the preliminary hearing. The Applicant further avers, that the failure of the Respondent State to provide an interpreter was fundamentally prejudicial since his Counsel made some arguments that contradicted his own statement namely, the matter on whether the Applicant had carried out the attack and whether he had motivation for the attack because of the belief that PW 1 was a witch. The Applicant states that, had an interpreter been provided, he would have objected to, and requested that the Counsel’s statements which were deviating from his position be disregarded.

36 *Human Rights Committee – Bozbey v Turkmenistan*, Communication No 1530/2006. (2011) 18 IHRR 414 ; *Sobhraj v Nepal* Communication No 1870/2009, UN Doc CCPR/C/99/D/1870/2009 (2010) ECHR, *Diallo v Sweden*, Judgement of 5 January 2010 Application No 13205/07. *Luedicke, Belkacem and Koç v Germany*, ECHR, Judgment of 28 November 1978, Application No 13205/07; *Kamasinski v Austria*, ECHR, Judgment of 19 December 1989; *Hermi v Italy*, ECHR, Judgment of 18 October 2007, Application No 18114/02.

124. The Applicant further states that, at the trial, the interpreter was only present for the purposes of interpreting his testimony and that of PW 1 for the Court's benefit. The Applicant argues that no interpreter appears to have been made available to enable him to understand what was said by the other witnesses, counsel, the judge or the assessors. He concludes by stating that he was not afforded the resources needed to enable him to effectively understand pre-trial proceedings, defend himself during the trial, and have his cause heard. This allegedly resulted in the violation of his right to fair trial and caused significant repercussions on the outcome of the trial.

125. On its part, the Respondent State did not specifically address this issue but rather, observed that the Applicant was defended by four advocates from commencement of his trial to the appeal stage and that he was accorded all the guarantees in compliance with the requirements of the right to fair trial.

126. The Court has previously considered the issue of provision of interpretation and observed that "even though Article 7(1)(c) of the Charter referred to earlier does not expressly provide for the right to be assisted by an interpreter, it may be interpreted in the light of Article 14(3)(a) of the ICCPR, which provides that ... everyone shall be entitled to ... (a) be promptly informed and in detail in a language which he understands of the nature and cause of the charge against him; and (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court".³⁷

127. It is evident from a joint reading of the two provisions that every accused person has the right to an interpreter if they are unable

³⁷ *Armand Guehi v United Republic of Tanzania* (merits and reparations) (2018) 2 AfCLR 477 § 73.

to understand the language in which the proceedings are being conducted.

128. The Court has held in the Matter of *Yahaya Zumo Makame v United Republic of Tanzania*³⁸ “that an accused person is entitled to an interpreter if he or she cannot understand or speak the language that is being used in court. It is practically necessary that where an accused person is represented by Counsel that the need for interpretation is communicated to the Court”. Furthermore, it held in the Matter of *Armand Guehi v United Republic of Tanzania*³⁹ that if an Applicant does not object to the continuance of proceedings in a language other than his own, he will be deemed to understand the processes and to have agreed to the manner in which they were being conducted.
129. The record before this Court demonstrates that when the prosecution was presenting its case during the trial, it was established that PW1 was not conversant in Kiswahili and only spoke Kihaya, as a result of which the court requested an interpreter to be sworn in to interpret from Kiswahili to Kihaya and vice versa.
130. On the other hand, the Court notes that at the Applicant’s arraignment, when taking his plea, the information was read over and explained to him in Kiswahili, to which he pleaded “*Siyo kweli*” in Kiswahili, meaning, not true and thereafter a plea of not guilty was entered. Furthermore, that the Applicant never voiced his concerns about not being able to understand the proceedings because of a language barrier or at any point objected to the proceedings. The Court notes that the Applicant did not point to any part of the proceedings where he expressly objected and demanded the presence of an interpreter.⁴⁰
131. In view of the foregoing, the Court finds that the Respondent State did not violate Article 7(1)(c) of the Charter as read together with Article 14(3)(a) of the ICCPR as regards the alleged failure to provide the Applicant with interpretation during his trial.

38 ACtHPR, Application No 023/2016, Judgment of 25 June 2021 (merits and reparations), § 93.

39 *Ibid* § 77.

40 *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477 § 77.

B. Alleged violation of the right to life

- 132.** The Applicant avers that the Respondent State violated his right to life namely by:
- i. Imposing the mandatory death penalty without considering the circumstances of the offender and the offence;
 - ii. Imposing the death penalty outside the category of cases to which it can be lawfully applied; and
 - iii. Imposing the death penalty without a fair trial.
- 133.** On the first ground, the Applicant argues that the High Court relied solely on the mandatory sentence for murder as provided under Tanzanian Law, yet, Article 4 of the Charter and Article 6 of the ICCPR provide for the right to life and create a presumption in favour of life, therefore, the death penalty should be imposed only in the most exceptional circumstances. The Applicant argues further that the mandatory imposition of the death penalty negates the discretionary power of the judicial officer to consider the circumstances of the offender and the offence, and to determine whether the offence is one of the worst of its kind, warranting imposition of the death sentence.
- 134.** In relation to his mental health status, the Applicant avers that the High Court should have considered this as a mitigating factor, similar to what is done in other national jurisdictions.⁴¹ He submits that after this Application was filed before this Court, PALU commissioned Mr Isaac Lema,⁴² a clinical psychologist, to undertake a medical examination of his mental health status at the time the alleged murder was committed. In a report dated 29 May 2018,⁴³ Mr. Lema confirmed that at the time of his arrest, the Applicant suffered from severe learning difficulties, foetal alcohol syndrome and psychosis.
- 135.** The Applicant argued that these conditions would have a profound effect on his behaviour, in particular, limiting his ability to control

41 *Mitcham v DDP* (Supra), Eastern Caribbean Court; *Republic v Margret Nadzi Makolija*. Criminal Appeal No 396 of 2008, Malawi High Court; *Republic v James Galeta* (Sentencing rehearing Cause No 47 of 2015), Malawi High Court; *Republic v Dan Saidi Zonke* (Sentencing rehearing Cause No 7 of 2016), Malawi High Court; *R v Reyes* (2003) 2LRC 688, Supreme Court of Belize.

42 A Clinical Psychologist at Muhimbili University of Health and Allied Sciences (MUHAS) working under the Department of Psychiatry and Mental Health for both MUHAS and Muhimbili National Hospital in Dar-es Salaam. Experienced in diagnosis and treatment of a variety of mental illnesses and forms of intellectual disability. Mr Lema has particular experience in assessing and treating individuals who suffer from addiction and addiction related illnesses.

43 This Report is annexed to the additional evidence filed by the Applicant to support the amended Application. The Report is dated 29 May 2018.

his impulses, understand social codes of conduct, and respond appropriately to stressful situations.

136. Citing a number of cases from various jurisdictions,⁴⁴ the Applicant argues that if the judicial officers of the Respondent State had the liberty to consider the above-mentioned conditions, during the proceedings against him, they would not have concluded that sentencing the Applicant to death was the appropriate punishment. The Applicant surmises that in all cases concerning the possible application of the death penalty, the personal circumstances of the offender and the particular circumstances of the offence including its specific aggravating or extenuating elements must be considered by the sentencing court.
137. On the second ground, the Applicant submits that for a death sentence to be permissible, it is necessary that the offence must be of the most serious nature.⁴⁵ He submits that the burden of proving that his case before the domestic courts met this threshold rested with the Respondent State, which failed to do so. The Applicant further submits that the Respondent State violated his right to life by sentencing him to death, without considering his mental and sobriety status at the time of the commission of the offence and the lack of intent to kill.
138. On the third ground, the Applicant avers that the African Commission has emphasised that “if, for any reason, the criminal justice system of a state does not, at the time of trial or conviction, meet the criteria for Article 7 of the African Charter or if the particular proceedings in which the penalty is imposed have not stringently met the highest standards of fairness, then the subsequent Application of the death penalty will be considered a violation of the right to life”. The Applicant submits that there have been several breaches of his right to a fair trial, which in turn have resulted in the imposition of the death sentence on the Applicant, consequently violating his right to life.

44 *Moise v the Queen* (unreported) – Eastern Caribbean Court of Appeal; *Pipersburgh v R Privy Council*; *Mitcham & Ors v DPP* – Eastern Caribbean Court of Appeal; *S v Makwanyane* – South African Constitutional Court; *Trimmingham v The Queen Mulla; & Another v State of UP*.

45 *Brown v Jamaica*, HRC; *Chisanga v Zambia*; *Republic v Jamuson White*, High Court of Malawi; *Kindler v Canada*, Communication No 470/1991; *Trimmingham v The Queen*; and *Luboto v Zambia*.

139. The Respondent State, responded cumulatively on the three grounds raised by the Applicant.⁴⁶
140. The Respondent State avers that the “Court of Appeal did not breach Article 13(6)(d) and 14 of its Constitution, because the Court of Appeal is the final authority in dispensing justice in Tanzania as per Article 107A (1) of the Constitution”. It further argues that the punishment for the offence of murder is provided by statute, under Section 197 of the Penal Code [Cap16, Revised Edition, 2002] and that the Court of Appeal,⁴⁷ has upheld the constitutionality of the death penalty as provided under its Constitution.
141. The Respondent State submits that Article 6 of the ICCPR does not prohibit the imposition of the death penalty, which is a lawful penalty. It only requires States which have not abolished the death penalty, to impose it only for the most serious crimes in accordance with the laws, pursuant to a final judgment rendered by a competent court.
142. The Respondent State further argues that the Applicant has never raised before domestic courts, the allegation that the death penalty is in violation of the Constitution of the United Republic of Tanzania. The Respondent State avers that it is being made aware of this claim for the first time, before this Court, since the Applicant never utilised the remedies available within the municipal courts, of filing a constitutional petition or raising the matter as a ground of appeal before the Court of Appeal. The Respondent State argues that this allegation is an afterthought and should be dismissed for lack of merit.

143. The Court notes that Article 4 of the Charter provides that: “[H]uman beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right”.
144. The Court considers that although the Applicant has raised three separate grounds relating to the alleged violation of the right to

46 Respondents’ Response to the Application filed on 6 February 2017, in response to the original Application before Applicant was represented by PALU.

47 *Mbushuu Alias Dominic Mnyaroje and Another v Republic* [1995] TLR.

life and the mandatory imposition of the death penalty, that is, the circumstances of the offender, the lawfulness of the sentence and compliance with guarantees of due process during the trial, the only issue for it to determine is whether the mandatory imposition of the death penalty constitutes an arbitrary deprivation of the right to life.

145. The Court recalls the well-established international human rights case-law on the criteria to apply in assessing arbitrariness of a death sentence,⁴⁸ that is, whether the death sentence is provided for by law, whether the sentence was passed by a competent court and whether due process was followed in the proceedings leading to the death sentence.
146. In relation to the first criteria, the Court notes that the death sentence is provided for in Section 197 of the Penal Code of the United Republic of Tanzania.
147. Regarding the second criteria, the Court observes that the Applicant's contention is not that the courts of the Respondent State lacked jurisdiction to conduct the processes that led to the imposition of the death penalty on him. The Court further notes that the Applicant contends rather that the High Court could only impose the death sentence because it is provided for in the law as the mandatory sentence for murder, thus denying the judicial officer the discretion to impose any other sentence.
148. In relation to the third criteria, the Court recalls that in the Matter of *Ally Rajabu and Others v Tanzania*, it has decided that the death penalty can only be imposed in accordance with the norms and standards required by a fair trial.⁴⁹ In this regard, the Court held that "any penalty must be imposed by a tribunal that is independent in the sense that it retains full discretion in determining matters of fact and law."⁵⁰ The Court finds that, by taking away the discretionary power of a judicial officer to impose a sentence on the basis of proportionality and individual circumstances of a convicted person, the mandatory death sentence does not comply

48 See *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, Communications 137/94, 139/94, 154/96, 161/97 (2000) AHRLR 212 (ACHPR 1998), §§ 1-10 and § 103; *Forum of Conscience v Siena Leone*, Communication 223/98 (2000) 293 (ACHPR 2000), § 20.; See Article 6(2), ICCPR; and *Eversley Thompson v St. Vincent & the Grenadines*, Comm. No 806/1998, U.N. Doc. CCPR/C70IO/806/1998 (2000) (U.N.H.C.R.), 8.2; See also *Ally Rajabu and Others v United Republic of Tanzania*, ACTHPR, Application No 007/2015, Judgment of 28 November 2019 (merits and reparations), § 104.

49 *Ally Rajabu and Others v Tanzania* (merits and reparations), § 98.

50 *Ibidem*, §107.

with the requirements of due process in criminal proceedings.⁵¹

149. In the instant case, the Court finds that the mandatory imposition of the death penalty as provided for in Section 197 of the Respondent State's Penal Code and as automatically applied by the High Court in the case of the Applicant does not uphold fairness and due process.
150. From the foregoing, the Court holds that the mandatory nature of the imposition of the death penalty constitutes an arbitrary deprivation of the right to life.
151. The Court, therefore, finds that the Respondent State has violated Article 4 of the Charter.

C. Alleged violation of the Applicant's right to the respect of dignity

152. The Applicant cites Article 5 of the Charter and avers that the Respondent State has violated his right to the respect of dignity through (i) the imposition of the death penalty in circumstances where a person suffers from mental illness and intellectual disability and (ii) the imposition of the death penalty by hanging.

i. Imposition of the death penalty on persons who suffer from mental illness and intellectual disability

153. The Applicant avers that executing persons who suffer from severe mental illness or intellectual disability violates the right to dignity and constitutes cruel, inhuman or degrading punishment. The Applicant further submits that in its General Comment No 2, the African Commission, has recognised the need to prohibit the execution of persons with psycho-social and intellectual disabilities and the same holds true for courts around the world.⁵²
154. The Applicant avers that he suffers from severe mental illness and intellectual disability, and on this basis alone the death penalty ought not to have been meted out to him because, doing so, violates his right to dignity. The Applicant also states that the Respondent State failed to carry out a mental health evaluation on him, before his trial, and thus did not take into account his mental

⁵¹ *Ibidem*, 110.

⁵² *Francis v Jamaica* (Communication No 606/1994, Judgment of 3 August 1995); *Sahandath v Trinidad and Tobago*; (Communication No 606/1994, Judgment of 3 August 1995; *Ford v Wainwright*, 477 U.S. 399, 409-10, 417; *Panetti v Quaterman*, 551 U.S. 930, 979-80-(2007) at 958-59; *Atkins v Virginia*, 536, us. 304 (2002); *Piper's burg v The Queen*; *Moise v The Queen*.

health condition in determining whether the death sentence was justified. The Applicant argues that he was taken to a mental institution in Dodoma, solely for the purpose of assessing whether he was insane or competent to stand trial. Furthermore, that he was unable to access the medical report of the evaluation of his mental health status which was undertaken while he was at the Isanga Mental Institution in Dodoma.

155. The Respondent State did not respond on this issue.

156. The Court notes that, although it is alleged that the imposition of the death penalty on a mentally ill person violates the person's right to dignity, the issue for determination is rather, whether the imposition of the said penalty was done following proceedings conducted in accordance with the guarantees of the right to a fair trial. The Court notes in this regard, the pertinence of Article 7(1) of the Charter which provides that: "Every individual shall have the right to have his cause heard."

157. The Court notes from the record of proceedings that, On 21 May 2012, during the taking of his plea before the High Court, Mr. Katabalwa, the Applicant's lawyer, observed that his client may not have been of sound mind and prayed the court to order that the Applicant should undergo a medical examination to determine his state of mind at the time he committed the offence. The prosecution did not object to this request. On the same date the High Court ordered that the Applicant undergo a medical examination on his mental health status at Isanga Mental Institution, in Dodoma, and that the medical report be presented to it. The record before this Court indicates that the Applicant was institutionalised at the said mental health facility from June 2012 to November 2013.

158. The Court notes that there is nothing from the record to indicate that the medical evaluation report of the mental health status of

the Applicant ordered by the High Court, was transmitted to it for consideration before it delivered its judgment on 22 April 2015. If this were the case, the report would have been referred to by the High Court in the course of the trial proceedings and in its judgment.

159. The Court further notes that the record indicates that the Applicant and his legal representatives tried to obtain from Isanga Mental Institution and from the Attorney General's Office, the report of the medical evaluation on the Applicant's mental health status ordered by the High Court.
160. The Court therefore finds that, by the High Court not considering the medical evaluation report of the Applicant's mental health status, this constitutes a grave procedural irregularity that resulted in a violation of the Applicant's right to a fair trial, as guaranteed under Article 7(1) of the Charter.

ii. Execution of the death penalty by hanging is a cruel, inhuman and degrading treatment

161. The Applicant submits that in Tanzania, the death penalty is administered by hanging, and the High Court directed that hanging be used to execute his sentence. The Applicant also avers that "hanging causes excessive suffering and is strictly not necessary, therefore, it constitutes a violation of Article 5 of the African Charter".
162. The Applicant contends that the African Commission has previously observed⁵³ that "the current position of international human rights law and the execution of the death penalty is that where a death sentence has been imposed it must be carried out in such a way as to cause least possible physical and mental suffering".

163. The Respondent State contends that throughout the trial, it recognised and respected the dignity of the Applicant, who was treated in accordance with the law during his trials in the High

53 *Interights & Ditshwanelo v Republic of Botswana*.

Court and before the Court of Appeal.

164. The Respondent State argues that the death penalty is provided for under Section 197 of its Penal Code as a punishment for murder. It avers further that, the sentence for the offence of murder has been deemed constitutional by the highest court in the land, the Court of Appeal, and that in any case, the Applicant is raising this alleged violation for the first time before this Court and if he was aggrieved, he should have raised the matter before the domestic courts. The Respondent State therefore concludes that this allegation is vague, frivolous and should be dismissed for lack of merit.
165. The Respondent State further avers that the ICCPR recognises the death penalty for serious offences as long as it is applied in accordance with the laws of the country at the time, and is carried out pursuant to a final judgment rendered by a competent court.
166. The Respondent State cites Article 27 of the Charter and contends that by killing the deceased, the Applicant instead neglected his duty to respect the right to life and dignity of the deceased. According to the Respondent State, the Applicant brutally terminated the life of the deceased who was an innocent child, therefore it is he who failed to recognise the rights and duties enshrined in the Charter. Finally, the Respondent State argues that, in any case, the Applicant has not demonstrated how his right to be treated with respect and dignity was violated.

167. Article 5 of the Charter provides as follows:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

168. The Court notes that the Applicant alleges the violation of his right to life through the mandatory imposition of the death penalty and method of execution of the death penalty by hanging, which arises from his sentence. The issue of the imposition of the mandatory death penalty has already been dealt with, therefore, the issue for determination here is whether the method of execution of the death penalty, that is, by hanging, constitutes cruel, inhuman and degrading treatment.

169. The Court recalls that it has previously held in the matter of *Ally Rajabu and Others v Tanzania* that, the implementation of the death penalty by hanging, where such a penalty is permitted, is “inherently degrading” and “encroaches upon dignity in respect of the prohibition of ... cruel, inhuman and degrading treatment”.⁵⁴ The Court therefore found that, this constitutes a violation of the right to dignity under Article 5 of the Charter. The Applicant in the instant case faces the same penalty.
170. The Court therefore finds that the Respondent State has violated Article 5 of the Charter.

VIII. Reparations

171. The Court notes that Article 27(1) of the Protocol stipulates that “[I]f the Court finds that there has been violation of a human or peoples’ right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.”
172. As it has consistently held, the Court considers that, for reparations to be granted, the Respondent State should first be internationally responsible for the wrongful act. Second, causation should be established between the wrongful act and the alleged prejudice. Furthermore, and where it is granted, reparation should cover the full damage suffered. Finally, the Applicant bears the onus to justify the claims made.⁵⁵
173. The Court also restates that measures that a State could take to remedy a violation of human rights can include restitution, compensation and rehabilitation of the victim, as well as measures to ensure non-repetition of the violations, taking into account the circumstances of each case.⁵⁶
174. The Court reiterates that the onus is on the Applicant to provide evidence to justify his prayers.⁵⁷ With regard to moral damages,

54 *Ally Rajabu v Tanzania* (merits and reparations), § 119-120.

55 *Norbert Zongo and Others v Burkina Faso* (reparations) (5 June 2015) 1 AfCLR 258, §§ 20 to 31; *Lohé Issa Konaté v Burkina Faso* (reparations) (3 June 2016) 1 AfCLR 346, §§ 52 to 59; and *Reverend Christopher R. Mtikila v United Republic of Tanzania* (reparations) (13 June 2014) 1 AfCLR 72, §§. 27 to 29.

56 *Ingabire Victoire Umuhoza v Republic of Rwanda* (reparations) (7 December 2018) 2 AfCLR 202, § 20. See also *Kalebi Elisamehe v Tanzania* (merits and reparations), § 96.

57 *Kennedy Gihana and Others v Republic of Rwanda*, ACtHPR, Application No 017/2015, Judgment of 28 November 2019, § 139; See also *Reverend Christopher R. Mtikila v Tanzania* (reparations), § 40; *Lohé Issa Konaté v Burkina Faso* (reparations), § 15(d); and *Kalebi Elisamehe v Tanzania* (merits and reparations), § 97.

the Court has held that the requirement of proof is not strict⁵⁸ since it is presumed that there is prejudice caused when violations are established.⁵⁹

175. The Court has found that the Respondent State violated the Applicant's right to be heard within a reasonable time as provided under Article 7(1)(d) of the Charter due to the delay in commencing his trial. The Court has also found that with the imposition of the mandatory death penalty on the Applicant, the Respondent State has violated the Applicant's right to a fair trial as provided under Article 7(1) of the Charter, the right to life as provided under Article 4 of the Charter and the right to dignity, as provided for under Article 5 of the Charter. Lastly, the Court has also found that the conclusion of the Applicant's trial without consideration of the medical evaluation report of the Applicant's mental health status during the commission of the offence is a violation of Article 7(1) of the Charter.
176. The Court notes that some of the Applicant's claims for reparation are made in United States Dollars. In its earlier decisions, the Court has held that, as a general principle, damages should be awarded, where possible, in the currency in which loss was incurred.⁶⁰ In the present case, the Court will apply this standard and monetary reparations, if any, will be assessed in Tanzanian Shillings.
177. It is against these findings that the Court will consider the Applicant's prayers for reparation.

A. Pecuniary reparations

i. Material prejudice

178. The Applicant prays the Court to grant his brother Respick Henerico, reparations in the amount of United States Dollars Two

58 *Norbert Zongo and Others v Burkina Faso* (reparations), § 55. See also *Kalebi Elisamehe v Tanzania*, § 97.

59 *Ally Rajabu and Others v United Republic of Tanzania*, ACtHPR, Application No 007/2015, Judgment of 28 November 2019, § 136; *Armand Guehi v Tanzania* (merits and reparations), § 55; *Lucien Ikili Rashidi v United Republic of Tanzania*, ACtHPR, Application No 009/2015, Judgment of 28 March 2019 (merits and reparations), § 119; *Norbert Zongo and Others v Burkina Faso* (reparations), § 55; and *Kalebi Elisamehe v Tanzania* (merits and reparations), § 97.

60 See *Lucien Ikili Rashidi v Tanzania* (merits and reparations); and Application No 003/2014. Judgment of 0711212018 (reparations), *Ingabire Victoire Umuhoza v Republic of Rwanda*, § 45.

Thousand and Ninety Seven (USD 2,097 or Tanzanian Shillings (TZS) 3,428,000), for material loss suffered. That the expenses are broken down for the past two years as follows: amounts: (i) provision of food amounting to TZS 80,000 per month and TZS 1,920,000 in total (ii) provision of shelter amounting to TZS 20,000 per month and TZS 480,000 in total: and (iii) provision of other basic necessities (such as clothing and other incidental expenses) amounting to TZS 22,000 per month and TZS 528,000 in total. The Applicant also claims that, Respick Henerico has also suffered financial loss due to the Applicant's incarceration by incurring transport costs of TZS 200,000 per month from visiting the Applicant at Butimba prison, providing pocket money to the Applicant in the amount of TZS 70, 000 and expenses amounting to TZS 30,000 for the purchase of necessities for the trip. The Applicant also states that Respick Henerico incurred expenses of TZS 200,000 for transportation to visit the Applicant in hospital.

179. The Respondent State did not respond regarding this claim.

180. The Court recalls that in order for a claim for material prejudice to be granted, an applicant must show a causal link between the established violation and the loss suffered, and further prove the loss suffered.⁶¹ In the instant case, the Court notes that the Applicant has not established the link between the violations established and the material losses claimed. The Court observes that the Applicant has provided an affidavit explaining that Respick Henerico is his alleged brother, but has not provided other acceptable evidence to prove the relationship or specific proof of the expenses allegedly incurred, such as receipts for the

61 See *Armand Guehi v Tanzania* (merits and reparations), § 181; *Norbert Zongo and Others v Burkina Faso* (reparations), § 62.

payments.⁶²

- 181.** The Court, therefore, dismisses the Applicant's prayers for damages for the material prejudice suffered as a result of his incarceration.

ii. Moral prejudice suffered by the Applicant

- 182.** The Applicant requests that this Court awards him reparations for moral prejudice on the basis of equity as exercised by this Court in previous cases, while considering the unique circumstances the Applicant endured. The Applicant argues that, being held for seven (7) years without trial deprived him of the proximity of his family and isolated them from him. Additionally, he was never able to plan for his future and has never met his sole surviving son who was born soon after his arrest.

The Applicant prays the Court to grant him the amount of United States Dollars thirty thousand (USD 30,000) for the moral prejudice suffered.

- 183.** The Respondent State did not respond to this claim.

- 184.** The Court recalls its jurisprudence in the matter of *Armand Guehi v United Republic of Tanzania*, where, due to a delay in the commencement of the Applicant's trial for murder it held that "in the circumstances of this case where the Applicant was accused of murder and faced the death sentence, such delay is also likely to have caused anguish. The prejudice that ensued warrants compensation, which the Court has discretion to evaluate based

⁶² *Christopher Jonas v United Republic of Tanzania*, Application No 011/2015. Judgment of 25 September 2020 (reparations), § 20, *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 18.

on equity”.

185. The Court also recalls its jurisprudence in the matter of *Ally Rajabu and Others v United Republic of Tanzania*,⁶³ in which it observed that:

[t]he prolonged period of detention awaiting execution causes the sentenced persons to suffer: ... severe mental anxiety in addition to other circumstances, including, ...: the way in which the sentence was imposed, lack of consideration of the personal characteristics of the accused; the disproportionality between the punishment and the crime committed; ... the fact that the judge does not take into consideration the age or mental state of the condemned person; as well as continuous anticipation about what practices their execution may entail.⁶⁴

186. In the instant case, the Court notes that the lengthy pre-trial period of six (6) years, eight (8) months and nineteen (19) days in and of itself caused the Applicant prejudice and the uncertainty associated with waiting for the commencement of the trial, resulted in anxiety, distress and psychological tension to the Applicant.
187. The Court further observes that in the instant case, while the death sentence is yet to be carried out, the Applicant has inevitably suffered prejudice from the established violation caused by the very imposition of the sentence, as it was mandatory in nature. The Court is cognisant of the fact that being sentenced to death is one of the most severe punishments with the gravest psychological consequences.
188. In view of the above, the Court decides to grant damages in the sum of Tanzanian Shillings Five Million (TZS 5,000,000) as fair compensation for the moral prejudice the Applicant suffered.

iii. Moral prejudice suffered by indirect victims

189. The Applicant prays the Court to grant United States Dollars five thousand (USD 5000) to his brother Respick Henerico and five thousand (USD 5000) to Godfrey Henerico his son as indirect victims on account of moral prejudice suffered.

63 *Ally Rajabu and Others v Tanzania v United Republic of Tanzania*, ACTHPR, Application No 007/2015, Judgment of 28 November 2019 (merits and reparations) §§ 149-150.

64 *Amin Juma v United Republic of Tanzania*, ACTHPR, Application No 024/2016, Judgment of 30 September 2021 (merits and reparation), §15.

190. The Respondent State did not respond specifically to this allegation.

- 191.** The Court notes that with regard to indirect victims, as a general rule, moral prejudice is presumed with respect to parents, children and reparation is granted only when there is evidence of spousal relations, or filiation with an applicant. For other categories of indirect victims, proof of moral prejudice suffered is required.⁶⁵
- 192.** In the instant case, the Applicant prays the Court to grant United States Dollars five thousand (USD 5000) to his brother, Respick Henerico and United States Dollars five thousand (USD 5000) to Godfrey Henerico, his son as indirect victims for moral prejudice they allegedly suffered.
- 193.** The Court observes that the Applicant has filed a notarised Affidavit deposed by Respick Henerico, stating that he is the Applicant's younger brother, as well as certified copies of baptism certificates for Respikius Mwijage citing Henericko Paulo as the father and Gozbert Heneriko as the father of Godfrey Rweyemamu. The Court notes that, in his pleadings, the Applicant cited his son as Godfrey Henerico and not as Respikius Mwijage or Godfrey Rweyemamu as indicated in the copies of birth certificate he provided. The Applicant has also not provided an explanation for the difference between his son's name as listed in his pleadings and that indicated on the baptism certificates.
- 194.** Under the circumstances, the Court is of the view that the documentary evidence provided in form of the affidavit and the copies of the baptism certificate, is not enough to prove the alleged indirect victims' filiation to the Applicant and the moral prejudice they allegedly suffered.⁶⁶
- 195.** In view of the foregoing, the Court dismisses the Applicant's prayer for reparations for moral prejudice to the alleged indirect victims.

⁶⁵ *Zongo and others v Burkina Faso* (reparations), § 54; and *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 135; *Léon Mugesera v Rwanda* (merits and reparations), § 148.

⁶⁶ *Lucien Ikili Rashidi v Tanzania* (merits and reparations), §§ 135-136.

B. Non-pecuniary reparations

i. Release

- 196.** The Applicant prays the Court to set aside the death sentence imposed on him and order his release from prison. He also states, that, the violation of his right to be tried within a reasonable period ought to result in his release.
- 197.** The Applicant avers that there are several compelling reasons for the Court to order his release. He submits that re-opening the defence case or holding a retrial would “result in prejudice and occasion a miscarriage of justice”, given the following circumstances (i) the passage of time since the alleged offence, (ii) the unfairness of the Applicant remaining in custody after ten (10) years in prison, (iii) the risk that a retrial may result in an unlawful mandatory death sentence, (iv) the existence of tainted evidence that is not capable of correction in fresh proceedings and (v) the Applicant’s rehabilitation.

- 198.** The Respondent State did not respond on this claim.

- 199.** The Court considers, with respect to these prayers, that while it does not assume appellate jurisdiction over domestic courts and cannot set aside sentences handed down by those courts,⁶⁷ it has the power to make any order on reparations as appropriate, where it finds that national proceedings were not conducted in line with international standards.

⁶⁷ See *Armand Guehi v Tanzania* (merits and reparations), § 33; Application No 027/2015. Judgment of 21/09/18, *Minani Evarist v United Republic of Tanzania* (merits), § 81; *Mohamed Abubakari v Tanzania* (merits), *op. cit.*, §. 28.

200. Regarding the order to set aside the Applicant's sentence, the Court notes that it has not determined whether the conviction and sentence of the Applicant was warranted or not, as this is a matter to be left to the national courts. The Court is rather concerned with whether the procedures in the national courts comply with the provisions of human rights instruments ratified by the Respondent State.⁶⁸
201. The Court recalls that it has established that it can only order a release:

“[I]f an Applicant sufficiently demonstrates or if the Court by itself establishes from its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and that his continued detention would occasion a miscarriage of justice.”⁶⁹
202. In the instant case, the Court recalls that it has found that the Respondent State violated the Applicant's rights to a fair trial by High Court concluding his trial without considering the medical evaluation report of the Applicant's mental health status at the time of the commission of the offence which the High Court itself ordered for, as required by its own laws. The Court finds that the logical remedy is for the Respondent State to re-open proceedings and to conclude them within 1 (one) year from the date of notification of this judgment, and it so orders.

ii. Guarantees of non-repetition

203. The Applicant prays the Court to order the Respondent State to amend its laws to ensure respect of the right to life under Article 4 of the African Charter by removing the mandatory death sentence for the offence of murder.
204. The Applicant further avers that the right to life can only be resolved by an order to revoke the death sentence imposed and accordingly, to remove the Applicant from death row. The Applicant

68 *Ladislaus Onesmo v United Republic of Tanzania*, ACTHPR, Application No 047/2016, Judgment of 30 September 2021 (merits and reparation) § 56; *Minani Evarist v United Republic of Tanzania* (merits and reparations) (21 September 2018) 2 AfCLR 402, § 54. See also *Ernest Francis Mtingwi v Tanzania* (jurisdiction), § 14; *Alex Thomas v Tanzania* (merits), § 130; *Mohamed Abubakari v Tanzania* (merits), §§ 25 and 26; *Kijiji Isiaga v United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 65.

69 *Minani Evarist v Tanzania* (merits and reparations), § 82; See also *Jibu Amir alias Mussa and Saidi Ally alias Mangaya v United Republic of Tanzania*, ACTHPR, Application No 014/2015, Judgment of 28 November 2019 (merits and reparations), § 96; and *Mgosi Mwita Makungu v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 550, § 84; and *Kalebi Elisamehe v Tanzania* (merits and reparations), § 111; Application No 047/2016, *Ladislaus Onesmo v United Republic of Tanzania* (merits and reparations) § 93.

affirms that the only way to ensure compliance with Article 4 of the African Charter is to order the Respondent to amend its laws to remove the mandatory death sentence for the offence of murder.

205. The Respondent State did not respond specifically to this allegation.

206. The Court has previously dealt with this matter and ordered the Respondent State to undertake all necessary measures to remove from its Penal Code the provision for the mandatory imposition of the death sentence.⁷⁰ The Court therefore reiterates this order in the instant case.

iii. Publication of the judgment

207. Though the Applicant did not seek orders for publication of this judgment, pursuant to Article 27 of the Protocol and the inherent powers of the Court, the Court will consider this measure.

208. The Court recalls its position that “a judgment, *per se*, can constitute a sufficient form of reparation for moral damages”.⁷¹ Nevertheless, in its previous judgments, the Court has *suo motu* ordered the publication of its judgments where the circumstances so require.⁷²

209. The Court observes that, in the present case, the violation of the right to life by the provision on the mandatory imposition of the

⁷⁰ *Ally Rajabu and Others v United Republic of Tanzania*, ACTHPR, Application No 007/2015, Judgment of 28 November 2019, § 136; *Armand Guehi v Tanzania* (merits and reparations), § 171 (xv-xvi)

⁷¹ *See Reverend Christopher Mtikila v Tanzania* (reparations), § 45.

⁷² *See Armand Guehi v Tanzania*, *op. cit.*, § 194; *Reverend Christopher R. Mtikila v Tanzania* (reparations), § 45 and 46(5); and *Norbert Zongo and Others v Burkina Faso* (reparations), § 98.

death penalty goes beyond the individual case of the Applicant and is systemic in nature. The Court further notes that its finding in this Judgment bears on a supreme right in the Charter, that is, the right to life.

- 210.** In view of the above, the Court orders the publication of this Judgment.

IX. Costs

- 211.** The Applicant prays for payment of United States Dollars two thousand, four hundred and forty dollars (USD 2, 440) on account of legal and related costs. The Applicant also prays for payment of United States Dollars four thousand, four hundred (USD 4, 400) for legal fees and expenses incurred by the Applicant's counsel for transport expenses and the time spent on the case by the legal counsel, that is, United States Dollars four thousand four thousand (USD 4,000) for approximately twenty (20) hours at United States Dollars two hundred (USD 200) per hour and approximately United States Dollars Four Hundred and Forty (USD 440) for travel and other expenses incurred.

- 212.** The Respondent State prays the Court to order Applicant to bear the costs of this Application.

- 213.** Pursuant to Rule 32(2) of the Rules “unless otherwise decided by the Court, each party shall bear its own costs, if any”.⁷³
- 214.** The Court notes that the Applicant was represented by PALU on a *pro bono* basis under the Court's legal aid scheme. The Court notes that, its legal aid scheme covers the costs and expenses that were incurred by PALU in representing the Applicant therefore

73 Formerly Rule 30(2) of the Rules of Court, 2 June 2010.

his claim in this regard is unjustified and is therefore dismissed.

215. In light of the foregoing, the Court rules that each Party shall bear its own costs.

X. Operative part

216. For these reasons,

The Court

Unanimously,

On jurisdiction

- i. *Dismisses* the objection to its material jurisdiction;
- ii. *Declares* that it has jurisdiction.

On admissibility

- iii. *Dismisses* the objection to the admissibility of the Application;
- iv. *Declares* that the Application is admissible.

On merits

- v. *Finds* that the Respondent State has not violated the Applicant's right to a fair trial, protected under Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR with regard to the provision of effective free legal assistance;
- vi. *Finds* that the Respondent State has not violated the Applicant's right to a fair trial, protected under Article 7(1)(c) of the Charter with regard to the provision of an interpreter;
- vii. *Finds* that the Respondent State has not violated the Applicant's right to a fair trial, protected under Article 7(1) (c) of the Charter with regard to the right to have his cause heard by a competent court or tribunal;
- viii. *Finds* that the Respondent State has violated the Applicant's right to fair trial, protected under Article 7(1)(d) of the Charter with regard to the right to be tried within a reasonable time;
- ix. *Finds* that the Respondent State has violated the Applicant's right to a fair trial under Article 7(1) of the Charter, with regard to the non-consideration by the High Court, of the medical evaluation report regarding the Applicant's mental health status at the time of commission of the offence;
- x. *Finds* that the Respondent State has violated the right to life under Article 4 of the Charter in relation to the mandatory imposition of the death penalty;
- xi. *Finds* that the Respondent State has violated the right to the respect of dignity under Article 5 of the Charter in relation to the method of execution of the death penalty, that is, by hanging.

*Unanimously,
On reparations*

Pecuniary reparations

- xii. *Dismisses* the Applicant's prayer for material damages;
- xiii. *Dismisses* the Applicant's prayer for damages for moral prejudice suffered by alleged indirect victims;
- xiv. *Grants* the Applicant's prayer for damages for the moral prejudice he suffered and awards him the sum of Tanzanian Shillings Five Million (TZS 5,000,000);
- xv. *Orders* the Respondent State to pay the sum awarded under (xiv) above, free from tax as fair compensation to be made within six (6) months from the date of notification of this Judgment, failing which it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment until the amount is fully paid.

Non-pecuniary reparations

- xvi. *Orders* the Respondent State to take all necessary measures, through its internal processes and within one (1) year of the notification of this Judgment, to re-open and finalise the criminal proceedings relating to the Applicant through a procedure that does not allow the mandatory imposition of the death sentence and upholds the full discretion of the judicial officer;
- xvii. *Orders* the Respondent State to immediately, take all necessary steps, to remove the mandatory imposition of the death penalty from its Penal Code as it impinges on the discretion of the judicial officers in imposing sentences.
- xviii. *Orders* the Respondent State to publish this Judgment, upon notification thereof, on the websites of the Judiciary, and the Ministry for Constitutional and Legal Affairs, and to ensure that the Judgment remains accessible for at least one (1) year after the date of such publication.

Implementation and reporting

- xix. *Orders* the Respondent State to submit to it within six (6) months from the date of notification of this judgment, a report on the status of implementation of the orders set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On costs

- xx. *Orders* that each Party shall bear its own costs.

Declaration: TCHIKAYA

1. I voted in favour of the operative part of the judgment because, like my honourable fellow judges, I believe that in the instant case, the Tanzanian State violated a human right, namely the right of the Applicant, *Gozbert Henrico*,¹ to a fair trial.
2. As an opponent of the death penalty by principle and conviction, this Declaration is an expression of my profound disagreement with the essence and the various forms of the death penalty, particularly the mandatory death penalty. We have already had the occasion to make observations on this matter, specifically in the *Rajabu* Case of 2019.² Indeed, in that Opinion, we held that “while asking Tanzania to review its legislation on a category of death penalty – the mandatory death penalty – is refusing to direct its decision to condemn the death penalty”. The *Gozbert Henrico* decision falls along the same lines. This approach is partial. A simple conviction of death penalty should be recommended.
3. The same is true when the Court holds in paragraph 168 of this judgment³ that “whatever the method of execution, the death penalty constitutes, in any event, cruel, inhuman and degrading punishment and notes that world practice is tending more and more towards its abolition as a sanction”. And, “the application of the death penalty by hanging constitutes a violation of the right to dignity under the article of the Charter”. This conviction is partial. The Court could have taken this reasoning to its logical conclusion by purely and simply banishing this punishment in all its forms from the African legal order.

1 ACTHPR, *Gozbert Henrico v Tanzania*, 2 December 2021: The facts took place on 27 May 2008 in the Kagera region of Tanzania. Following the sale of a piece of land by his brother, the Applicant, drunk and under the influence of drugs, broke into the house of his relatives. Using a machete, he injured three of them in the shoulder, head, neck and hands. In the course of the attack, he also killed the son of his deceased brother carried on the back by his grandmother.

2 ACTHPR, *Ally Rajabu and others*, 28 November 2019: An application was submitted to the Arusha Court on 26 March 2015 by the Applicants who are Tanzanian nationals sentenced to death for murder, including Mr. Ally Rajabu. On the merits of the case, the Court had yet to take a clear position on the issue of the mandatory sentence which was the sentence upheld by domestic judges.

3 ACTHPR, *Gozbert Henrico v Tanzania*, § 168.

4. In some ways, the *Gozbert Henrico* decision echoes the limitations of the 2019 *Rajabu et al.* decision, particularly with regard to the mandatory death penalty regime. Whether mandatory or not, these punishments, whose human and sociological effects are the same, should be subject to the same legal regime in terms of dismissal. Ultimately, it should be an abolitionist regime, without for that matter precluding the selective application of the mandatory death penalty for certain crimes.

The “two” death sentences have similar effects

5. We will not belabour the well-known harmful and devastating effects of the death penalty. Our opinion in *Rajabu* emphasized that “... what is condemned in the death penalty is found *mutatis mutandis* in the mandatory death penalty. The latter is of no significant contribution to the distinction that should be made with regard to the initial death sentence”.⁴ The position of the Court is at odds with the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty of 1989.⁵
6. Simply put, the mandatory death penalty combines most of the disadvantages of the death penalty. It violates fundamental human rights, as set out in the Universal Declaration of Human Rights of 1948. It is also irrevocable. It is also considered to be no more dissuasive than life imprisonment. Moreover, it is used to execute suspects summarily, without any trial. The “two” death sentences are similar.
7. While there is no intention here to shift the debate to other kinds of death sentences, the fact remains that the issue of the death penalty always pits abolitionists against non-abolitionists. In this regard, it must be emphasized that there is no evidence that the death penalty is a deterrent. On the contrary, it has been shown that incidents of the most serious crimes have either decreased or stabilized in countries that have abolished the death penalty. Certainly, it is the essence of punishment – not its severity – that deters would-be criminals.

4 *Rajabu* Opinion, § 10.

5 The Second Optional Protocol to the International Covenant on Civil and Political Rights, for the abolition of the death penalty was adopted and proclaimed by the General Assembly in its Resolution 44/128 of 15 December 1989.

A unique dismissal regime

8. The law, as applied in the *Gozbert* case may still raise questions. The Court “ orders the Respondent State to take all necessary measures, through its internal processes and within one (1) year (...) to implement the Court’s decision in *Ally Rajabu v Tanzania* the mandatory imposition of the death sentence and upholds the full discretion of the judicial officer”. This operative part of the Judgment provides a basis for validating the death penalty, given that it challenges the mandatory death penalty only.
9. The *Dexter* decision rightly pointed out that “In this context, it recalls its jurisprudence and reiterates that the automatic and mandatory imposition of the death sentence, constitutes an arbitrary deprivation of life, incompatible with article 6(1) of the covenant, provided that the death sentence is passed without the personal circumstances of the accused or the particular circumstances of the crime being taken into consideration”.⁶
10. The above-mentioned opinion recalls the Committee’s conclusion that “The existence of a de facto moratorium on executions is not sufficient to make the mandatory death penalty compatible with the covenant”. It is therefore clear that the two are twin penalties subject to the same dismissal regime under international law.
11. The history of abolition should do the rest. Two-thirds of the world’s countries have either abolished the death penalty completely or no longer enforce it. In Europe, many countries have abolished the death penalty. The European Union requires its members to abolish the death penalty. This is a very important requirement for membership of the Council of Europe. In sub-Saharan Africa, 22 states have already abolished the death penalty. Every year, the situation evolves towards the end of the death penalty. The latest countries to abolish the death penalty are Chad and Sierra Leone.

6 *Communication Dexter Eddie Johnson v Ghana*, 28 March 2014, § 9 and following.

Joint Declaration: KIOKO and CHIZUMILA

1. In the instant case, the twin main issues at hand were, firstly, the mandatory imposition of the death penalty in a manner that takes away the discretion of the judicial officer and, secondly, the method of carrying out the death penalty, namely, by hanging. The relevant provisions in the Respondent State's Penal code, were challenged as constituting cruel, inhuman and degrading treatment.
2. While we agree in substance with the majority decision on these two issues, there is one particular point, relating to the clarity and preciseness of one of the paragraphs in the operative part of the Judgment, on which we join issue with the majority.
3. It was our view, which we still hold now, that the operative part of a Court decision ought to be couched in such a manner that the reader, whether a litigant, or a scholar, or a student of law, or a member of the public will easily understand the context and import of the orders issued by the Court. Furthermore, we believe that the overriding principles in drafting a judgment are "clarity, coherence and conciseness"¹ and of course, fidelity to the law and facts; all other considerations in our view are secondary. This is important because experience has shown, as Lord Burrows has also stressed, that "there are few people who read every word of a judgment". Indeed, Lord Burrows even goes further to exclude academics from among the few persons who would read every word of a judgment, asserting that the focus will be on the section on the law.²
4. We agree with the reasoning behind the paragraph in question as articulated in the body of the final judgement. However, we hold the view that there was a serious flaw in the process, as well as an omission in one of the operative paragraphs of the judgment that is the subject of this Declaration. We believe that in this instance, the Court adopted a process that gave primacy and undue consideration to form rather than substance.

1 See Lord Burrows, Justice of the Supreme Court of the United Kingdom 20 May 2021, on "Judgment-Writing: A Personal Perspective" at the Annual Conference of Judges of the Superior Courts in Ireland, p 2 in which he stresses the three Cs.

2 *Ibid* Page 5. Lord Burrows asserts "There are few people who read every word of a judgment. So, for example, an academic, unlike the parties, is rarely interested in the ins and outs of the facts and will often rely on a headnote for the facts, if there is one. What the academics are interested in is the law. It makes no difference to an academic if the judgment has 300 paras on the facts or 30 paras on the facts. All that fact-finding will be skipped or quickly flicked through in any event although he or she may have to dip into it further at some stage".

The Process

5. The judgement was scheduled for delivery on 2 December 2021. However, on the date of delivery it was taken out following insistence that there was a fatal error in the operative part of the judgment. For this reason, delivery of the judgment was deferred to allow further deliberations. The alleged fatal error was the reference to a previous decision of the Court, as indicated hereunder, preference being for the paragraph to stop immediately after “imposing sentences”:

Orders the Respondent State to immediately, take all necessary steps, to remove the mandatory imposition of the death penalty from its Penal Code as it impinges the discretion of the judicial officers in imposing sentences, and, also to comply with the Court’s decision in the matter of *Ally Rajabu v United Republic of Tanzania*,³ which was to the same effect.
6. It should be underlined that indeed the last part of the paragraph in question did not correctly express what had been agreed earlier by the Court. It ought to have instead stipulated, “and in line with the Court’s decision in the matter of *Ally Rajabu v United Republic of Tanzania*, which was to the same effect’. The Court had also agreed that there would no need for a footnote in the operative part since a full citation was already provided for in the body of the judgment. We see no conceivable reason, even with this alleged error, why delivery of the judgment was deferred.
7. We hold the view that while references to other decisions in the operative part is not elegant, its inclusion cannot constitute a fatal error by any stretch of the imagination. Postponing delivery of the judgment for this reason alone was in our view unjustified.

Subsequent formulation and Practice of the Court

8. Subsequently, the Court decided that the paragraph should simply read as follows: “Orders the Respondent State to immediately, take all necessary steps, to remove the mandatory imposition of the death penalty from its Penal Code as it impinges the discretion of the judicial officers in imposing sentences”. We did not share

3 *Ally Rajabu and Others v Tanzania v United Republic of Tanzania*, ACtHPR, Application No 007/2015, Judgment of 28 November 2019 (*merits and reparations*) § 107. In its judgment, *the Court had ordered the Respondent State to take all necessary measures, within one (1) year from the notification of this judgment to remove the mandatory imposition of the death penalty from its Penal Code and for the rehearing of the case on the sentencing of the Applicants through a procedure that does not allow the mandatory imposition of the death sentence and upholds the full discretion of the judicial officer.*

this view.

9. While we agreed with the logic of requiring immediate implementation of the decision, since the Respondent State had failed to implement previous decisions of the Court to the same effect, we think this context ought to have been included in the operative part. This is in consonance with the practice of the Court.⁴ Indeed, in all judgments where the Court has found violation of a right provided for in the Charter, for example the right to free legal assistance, it states so in the operative part. The Court does not simply state that it found a violation of Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR, but adds “for failure to provide the Applicant with free legal assistance”.⁵
10. Additionally, we could not identify any previous decision of the Court where it required immediate implementation of its decision. Indeed, all decisions of the Court requiring a change in the law normally carry a time frame of one year or two years. The only reason for stipulating immediate implementation of this judgment was because, the Respondent State had been given one (1) year in in *Ally Rajab*,⁶ and in subsequent decisions, to change its law, which it had failed to do.
11. We believe that, if it is accepted that majority of readers do not read the full judgments of the Court, what is the logic for leaving it out an important aspect of the reasoning of the Court? If virtually all decisions of the Court carry a time frame beyond the date of its issue, how is one to understand the reasoning of the Court without going through the entire judgment? What prejudice could possibly accrue from being clear, coherent and precise?
12. For our part, we would have joined the consensus with a formulation that generally made reference to previous decisions

4 For example, in *Anudo Ochieng Anudo v Tanzania*, Application No 012/2015, delivered on 2 December 2021 (reparations) the Court *ordered* the Respondent State to take all the necessary steps to restore the Applicant’s rights, by allowing him to return to the national territory, ensuring his protection and submitting a report to the Court within forty-five (45) days of notification of this Judgment”.

5 See *Hamis Shaban alias Amis Ustadh v Tanzania*, Application No 026/2015, delivered on 2 December 2021 (merits and reparations), in which the Court found that “the Respondent State is in violation of Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR, for failure to provide the Applicant with free legal assistance”. The Court granted pecuniary reparations and ordered “the Respondent State to pay the amount indicated under sub-paragraph (vii) above free from tax as fair compensation to be made within six (6) months from the date of notification of this Judgment, failing which it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment until the amount is fully paid”.

6 *Ibid.*

of the Court, for example, “in line with previous decisions of the Court” or “in line with previous decisions of the Court that remain unimplemented”. By leaving out this important aspect of the reasoning of the Court, we believe the majority have followed a perilous path that is new and inconsistent and without any good reason for doing so.

Msuguri v Tanzania (order) (2022) 6 AfCLR 56

Application 052/2016, *Marthine Christian Msuguri v United Republic of Tanzania*

Order (re-opening pleadings), 8 March 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSOUOLA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant, a citizen of the Respondent State, filed this Application while he was in prison awaiting execution of a death sentence by hanging for murder. The Applicant alleged that the proceedings before the domestic courts, including his trial, conviction and unsuccessful appeal, were in violation of some of his Charter protected rights. After the initial exchange of pleadings, the Applicant filed new pleadings to which the Respondent State did not respond, leading to a closure of pleadings. In this ruling, the Court invoked its Rules of Court to order that pleadings be re-opened to enable the Respondent State file its Response to the Applicant's new pleadings.

Procedure (reopening of pleadings in the interests of justice, 12, 15)

I. Parties

1. Marthine Christian Msuguri (hereinafter referred to as “the Applicant”) is a Tanzanian national who, at the time of filing the Application, was incarcerated at the Butimba Central Prison in Mwanza Region. On 30 July 2010, he was sentenced to death by hanging, following his conviction for the offence of murder. The Applicant alleges the violation of his rights to a fair trial in relation to proceedings before domestic courts.
2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as “the Respondent State”), which became a Party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as “the Declaration”), through which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission an instrument withdrawing its Declaration.

The Court held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect 22 November 2020.¹

II. Subject of the Application

3. From the record before this Court, it emerges that, on 30 July 2010, the High Court of Tanzania sentenced the Applicant to death by hanging for the offence of murder, in Criminal Case N° 102 of 2010.
4. Dissatisfied by this decision, the Applicant decided to appeal before the Court of Appeal of Tanzania, which on 11 March 2013 dismissed the appeal entirely.
5. On 12 March 2013, the Applicant filed Application No 7 of 2013 before the Court of Appeal of Tanzania for review of its judgment. He alleges that the Application was neither heard nor listed for hearing up to the time he filed the Application before this Court.

III. Summary of the Procedure before the Court

6. The Application was filed on 9 September 2016 and served on the Respondent State on 16 November 2016.
7. The Parties exchanged pleadings on both the merits of the matter and reparations sought by the Applicant.
8. On 4 October 2018, the Court decided, in the interest of justice, to grant the request by the International Human Rights Clinic at Cornell University School of Law to represent the Applicant and in that regard, recognised Advocate Fulgence T. Massawe as Applicant's Counsel. The Counsel was accordingly availed the case file for submission of pleadings.
9. On 1 June 2020, the Registry transmitted to the Respondent State the new submissions made by the aforementioned Counsel on behalf of the Applicant.
10. At the expiry of the time granted to do so, the Respondent State did not respond to these new pleadings.
11. Pleadings were closed on 2 February 2022 and the Parties were duly informed.

¹ *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACTHPR, Application No 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.

IV. On the reason for reopening of pleadings

12. The Court notes that Rule 46(3) of the Rules provides that “the Court has the discretion to determine whether or not to reopen pleadings”. The Court further notes that pursuant to Rule 90 of the Rules, “Nothing in these Rules shall limit or otherwise affect the inherent power of the Court to adopt such procedure or decisions as may be necessary to meet the ends of justice.”
13. The Court recalls that, in accordance with Rule 44(7) of the Rules, “If any party fails to file its pleadings and does not make a request for extension, its attention shall be drawn to Rule 63 of the Rules. In such instance, the defaulting party shall be granted not more than forty-five (45) days to file its pleadings.”
14. From the proceedings of the present matter as earlier recounted, it emerges that the Respondent State did not file any submission after it was granted time to respond to the new pleadings submitted by the appointed Counsel for Applicant. Noting that submissions made by the Applicant in the aforementioned pleadings involve new allegations, arguments and prayers on which the Court will be called to make a determination, the interest of justice demands that attention of the defaulting party, here the Respondent State, be drawn to the procedure applicable under Rule 44(7) read jointly with Rule 63 of the Rules.
15. The foregoing necessitates that pleadings be reopened for purposes of implementing the procedure prescribed under Rule 44(7) of the Rules, that is grant the Respondent State forty-five (45) days to respond to the new pleadings filed by the Applicant, failing which the default procedure will take its course.
16. For these reasons,
The Court
Unanimously,
 - i. Orders that the pleadings in *Application 052/2016 – Marthine Christian Msuguri v United Republic of Tanzania* be, and are hereby reopened.
 - ii. Orders the Respondent State to submit the Response to the Applicant’s new pleadings within forty-five (45) days of receipt thereof.

Adelakoun & Ors v Benin (provisional measures) (2022) 6 AfCLR 59

Application 012/2021, *Landry Angelo Adelakoun, Romaric Jesukpego Zinsou and Fifamin Miguele Houeto v Republic of Benin*

Ruling, 24 March 2022. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

The Applicants, who are citizens of the Respondent State, brought this Application alleging that some of their human rights were violated when the Respondent State shut down the internet on a day fixed for legislative elections in that State. Together with the main Application, the Applicant filed a request for provisional measures. The Court held that the Applicants did not clearly state the measures they sought and failed to provide proof of urgency or extreme gravity to warrant issuance of provisional measures. Accordingly, the Court dismissed the request for provisional measures.

Jurisdiction (*prima facie*, 11-15)

Provisional measures (extreme gravity and urgency, 19-20; irreparable harm, 19, 21; clarity of measures sought, 22; burden of proof, 22; proof of urgency and extreme gravity, 22)

I. The Parties

1. Landry Angelo Adelakoun, Romaric Jesukpego Zinsou and Fifamin Miguele Houeto (hereinafter, the “Applicants”) are nationals of Benin, residing in Cotonou. They allege human rights violations owing to the shutdown of the internet on the day of legislative elections on 28 April 2019.
2. The Application is filed against the Republic of Benin (hereinafter “the Respondent State”), which on 21 October 1986 became a Party to the African Charter on Human and Peoples’ Rights (hereinafter “the Charter”) and on 22 August 2014 to the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (hereinafter “the Protocol”). On 8 February 2016, the Respondent State also deposited the Declaration provided for in Article 34(6) of the Protocol (hereinafter “the Declaration”) by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 25 March 2020, the Respondent State deposited with the African Union

Commission (AUC) the instrument of withdrawal of its Declaration. The Court has previously ruled that this withdrawal has no effect on pending cases and on new cases filed before the withdrawal of the Declaration comes into force one year after its deposit, that is, on 26 March 2021.¹

II. Subject of the Application

3. It emerges from the Application, that, on 28 April 2019, in “an atmosphere of heightened tension”, the Republic of Benin organised legislative elections in which only two political parties supporting the ruling party participated.
4. They aver that it is in this atmosphere, “and to the surprise of everyone”, that the Beninese people woke up to a nation-wide shutdown of the internet on the day of the said elections.
5. The Applicants submit that at no time were Beninese citizens given advance notice of internet shutdown in order for them to take the necessary measures.

III. Alleged violations

6. The Applicants allege a violation of the right to freedom of opinion and expression, which entails the right to hold opinions without interference and the right to seek, receive and disseminate, regardless of borders, information and ideas through any media, as protected by Article 19 of the Universal Declaration of Human Rights (UDHR).

IV. Summary of the Procedure before the Court

7. The Application was filed at the Registry on 22 March 2021 together with a request for a provisional measure, which he did not specify.
8. On 28 September 2021, the Application on the merits together with the request for a provisional measure were served on the Respondent State for its Response on the merits and on the request for provisional measures within ninety (90) days and fifteen (15) days, respectively from the date of receipt.

¹ *Houngue Éric Noudehouenou v Republic of Benin*, ACTHPR, Application No 003/2020 Ruling of 5 May 2020 (provisional measures), §§ 4-5 and corrigendum of 29 July 2020.

9. On 20 October 2021, the Respondent State filed its response to the request for a provisional measure.

V. *Prima facie* jurisdiction

10. Article 3(1) of the Protocol provides that:
The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
11. Under Rule 49(1) of the Rules² “the Court shall ascertain its jurisdiction ...”. However, in the case of provisional measures, the Court does not have to ensure that it has jurisdiction on the merits of the case, but only that it has *prima facie* jurisdiction.³
12. In the instant case, the rights alleged by the Applicants to have been violated are protected by the UDHR, a human rights instrument to which the Respondent State is bound.⁴ The Court further recalls that the Respondent State has ratified the Protocol and deposited the Declaration under Article 34(6) of the Protocol as stated in paragraph 2 of this Ruling.
13. The Court recalls that it has held that the withdrawal of the Declaration deposited under Article 34(6) of the Protocol has no retroactive effect, nor does it affect new cases brought before the withdrawal came into effect⁵ as in the instant case. The Court reiterates its position that the withdrawal of the Respondent State's Declaration took effect on 26 March 2021.⁶
14. The Court notes that in the instant case, the Application was filed on 22 March 2021, before the effective date of withdrawal of the Declaration. Accordingly, the said withdrawal does not affect its personal jurisdiction.
15. The Court concludes that it has *prima facie* jurisdiction to hear the Application for a provisional measure.

2 Rules of Court, 25 September 2020.

3 *Komi Koutche v Republic of Benin* (provisional measures) (2 December 2019) 3 AfCLR 725 § 14.

4 Constitution of Benin of 11 December 1990.

5 *Ingabire Victoire Umuhoza v Republic of Rwanda* (Jurisdiction) (3 June 2016) 1 AfCLR 540, § 67.

6 *Houngue Éric Noudéhouenou v Republic of Benin*, ACtHPR, Application No 003/2020, Ruling of 5 May 2020 (provisional measures), §§ 4-5 and corrigendum of 29 July 2020.

VI. Provisional measure requested

16. The Applicants pray “the Court to order a provisional measure”.
17. The Respondent State challenges the Applicants’ request, arguing that the Applicants neither demonstrate that the requirements of extreme gravity, urgency or irreparable harm have been met, nor do they specify the provisional measure requested from the Court.

18. The Court notes that Article 27(2) of the Protocol provides that “in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary”.
19. In view of the foregoing, the Court may only order provisional measures in cases of extreme gravity and urgency, aimed at preventing irreparable harm to persons.
20. The Court recalls that urgency, which is consubstantial with extreme gravity, means that “an irreparable and imminent risk is caused before the Court renders its ruling”.⁷ The risk in question must be real, which excludes supposed or abstract risk. There should be a serious risk that requires immediate remedial action.⁸
21. The Court notes that for irreparable harm, there must be a “reasonable likelihood of occurrence” in the context and personal circumstances of the Applicant(s).⁹
22. The Court emphasises that it is for the Applicant seeking provisional measures to state them clearly and to provide proof of urgency or extreme gravity as well as proof of the irreparable nature of the harm.¹⁰ It notes that, in the instant case, the Applicants have not met these requirements.

7 *Sébastien Ajavon v Republic of Benin*, ACtHPR, Application No 062/2019, Ruling of 17 April 2020 (provisional measures), § 61.

8 *Ibid*, § 62.

9 *Ibid*, § 63.

10 *Romarc Jesukpego Zinsou and others*, ACtHPR, Application No 008/2021, Ruling of 10 April 2021 (provisional measures) § 20.

23. Accordingly, the Court dismisses the request for a provisional measure.
24. For the avoidance of doubt, the Court recalls that this Ruling is provisional in nature and in no way prejudices the Court's findings on its jurisdiction, on the admissibility of the Application and the merits thereof.

VII. Operative part

25. For these reasons,
The Court
Unanimously,

- i. *Dismisses* the request for a provisional measure.

Belgheith v Tunisia (order) (2022) 6 AfCLR 64

Application 017/2021, *Ibrahim Ben Mohamed Ben Ibrahim Belgheith v United Republic of Tunisia*

Order, 24 March 2022. Done in Arabic, English and French, the Arabic text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: BEN ACHOUR

The Applicant, a national of the Respondent State, brought this Application to challenge the promulgation of certain decrees by the President of the Respondent State. The Applicant alleged that the Respondent State violated some of his Charter protected rights by the promulgation of the decrees which abrogated part of the Respondent State's Constitution and resulted in a seizure of power by the President. Along with the Application, the Applicant filed a request for provisional measures seeking an order to end the exceptional measures and restore legitimate rule. The Court ruled that it would address the request for provisional measures along with the merits of the case.

Provisional measures (similarity with merits, 15-16)

I. The Parties

1. Ibrahim Ben Mohamed Ben Ibrahim Belgheith, is a national of the Republic of Tunisia (hereinafter referred to as "the Applicant") and a lawyer. He alleges the violation of his rights guaranteed under Articles 3(1), 7, 13, 20(1) of the Charter following the promulgation by the President of the Republic, of Presidential Decrees No 80 of 29 July 2021, 109 of 24 August 2021, 117 of 22 September 2021 and 137 and 138 of 11 October 2021 on the abrogation of the Constitution.
2. The Application is filed against the Republic of Tunisia (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 5 October 2007. It deposited, on 16 April 2017, with the African Union Commission, the Declaration provided for in Article 34(6) of the Protocol by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations.

II. Subject of the Application

3. The Applicant alleges that, the President of the Respondent State issued the following decrees to abrogate the Constitution and the democratic process and seized power illegally by virtue of:
 - Presidential Decree No 80/2021 of 29 July 2021 suspending all powers of the Assembly of People's Representatives and lifting the parliamentary immunity of its members for a period of one month from 25 July 2021, and providing for a possible extension of the said suspension by virtue of a Presidential Decree in accordance with Article 80 of the Constitution.
 - Presidential Decree No 109 of 24 August 2021 extending the aforementioned exceptional measures suspending the powers of the Assembly of People's Representatives and lifting the parliamentary immunity of its members until further notice.
 - Presidential Decree No 117 of 22 September 2021 on exceptional measures to abrogate the Constitution, with the exception of its preamble, chapters one and two, and all constitutional provisions that are not in accordance with the aforementioned Presidential Decree.
 - Presidential Decrees No 137 and 138 of 11 October 2021, enforcing the latter Decree (117 of 22 September 2021), appointing a Head of Government and members of the Government.

III. Summary of the Procedure before the Court

4. The Application together with the request for provisional measures was received at the Registry on 25 October 2021.
5. On 10 November 2021, the Application together with the request for provisional measures were served on the Respondent State. The Respondent State was requested to file its response to the request for provisional measures within fifteen (15) days and its Response to the Application within ninety (90) days of receipt thereof.
6. The Respondent State did not respond to the request for provisional measures within the time given.
7. On 16 February 2022, the Respondent State responded on the merits of the Application, and this Response was served on the Applicant for a Reply within forty-five (45) days of receipt.

IV. Prayers of the Parties

8. The Applicant prays the Court to declare that, by promulgating the above-mentioned Decrees, the Respondent State violated his

rights as a human being and the following rights of the Tunisian people:

- The right of the people to self-determination guaranteed under Article 20(1) of the Charter;
 - The right of citizens to participate freely in the conduct of their country's affairs as guaranteed under Article 13(1) of the Charter;
 - Articles 3, 2, 5, 11, 14, and of the African Charter on Democracy, Elections and Good Governance;
 - Article 1 of the Charter;
 - The right to have one's cause heard guaranteed under Article 7 of the Charter;
9. The Applicant also requests the Court to order the Respondent State to repeal all the Decrees mentioned in paragraph 3 above, to guarantee the human rights mentioned, by ordering the following measures:
- Enactment of laws guaranteeing the supremacy of the Constitution, including expediting the establishment of the Constitutional Court and removal of all legal and political impediments to its establishment;
 - Enactment of laws to criminalise the transfer, contribution to, and support of, unconstitutional change of power;
 - Enactment of laws that engender a democratic culture among the population, especially among the youth;
 - Establishment of effective mechanisms to remedy constitutional violations, pending the establishment of the Constitutional Court, and finally, to order the Respondent State to report on the status of implementation of the stated decision and guarantees of non-repetition.
10. The Respondent State did not respond to the request for provisional measures.

V. Provisional measures requested

11. The Applicant prays the Court to order Respondent State to take the following provisional measures:
- An end to the exceptional measures, return to constitutional legitimacy, respect of the provisions of the Constitution as a guarantee of the human rights that have been violated, and restoration of the powers and activities of the legislature.
12. The Applicant considers that the above-mentioned exceptional measures put him and the entire Tunisian people in a grave and perilous situation, and constitutes a reversal of its democratic process and constitution, grave violations of the people's right to self-determination, the right to participate in the management of

the country's affairs and the rights provided for in the Charter, the two international covenants¹ and the African Charter on Democracy, Elections and Governance.

13. The Applicant further submits that, as a result, the constitutional guarantees protected by the instruments that the Court is mandated to apply and respect, have been abrogated, such that it is necessary to order provisional measures within the meaning of Article 27 of the Protocol.
14. The Applicant contends that the capture and continued exercise of power by one person may result in a *fait accompli* that is difficult to surmount over time, thereby creating a state of uncertainty (imminent danger) in addition to creating the required conditions of peril, which have already begun with the international isolation of Tunisia. This is what caused the bankruptcy of the country, the deterioration of its credit rating and the refusal of international financial institutions to deal with illegal authorities, which will lead to a fall in the value of the Tunisian Dinar, higher debt value and the violation of the basic economic and social rights of all Tunisian citizens.

15. The Court notes from the foregoing, that the measures sought are the same as those contained in the merits of the Application and may prejudice the merits of the case. Therefore, the Court will consider these requests in the context of the judgment on the merits of the case.
16. Accordingly, in the interests of proper administration of justice, the Court decides to rule on the request for provisional measures and the merits of the case at the same time, and considers that the situation requires it to expedite the examination of the Application.

1 International Covenant on Civil and Political Rights and International Covenant on Economic Social and Cultural Rights.

VI. Operative part

17. For these reasons,

The Court

Unanimously,

Decides to rule on the request for provisional measures and the merits of the case at the same time.

Mahiri v Tanzania (striking out) (2022) 6 AfCLR 69

Application 029/2017, *Magweiga Mahiri v United Republic of Tanzania*

Order, 24 March 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSOUOLA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

At the time of filing his Application, the Applicant, a citizen of the Respondent State, was serving a life sentence, having had an earlier death sentence for murder commuted by a presidential pardon, to a life sentence. After the Application was filed and *pro bono* legal representation approved for the Applicant by the Court, both the Applicant and the Respondent State failed to respond to correspondence from the Court. Accordingly, the Court ordered the Application to be struck out.

Procedure (duty of parties to be diligent, 21-22; striking out, 23, 31)

I. The Parties

1. Mr. Magweiga Mahiri (hereinafter, “the Applicant”) is a Tanzanian national, who at the time of filing this Application, was serving a sentence of life imprisonment following his conviction for the offence of murder. The Applicant was initially sentenced to death by hanging, a conviction that was later commuted to life imprisonment by a presidential pardon.
2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as “the Respondent State”), which became a Party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol, through which it accepted the jurisdiction of the Court to receive applications from individuals and NGOs (hereinafter referred to as “the Declaration”). On 21 November 2019, the Respondent State deposited, with the African Union Commission, an instrument withdrawing the said Declaration. The Court has held that this withdrawal has no bearing on pending cases and new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period of one year after its deposit.

II. Subject of the Application

A. Facts of the matter

3. It emerges from the records that on 20 May 1985, the Applicant killed Mwita Kenani, who the Applicant claims to have caught red-handed sleeping with his wife in his matrimonial home. The Applicant alleges that when the deceased tried to escape in the darkness “by breaking through the front door”, he stabbed him to death.
4. After the incident, the Applicant asserts that he was arraigned before the District Court of Tarime in 1988 but despite him pleading guilty for the offence of manslaughter, the case was committed to the High Court of Tanzania on circuit at Musoma where he was charged with the offence of murder.
5. On 28 August 1991, the High Court convicted the Applicant of the offence of murder and sentenced him to death by hanging. Subsequently, the Applicant appealed to the Court of Appeal of Tanzania sitting at Mwanza, challenging both his conviction and sentence.
6. The Court of Appeal upheld the High Court’s verdict and dismissed the appeal on 29 May 1992.
7. The Applicant alleges that his case was heard by the domestic courts without considering the principle of rule of law and against the basic standards of justice. In this regard, the Applicant contends that despite his plea of guilty for manslaughter, the Respondent State relied on four prosecution witnesses to prove the charge of murder and sustain his conviction without following national and international norms applicable to the charge of murder.

B. Alleged violations

8. The Applicant alleges that, by sentencing him to death by hanging while it was supposed to entirely abolish the death penalty, the Respondent State has violated his right to equality and equal protection of the law, the right to life and the right to prohibition against torture and ill-treatment, contrary to Articles 3, 4, 5 of the Charter, respectively.
9. The Applicant also contends that the Respondent State has violated Articles 7, 19 and 26 of the Charter by convicting him of the charge of murder on the basis of insufficient and unreliable evidence, and by failing to administer justice independently.

III. Applicant's Prayers

- 10.** The Applicant prays the Court to:
 - i. Declare that the Application is admissible;
 - ii. Declare that the decision rendered against him by the domestic courts violated his human rights;
 - iii. Issue an order nullifying the said decision of national courts;
 - iv. Order his acquittal and release from prison and ensure the full enjoyment of his rights;
 - v. Make any other order that the Court finds just and equitable or award reparations in accordance with Article 27 of the Protocol to redress the violations of his rights
- 11.** The Applicant further prays the Court to provide him with legal assistance in order to facilitate his representation and effective participation in the Court's proceedings.

IV. Summary of Procedure before the Court

- 12.** The Application was filed on 1 August 2017. On 7 August 2017, the Registry acknowledged receipt of the Application and by the same notice, requested the Applicant to provide copies of judgments of national courts pertaining to his Application.
- 13.** On 20 September 2017, the Applicant filed a copy of the judgment of the Court of Appeal. The Registry duly acknowledged receipt and notified the Applicant of the registration of his Application on 4 October 2017.
- 14.** On 5 March 2018, Professor Sandra L. Babcock of the International Human Rights Clinic of Cornell University Law School and Ms Nora Mbagathi, African Case Worker at Reprieve, sent a letter expressing interest to offer *pro bono* representation to the Applicant. On 16 May 2018, the Registry informed them that the Court had accepted their offer to represent the Applicant.
- 15.** On 2 July 2018, the Registry served the Application on the Respondent State with a request to file the names and addresses of its representatives within thirty (30) days and its Response to the Application within sixty (60) days, of receipt of the notice. The Respondent State filed the lists of its representatives on 27 August 2018 and the Registry acknowledged receipt and notified it to the Applicant on 30 August 2018.
- 16.** On 17 July 2018, the Registry sent a notice to the Applicant requesting him to file his submissions on reparations within thirty (30) days of receipt.
- 17.** On 30 August 2018, the Registry reminded the Applicant that the time provided for him to file his submissions on reparations

had elapsed on 16 August 2018. It also notified the Applicant of the Court's decision to *suo motu* grant him one last extension of fifteen (15) days from receipt of the notice within which he should file his submissions.

18. On 21 January 2019, the Respondent State, citing scarcity of staff, and that it was still collecting information from various government stakeholders, requested for further extension of time to file the Response within six (6) months. The request was transmitted to the Applicant on 28 January 2018 for his observations within fifteen (15) days of receipt.
19. Both Parties did not respond to the correspondence of the Registry.

V. On the striking out of the Application

20. The Court notes that the relevant Rule on striking out of Applications is Rule 65(1) of the Rules, which provides that:
 1. The Court may at any stage of the proceedings decide to strike out an Application from its cause list where:
 - a. An Applicant notifies the Court of his/her intention not to proceed with the case;
 - b. An Applicant fails to pursue his case within the time limit provided by the Court;
 - c. It, for any other reason, concludes that it is no longer justified to continue with the examination of the Application.
21. The Court reiterates that parties to an application should pursue their case with diligence.¹ Where they fail or implicitly or expressly indicate their lack of interest to do so, Rule 65 of the Rules, empowers the Court to remove the application from its cause list. The Court may also strike out an application if in the circumstances, it is no longer justified to continue with the determination of the matter.
22. The rationale behind Rule 65 of the Rules, is to encourage parties to demonstrate some level of diligence in pursuing their case or else their application could be struck out from the Court's cause list.

1 *Abdallah Ally Kulukuni v United Republic of Tanzania*, AfCHPR, Application No 007/2018 Order (strike out) of 25 September 2020, § 18.

23. Subject to the circumstances of each case, the Court retains the discretion to decide on whether a particular application should be struck out or not.
24. In the instant case, the Applicant filed his Application on 1 August 2017 praying for, *inter alia*, legal assistance to be provided by the Court.
25. On 17 July 2018, the Applicant was requested to file his submissions on reparations within thirty (30) days of receipt of the notice.
26. On 30 August 2018, the Registry reminded the Applicant that the time provided to file his submissions on reparations had elapsed and notified him of the Court's decision *suo motu* to grant a fifteen (15) days extension of time within which he should file the submissions.
27. On 17 September 2018, Professor Sandra L. Babcock wrote to the Court indicating that:

...we have not obtained a Power of Attorney in the matter of Magweiga Mahiri, case No 029/2016, because – as we understand it – Mr Mahiri has been released. We understand the Court intends to proceed with his case. However, we have not been able to locate him and thus, Mr Mahiri does not know of our representation. We would therefore request that the Court delist us as counsel for Mr. Mahiri.
28. On 14 February 2019, the Registry sent a letter to the Respondent State requesting the latter to confirm the release of the Applicant from prison following a Presidential Remission of his punishment. The Respondent State has, to date, not responded to the said letter.
29. The Court notes that, as can be seen from the foregoing, despite the extensions of time granted to the Applicant to file his submissions on reparations, the Applicant has failed to do so. Similarly, the Respondent State has failed to file its Response to the Application in spite of the fact that the Court granted it several extensions of time. In this regard, the Court notes from the record that there are proofs of delivery of the notices sent to both parties.
30. Furthermore, as indicated in the aforementioned letter of Professor Babcock, the Applicant could not be found in the address that he provided in his Application. As a result, it was not possible to obtain a Power of Attorney to provide him legal assistance.
31. The Court underscores that, regardless of his purported release or, possible change of address, it behoves the Applicant to give updates or notify the Court on his prison status or current whereabouts.
32. In view of the circumstances of this case, the Court thus finds that it is no longer justified to continue with the examination of the

Application. Consequently, the Court decides to strike it out from its Cause List.

- 33.** The Court notes that, the striking out of the Application is without prejudice to the Applicant's right to file for restoration of his Application in accordance with Rule 65(3) of the Rules.

VI. Operative part

- 34.** For these reasons,

The Court

Unanimously,

- i. *Strikes out* the instant Application from its Cause List.

Mariko v Mali (judgment) (2022) 6 AfCLR 75

Application 029/2018, *Oumar Mariko v Republic of Mali*

Ruling, 24 March 2022. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSOUALA, ANUKAM and NTSEBEZA

Recused under Article 22: SACKO

The Applicant, an opposition member of Parliament in the Respondent State, was a candidate in its 2018 Presidential elections. In this Application, he alleged that his human rights were violated as a result of the irregular nature of the elections, the decisions of the domestic courts in the challenge he brought against the election results, the lack of independence and impartiality of the domestic electoral body as well as the interference of executive bodies in the work of the electoral body. The Court found that the Respondent State had violated aspects of the Applicant's right to a fair hearing, the State's obligation to guarantee the independence of the Constitutional Court, and the obligation to establish and guarantee an independent and impartial electoral body. Accordingly, the Court awarded some of the reparations sought by the Applicant.

Jurisdiction (material, 16; personal, 16; temporal, 16; territorial, 16)

Admissibility (exhaustion of local remedies, 26-28)

Fair trial (trial within a reasonable time, 39-44; adversarial principle, 50-54; effective remedy, 59-65)

Independence of courts (link between independence and impartiality, 72; institutional independence, 75-79; personal independence, 80-86)

Impartiality of courts (presumption of impartiality, 89; autonomy of right, 92)

Equality and equal protection (connection to non-discrimination, 100; responsibility of authorities to ensure, 101; impact of presidential power to appoint judges, 104)

Independent electoral body (nature of independence, 115; nature of impartiality, 115; impact of overlapping jurisdiction, 121-125)

Mechanism for election dispute settlement (source of obligation, 133)

Transparency of electoral list (requirements for reliability of list, 148; vague and imprecise allegation, 152)

Right to vote and be voted (right to free elections, 161)

Reparations (basis for, 173; burden of proof, 174; material prejudice, 179-181; moral prejudice, 184-185; non-pecuniary, 188-191)

I. The Parties

1. Mr. Oumar Mariko (hereinafter referred to as “the Applicant”), a Malian national, is a medical doctor and a member of the National Assembly of the Republic of Mali. He alleges a violation of human rights in connection with the Malian presidential elections of 29 July 2018, in which he was a candidate.
2. The Application is filed against the Republic of Mali (hereinafter “the Respondent State”), which became a party to the African Charter on Human and Peoples’ Rights (hereinafter “the Charter”) on 21 October 1986, and to the Protocol on 20 June 2000. On 19 February 2010, the Respondent State deposited the Declaration provided for in Article 34(6) of the Protocol (hereinafter “the Declaration”), by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and non-governmental organisations with observer status before the African Commission on Human and Peoples’ Rights.

II. Subject of the Application

A. Facts of the matter

3. The Applicant avers that the 29 July 2018 presidential election in which he was a candidate was irregular. According to him, the decisions of Malian courts issued in violation of his rights, the lack of independence and impartiality of the electoral bodies, as well as the Ministry of Territorial Administration’s (hereinafter referred to as “MAT”) control of the electoral process, contributed to his elimination in the first round of voting.

B. Alleged violations

4. The Applicant alleges the violation of the following rights:
 - i. The right to have his cause heard, in particular, the right to be tried within a reasonable time and the right to be tried by an impartial court, protected by Article 7(1)(d) of the Charter, and the adversarial principle, protected by Article 14 of the International Covenant on Civil and Political Rights (hereinafter referred to as “ICCPR”);
 - ii. The right to full equality before the law and equal protection of the law, protected by Article 3 of the Charter;
 - iii. The right to vote and to be elected in periodic and transparent elections by universal and equal suffrage held by secret ballot, guaranteeing the free expression of the will of the electorate, protected by Article 25(2) of the ICCPR.

5. The Applicant also alleges that the Respondent State violated the following obligations:
 - i. The obligation to guarantee the independence of courts, under Article 26 of the Charter;
 - ii. The obligation to establish an independent and impartial electoral body, guaranteed by Article 17(1) of the African Charter on Democracy, Elections and Governance (hereinafter referred to as “ACDEG”) and Article 3 of the ECOWAS Protocol on Democracy and Good Governance (hereinafter referred to as “ECOWAS Protocol on Democracy”);
 - iii. The obligation to compile electoral lists in a transparent and reliable manner, with the participation of political parties and voters, guaranteed by Article 5 of the ECOWAS Protocol on Democracy;
 - iv. The obligation to establish and strengthen national mechanisms that redress election related disputes in a timely manner, as guaranteed by Article 17(2) of the ACDEG and Article 7 of the ECOWAS Protocol on Democracy;

III. Summary of the Procedure before the Court

6. The Application was received at the Registry on 17 November 2018. It was served on the Respondent State on 28 November 2018, with a request to file its Response within sixty (60) days, from the date of receipt.
7. On 22 January 2019, the Respondent State filed its response which was transmitted to the Applicant on the same date.
8. The parties filed their other pleadings within the time stipulated by the Court. Pleadings were closed on 15 September 2021 and the Parties were duly notified.

IV. Prayers of the Parties

9. The Applicant prays the Court to find and order that the Respondent State has violated:
 - i. his right to an effective remedy and his right to be tried by an impartial court, by virtue of Judgment No 2018-03/CC-EP issued on 8 August 2018 by the Constitutional Court of the Respondent State on the declaration of the final results of the first round (hereinafter referred to as “Constitutional Court judgment”);
 - ii. his right to be judged within a reasonable time, by virtue of the lack of judgment on jurisdiction rendered on 9 August 2018 by the Supreme Court of the Respondent State (hereinafter referred to as “Supreme Court judgment”);
 - iii. the obligation to establish independent and impartial electoral bodies, by virtue of Law 2016-048 of 17 October 2016 amended

by Law 2018-014 of 23 April 2018 on the Electoral Law (hereinafter referred to as “Electoral Law”);

- iv. the obligation to establish and strengthen national mechanisms to settle election related disputes in a timely manner, by virtue of Article 92 of the Constitution, the Organic Law on the Constitutional Court, its composition and the procedure followed before it¹ (hereinafter referred to as the “Organic Law on the Constitutional Court”), the Rules of Procedure of 28 August 2012 of the said Court and the Electoral Law.
- 10.** The Applicant also prays the Court to order the Respondent State to:
- i. Amend the Organic Law on the Constitutional Court to provide a legal framework for the recusal of its members ruling on electoral disputes;
 - ii. Amend Article 91 of the Constitution, the Organic Law on the Constitutional Court, and the Rules of Procedure of the said Court to bring them in line with Article 3 of the Charter, Article 17(2) of the ACDEG and Article 7 of the ECOWAS Protocol on Democracy;
 - iii. Amend the Electoral Law to bring it in compliance with Articles 17(1) and 3 of the ECOWAS Protocol;
 - iv. Order the Respondent State to refund the sum of twenty-five million (25,000,000) CFA francs paid as a deposit for the 29 July 2018 presidential election;
 - v. Order the Respondent State to pay him the sum of one hundred million (100,000,000) CFA francs as damages for the harm suffered;
 - vi. Take all other appropriate measures for the purpose of reparation.
- 11.** For its part, the Respondent State prays the Court to:
- i. Rule on admissibility;
 - ii. Dismiss the Application as unfounded.

V. Jurisdiction

- 12.** The Court notes that Article 3 of the Protocol reads as follows:
1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the [...] Protocol and any other relevant human rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

¹ Law 097-010 of 11 February 1997 pertaining to the organic law on the organization and functioning of the Constitutional Court as well as the procedure followed before it, amended by Law 02-011 of 5 March 2002.

13. According to Rule 49(1) of the Rules of Court,² “The Court shall conduct a preliminary examination of its jurisdiction [...] in accordance with the Charter, the Protocol and these [...] Rules”.
14. Based on the above provisions, the Court must, in each application, make a preliminary examination of its jurisdiction and rule on objections to its jurisdiction, if any.
15. The Court notes that the Respondent State has not raised any objections to its jurisdiction.
16. Having found that there is nothing in the record that shows it lacks jurisdiction, the Court concludes that it has:
 - i. Material jurisdiction, insofar as the Applicant alleges the violation of human rights protected by the Charter, the ICCPR, the ACDEG³ and the ECOWAS Protocol on Democracy,⁴ instruments⁵ ratified by the Respondent State;
 - ii. Personal jurisdiction, insofar as the Respondent State is a party to the Charter, the Protocol and has deposited the Declaration which allows individuals and non-governmental organisations to bring cases directly to the Court.
 - iii. Temporal jurisdiction, insofar as the alleged violations were committed after the Respondent State became a party to the Charter and the Protocol.
 - iv. Territorial jurisdiction, insofar as the facts of the case and the alleged violations took place in the territory of the Respondent State.
17. Consequently, the Court finds that it has jurisdiction to hear the instant Application.

VI. Admissibility

18. Article 6(2) of the Protocol provides that:
The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter.

2 Rule 39(1) of the Rules of 2 June 2010.

3 The Respondent State Became a party to the ICCPR on 23 March 1976, to the African Charter on Democracy, Elections and Governance on 2 September 2013, and to the ECOWAS Protocol on Democracy on 21 December 2001.

4 In the Judgment, *Action pour la protection des droits de l'homme v Côte d'Ivoire*, Judgment (merits) of 18 November 2016, 1 AfCLR 668, § 55-57, the Court recognized that the ACDEG and ECOWAS Protocol on Democracy are human rights instruments.

5 In the case of Application No 001/2014, the Court held that “the African Charter on Democracy and the ECOWAS Protocol on Democracy and Governance are human rights instruments within the meaning of Article 3 of the Protocol, and therefore that it has jurisdiction to interpret and apply the same”. (1 AfCLR 668, § 65)

19. Pursuant to Rule 50(1) of the Rules of Court:⁶

The Court shall ascertain the admissibility (...) in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules.

20. Rule 50(2), which restates in substance Article 56 of the Charter, reads as follows:

Applications filed before the Court shall comply with all of the following conditions:

- a. Indicate their authors even if the latter request anonymity;
- b. Are compatible with the Constitutive Act of the African Union and with the Charter;
- c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
- d. Are not based exclusively on news disseminated through the mass media;
- e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
- f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter; and
- g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the Charter.

21. The Court notes that the Respondent State has not raised any objection to admissibility. Nevertheless, the Court shall examine whether the requirements of the above-mentioned provision are met.

22. As regards the requirement specified under Rule 50(2)(a), the Court notes that the Applicant has clearly stated his identity.

23. The Application is also not in any way inconsistent with the Constitutive Act of the African Union and the Charter and thus, complies with Rule 50(2)(b), given that one of the objectives of the Constitutive Act of the African Union, as stated in its Article 3(h), is the promotion and protection of human and peoples' rights.

24. Furthermore, the Application does not contain any language that is disparaging or insulting to the Respondent State, its institutions or the African Union, as required under Rule 50(2)(c).

6 Rule 39 of the Rules of 2 June 2010.

25. The Application is also not based exclusively on news disseminated through the mass media, and thus, complies with the requirement under Rule 50(2)(d).
26. Regarding exhaustion of local remedies, the Applicant contends that he has complied with this requirement by filing his case before the highest Court, the Constitutional Court, of the Respondent State.
27. The Court notes from the available records that the Applicant indeed filed an appeal with the Constitutional Court by application dated 4 August 2018, for the purpose of “annulling the presidential election of 4 July 2018 and challenging the composition” of the said Court. This remedy, which is the only one available in relation to presidential elections,⁷ resulted in Judgment No 2018-03/CC-EP of 8 August 2018 on the declaration of the final results of the first round of the presidential election of 29 July 2018.
28. It follows from Article 94 of the Constitution of the Respondent State that the decisions of the Constitutional Court are not subject to appeal. Accordingly, the Court finds that the Applicant exhausted local remedies.
29. With regard to the requirement of filing an Application within a reasonable time as required under Rule 50(2)(f), the Court starts reckoning time from 8 August 2018, which is the date when the Constitutional Court’s rendered its decision. Between this date and the date the instant Application was filed with the Court, that is, 17 November 2018, three (3) months and nine (9) days elapsed. The Court considers that this period is reasonable and finds that, the Application has complied with this requirement.
30. Finally, the Court notes that in accordance with Rule 50(2)(g), there is no indication that the instant Application concerns a matter already settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union or the Charter.
31. In view of the foregoing, the Court declares the Application admissible.

7 Article 87 of the Constitution of Mali provides: ‘The Constitutional Court is seized, in the event of a dispute over the validity of an election, by any candidate, any political party or the government delegate, under the conditions provided for by an organic law’; Article 31 paragraph 1 of organic law 097-10 of 11 February 1997 determining the rules of organisation and operation of the Constitutional Court as well as the procedure followed before it provides: ‘All disputes relating to the election of the President of the Republic.

VII. Merits

- 32.** The Applicant alleges that the Respondent State violated his right to have his cause heard (A), his rights to equality before the law and to equal protection of the law (B). He also alleges that the Respondent State violated the obligation to establish an independent and impartial electoral body (C), the obligation to establish electoral lists in a transparent and reliable manner (D), and the obligation to establish and strengthen domestic mechanisms to settle electoral disputes (E). Furthermore, the Applicant alleges the violation of his right to be elected in periodic, and transparent elections by universal and equal suffrage (F).

A. Alleged violation of the right to have one's cause heard

- 33.** The Applicant alleges a violation of the right to have his cause heard, in particular, the right to be tried within a reasonable time, (i) the right to respect for the adversarial principle, (ii) the right to an effective remedy, (iii) the right to be tried by an impartial court, and the violation of the obligation to guarantee the independence of courts (iv).

i. Alleged violation of the right to be tried within a reasonable time

- 34.** The Applicant contends that on 25 July 2018, he filed an application for provisional measures with the Supreme Court of the Respondent State for the purpose of obtaining payment of his arrears of parliamentary allowances and funding from the African Solidarity for Democracy and Independence (SADI) party, of which he was the flagbearer in the presidential election of 29 July 2018. He alleges that the said Court only ruled on his application on 9 August 2018, that is, beyond the time limit of seventy-two (72) hours set under Article 241⁸ of Organic Law 2016-16 of 23 September 2016 on the organization, operating rules of the Supreme Court and the procedure followed before it (hereinafter

8 This Article provides: "In all cases of urgency and unless the public interest prevents it, the president of the administrative division or the magistrate he delegates may, upon simple request, even in the absence of a prior administrative decision (...) order all measures necessary to safeguard a fundamental freedom which has been gravely and manifestly illegally infringed upon by a legal person governed by public law or by a private body entrusted with the management of a public service, in the exercise of one of its powers, the Division shall render its decision within seventy-two (72) hours from the registration of the application at the Court Registry, the defendant being summoned".

- referred to as the “Organic Law on the Supreme Court”).
35. He explains that the said law establishes the right to be heard and judged, compatible with the urgency underlining summary proceedings. According to the Applicant, when the judge does not respect this time limit, even if it expires on a Saturday or holiday, he must indicate the reasons for this in the list of grounds for his ruling. However, the Supreme Court’s judgment is silent on this point.
 36. In its response, the Respondent State submits that the Seventy-two (72) hour time limit expired on Saturday, 28 July 2018, which was a holiday, since the presidential election was to take place the following day. Thus, it argues that the Supreme Court cannot be faulted for having rendered its judgment beyond the time limit specified by the law.
 37. The Respondent State further submits that the Supreme Court could not hear the Applicant’s application because the dispute concerning the 29 July 2018 presidential election falls within the jurisdiction of the Constitutional Court.

38. According to Article 7(1)(d) of the Charter, “ Every individual shall have the right to have his cause heard. This comprises (...) the right to be tried within a reasonable time by an impartial court or tribunal”.
39. The Court emphasises that the reasonableness of this time limit is, in principle, assessed taking into account the complexity of the case, the conduct of the Applicant and that of the domestic judicial authorities.⁹
40. The Court further points out that when the time limit within which the judicial decision must be taken is set by law, a violation is presumed in the event of non-compliance with that time limit. However, this presumption is rebuttable provided that there are reasonable grounds for the delay specified in the impugned decision.

9 *Wilfred Onyango Nganyi and Others v United Republic of Tanzania*, Judgment (merits) (18 March 2016), 1 AfCLR 507, § 136; *Alex Thomas v United Republic of Tanzania*, Judgment (merits) (20 November 2015) 1 AfCLR 465, § 104; *Norbert Zongo v Burkina Faso*, Judgment (merits) (5 December 2014), 1 AfCLR 219, § 92 to 97.

41. In the instant case, the Court notes that with regard to the time limit set under Article 241 of the organic law on the Supreme Court, the *dies a quo* corresponds to the day following the registration of the Application at the Registry of the Supreme Court, that is, 26 July 2018, while the *dies ad quem* is 29 July 2018.
42. However, the Supreme Court rendered its judgment on 9 August 2018, that is, fourteen (14) days after the matter was brought before it. The judgment does not contain any justification for the noncompliance with the seventy-two (72) hour timeline prescribed by the law.
43. In any case, by its nature, the summary procedure before the Supreme Court that the Applicant refers to entails the requirements of rapidity and urgency, and cannot be affected by public holidays.¹⁰
44. In view of the foregoing, the Court considers that the Respondent State has violated the Applicant's right to be tried within a reasonable time contrary to Article 7(1)(d) of the Charter.

ii. Alleged violation of the principle of adversarial proceedings

45. The Applicant contends that in the proceedings that gave rise to Judgment No 2018-03/CC-EP of 8 August 2018 on the proclamation of the results of the first round of the 29 July 2018 election of the President of the Republic (hereinafter referred to as the "Constitutional Court Judgment"), he filed a motion seeking the recusal of one of the members of the Respondent State's Constitutional Court. He states that one of the parties to these proceedings filed a motion praying the court to declare the request inadmissible. According to the Applicant, this counter motion was not served on him.
46. The Applicant further contends that the judge must not only respect, and cause to be respected the principle of adversarial proceedings, but also, in rendering his decision, may rely on the motions, explanations and documents produced by the parties only if the parties have examined them.
47. The Respondent State submits that the Constitutional Court rendered its decision in strict compliance with domestic and international standards. In this regard, the Respondent State avers

10 Article 492 of the Malian Code of Civil Procedure provides: "If, however, the case requires celerity, the judge of provisional measures may allow the summons to be issued at the time indicated, even on public holidays or non-working days, either at the hearing or at the defendant's home, with the doors open."

that the decision was rendered in an adversarial manner, on the basis of the pleadings submitted by the Applicant's Counsel and electoral documents, in compliance with the applicable norms.

48. The Court notes that Article 7(1) of the Charter provides that "Every individual shall have the right to have his cause heard".
49. The Court also notes that Article 14 of the ICCPR provides: "[...] Everyone shall be entitled to a fair hearing...".
50. The Court observes that these texts enshrine the right to a fair trial, one of the components of which is the adversarial principle, closely linked to that of equality of arms.
51. The Court emphasises that the adversarial principle requires that parties to a case have the right to be cognizant of any document or observation presented to the judge with a view to influencing his decision¹¹ This principle, applicable to all stages of the proceedings and before all courts, is so fundamental that it cannot be sacrificed even for economy and speed of proceedings.¹²
52. The Court notes from the judgment of the Respondent State's Constitutional Court's that in its Response,¹³ another party in the proceedings had objected to the Applicant's motion for the disqualification of certain members of the said Court. However, there is no mention in the judgment that the pleadings of the said party were served on the Applicant.
53. The Court considers that there is no provision in the laws governing the Respondent State's Constitutional Court that regulates service of documents and written submissions of the parties to a trial. In principle, this should be done either directly between the parties or through the intermediary of the Registry of the Court. In any event, the Respondent State, does not specifically dispute the Applicant's allegation that he was not served with all the pleadings filed before the same Court. In view of this, and in circumstances where the Applicant did not have the

11 ECHR, *Kress v France* (Application No 39594/98), Judgment of 7 June 2001, § 74.

12 ECHR, *Niderost-Hubert v Switzerland* (Application No 18990/91), Judgment of 18 February 1997, § 30.

13 Judgment n°2018-03/CC-EP of 8 August 2018 on the declaration of the final results of the first round of the presidential election (Poll of 29 July 2018), p. 27.

chance to examine pleadings concerning his case, the principle of adversarial proceedings cannot be said to have been respected.

54. The Court therefore concludes that the Respondent State has violated the right to be heard guaranteed under Article 7(1) of the Charter and Article 14(1) of the ICCPR by failing to respect the adversarial principle.

iii. Alleged violation of the right to an effective remedy

55. The Applicant contends that his petition to the Respondent State's Constitutional Court to annul the 29 July 2018 presidential election contained a motion for disqualification of certain members of that Court. According to him, this motion was declared inadmissible on the ground that the reasons for disqualification only apply to a case in which a member of the said Court is examining a dispute relating to a law in the drafting of which he actively participated, which is not the case in the instant Application.
56. He further submits that the decision was made in violation of Article 7 of the Charter, and Article 116 of the Malian Constitution,¹⁴ the Respondent State's Constitutional Court is obligated to grant the motion for recusal.
57. On its part, the Respondent State submits that the case be dismissed, pointing out that all the arguments raised by the Applicant, including the one relating to the recusal of members of the Constitutional Court, have been examined by the Constitutional Court in accordance with the Preamble and Article 93 of the Constitution, Article 7 of the Charter, as well as Articles 3,¹⁵ 8¹⁶ and 10¹⁷ of the Organic Law on the Constitutional Court.

14 This article states: "Treaties or agreements duly ratified or approved have, upon their publication, an authority equal to that of laws, subject to the application of each treaty or agreement by the other party.

15 This article states: "The functions of the Constitutional Court are incompatible with any public or administrative functions or any private or professional activities.

16 This article states: "The members of the Constitutional Court have the general obligation to refrain from anything that could compromise the independence and dignity of their functions. In particular, during their term of office, they are obliged not to hold any position of responsibility or leadership in political parties, even on an honorary basis, to keep the deliberations and votes secret, not to take any public position on matters that have been or may be decided by the Court, and not to give any consultation on matters falling within the competence of the Constitutional Court".

17 This article stipulates: "The Constitutional Court shall note, if necessary, the compulsory resignation of any of its members who have exercised an activity, a function or an elective mandate incompatible with their status as members of the Court, who no longer enjoy their civil and political rights or who have disregarded the general and particular obligations referred to in articles 3 and 8 above.

58. The Court notes that Article 7(1)(a) of the Charter provides:
Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.
59. The Court notes that this provision enshrines the right to an effective remedy, which guarantees everyone the right to bring before domestic courts an arguable complaint, that is, any alleged violation of an internationally protected right,¹⁸ whether substantive or procedural.¹⁹
60. The Court notes that the finding of a violation of the right to effective remedy has no bearing on the violation of an arguable right or claim in support of the said remedy. The Court notes that the fact that a violation of the right to an effective remedy has been established has no bearing on the violation of an arguable right or claim invoked in support of the said remedy.
61. The Court further emphasises that recusal is “the possibility by which a litigant request that a judge, arbitrator or expert refrain from sitting because he has reasons to suspect that he is biased against him for reasons determined by law, such as kinship or alliance, subordination, friendship or notorious enmity, conflict of interest...”²⁰
62. The Court notes that regulating the recusal procedure of courts is essential to the fairness of any trial, since it is consubstantial with the right to be tried by an impartial tribunal, a right protected by Article 7(1)(d) of the Charter.
63. In the instant case, the Court points out that the Constitutional Court of the Respondent State declared inadmissible the motion to disqualify some of its members on two grounds, on the one hand, because of the “absence of provisions (...) for a procedure

18 See in this sense, ECHR, *Kudla v Poland*, Judgment of 26 October 2000, §§ 151-156.

19 See in this sense, ECHR, *Powell and Rayner v United Kingdom*, Judgment of 21 February 1990, §§ 31-33; HRC, *Kazantzis v Cyprus*, inadmissibility decision of 7 August 2003, Communication n°972/2001, § 6.6 HRC, *Faure v Australia*, Views of 31 October 2005, Communication n°1036/2001.

20 Lexique des termes juridiques 2017-2018, Serge Guinchard et Thierry Debard, Dalloz, p. 1568.

for the recusal of a member of the Court”²¹ and on the other hand, because of the fact that “it is generally accepted that the right of an applicant to request the recusal of a member of a constitutional court applies, in particular, in a case where the member of the said court finds himself or herself examining a dispute relating to a law which he or she actively participated in drafting prior to his or her accession to the said court, in States where the review of the constitutional court is possible a posteriori, which is not the case in the Republic of Mali”.²²

64. It follows that the legislation governing the Constitutional Court of the Respondent State contain no specific provision on the recusal procedure.
65. The Court considers that the lack of a provision regulating the procedure for recusing the members of the Constitutional Court is an impediment to the effective exercise of the Applicant's individual right of a remedy, insofar as it has prevented the said Court from examining his complaint.
66. The Court concludes that the Respondent State has violated the Applicant's right to an effective remedy protected under Article 7(1)(a) of the Charter.

iv. Alleged violation of the obligation to guarantee the independence and impartiality of the Constitutional Court

67. The Applicant alleges a violation of the right to be tried by an impartial court, which, in his view, is the logical consequence of the violation of the right to an effective remedy. In his view, the fact that the challenge of unconstitutionality? was ruled inadmissible meant that the objective partiality of the members of the Constitutional Court could not be established.
68. He further contends that of the nine (9) judges of the Respondent State's Constitutional Court, the President of the Republic and the President of the National Assembly, each appoints three (3). He avers that this situation is an attack on the independence of the said Court and accounts for the automatic dismissal of petitions to annul the 29 July 2018 presidential election.
69. In response, the Respondent State submits that the case should be dismissed on the ground that the Applicant does not provide any

21 Ruling of the Constitutional Court of Mali of 8 August 2018 proclaiming the final results of the first round of the presidential election of 29 July 2018, pp 29 and 30.

22 *Ibidem*.

evidence to support his allegations. According to the Respondent State, the judgment of the Respondent State's Constitutional Court was rendered in accordance with the applicable standards and demonstrates the independence and impartiality of the said Court.

70. The Court notes that according to Article 7(1)(d) of the Charter the right to have one's cause heard includes the right to be tried by an impartial tribunal.
71. Furthermore, Article 26 of the Charter provides:

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the (...) Charter
72. The Court emphasises that although the Applicant has separately alleged the violation of the right to be tried by an impartial court, and the violation of the obligation to guarantee the independence of the courts, the Court will consider the said allegations in the same section not only because they relate to same Constitutional Court but also because there is a close link between the notions of independence and impartiality of the judiciary.²³

a. Independence of the Constitutional Court

73. The Court notes, in accordance with its jurisprudence, that:

The independence of the judiciary is one of the fundamental pillars of a democratic society. The notion of judicial independence essentially implies the ability of courts to discharge their functions free from external interference and without depending on any other authority.²⁴ Judicial independence has two main aspects: institutional and individual. Whereas institutional independence connotes the status and relationship of the judiciary with the executive and legislative branches of government, individual independence pertains to the

23 *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*, ACtHPR, Application No 062/2019, Judgment of 4 December 2019 (merits), § 176.

24 *Ibid*, note 22 § 277.

personal independence of judges and their ability to perform their functions without fear of reprisal.²⁵

74. In this respect, the Court will examine whether the independence of the Respondent State's Constitutional Court, both from an institutional and individual point of view, is guaranteed. This examination will be carried out both in the light of the texts governing it and in the light of the evidence produced by the Applicant in support of his allegations.
75. Regarding the institutional independence of the Respondent State's Constitutional Court, the Court notes that it is determined by factors such as its establishment as a body separate from the executive and legislative branches, its administrative independence in day-to-day management, its ability to function without inappropriate and unwarranted interference, and the availability of sufficient resources to enable it to perform its functions properly.²⁶
76. In the instant case, the Court notes that the Respondent State's Constitutional Court is established by the Constitution of the Respondent State. In Chapter IX, dealing with "The Constitutional Court", Article 85 of the Constitution provides that:
The Constitutional Court determines the constitutionality of laws and guarantees the fundamental rights of the human person and public freedoms. It is the body that regulates the functioning of institutions and the activity of public authorities.
77. Moreover, according to Article 15 of the Organic Law on the Constitutional Court,²⁷ the said court "enjoys autonomy of management. The President of the Court is the spending officer of its budget (...)". This Organic Law also contains provisions that guarantee its administrative autonomy.²⁸
78. In the light of these provisions, the Court notes that the Constitutional Court is a body separate from the executive and legislative powers. Moreover, it enjoys administrative and financial autonomy. More importantly, the Applicant has not provided evidence that, from an institutional point of view, the Constitutional Court has been subject to inappropriate or undue interference, directly or indirectly.

25 *Ibid*, note 22 § 278.

26 *Ibid*, note 22 § 278.

27 Organic law No 097-010 of 11 February 1997 setting the rules of organisation and functioning of the Constitutional Court as well as the procedure followed before it, amended by organic law 02-011 of 5 March 2002.

28 Article 20 states: "The Constitutional Court is headed by a President elected by his peers by secret ballot", Article 23 states: "The President of the Constitutional Court is responsible for the administration and discipline of the Court".

79. It follows that the institutional independence of the Respondent State's Constitutional Court is guaranteed.
80. As for the personal independence of an individual judge, it is determined by the mode of appointment and security of tenure, in particular, the existence of clear criteria for selection, appointment, duration of tenure as well as adequate guarantees against external pressure.²⁹
81. The Court notes that Article 91 of the Constitution, the Constitutional Court is composed of nine (9) members each appointed for a term of seven (7) years. Three (3) members are appointed by the President of the Republic, three (3) by the President of the National Assembly and three (3) by the Superior Council of the Judiciary (hereinafter referred to as "CSM"). They are selected from among law professors, lawyers and magistrates with at least fifteen (15) years' experience, as well as personalities who have rendered service to the State.
82. The Court emphasises that this text is complemented by Article 1(2) of the organic law relating to the Constitutional Court, which provides: "In addition to the criteria of experience and competence, the choice of members of the Constitutional Court also takes into account the moral and professional integrity of the persons concerned".
83. In any case, the Court notes that the term of office of the members of the Respondent State's Constitutional Court is renewable once, without any further specification. In other words, renewal remains within the discretion of the President of the Republic, the President of the National Assembly and the Superior Council of the Judiciary, presided over by the Head of State.
84. In this regard, the Court has consistently held that:

For judges who are appointed, the renewal of the term of office, which depends on the discretion of the President of the Republic and the Bureau of the National Assembly, does not guarantee their independence, especially as the authorities, namely, the President of the Republic and the President of the National Assembly, are empowered³⁰ by law to seize the Constitutional Court.³¹

29 *Ibid*, note 22 § 279.

30 Article 90 of the Constitution states: "The international commitments provided for in Articles 114 to 116 must be referred to the Constitutional Court either by the President of the Republic (...) or by the President of the National Assembly (...) before their ratification.

31 *XYZ v Republic of Benin*, ACTHPR, Application No. 010/2020 Judgment of 27 November 2020 (merits and reparations), § 70; *Sébastien Marie Aïkoulé Ajavon*

85. The Court considers that the absence of criteria for renewing the term of office of the members of the Constitutional Court is of a kind that undermines their independence, especially those members who wish to be reappointed.³² This is because the discretionary power of the appointing authority can lead to both wrongful non-renewal, and indulgent renewal of the said term.
86. In view of the foregoing, the Court considers that the absence of criteria for renewal of the mandate of the members of the Respondent State's Constitutional Court does not guarantee their independence.
87. The Court thus concludes that the Respondent State has violated Article 26 of the Charter.

b. Impartiality of the Constitutional Court

88. The dictionary of international public law defines impartiality as the "absence of bias, prejudice and conflict of interest in a judge (...) in relation to the parties appearing before him".³³
89. The Court states that in line with its jurisprudence, the impartiality of a judge is presumed and that incontrovertible evidence is required to rebut this presumption.³⁴
90. The Court points out that in the instant case, the Applicant alleges a violation of the right to be tried by an impartial court, as a consequence of the violation of the right to an effective remedy.
91. The Court emphasises that it has held³⁵ in paragraph 60 of this judgment that the violation of the Applicant's right to an effective remedy has no bearing on the violation of an arguable right or claim in support of the said remedy.
92. The Court notes that the allegation of violation of the right to be tried by an impartial court is therefore autonomous. In this respect, it is up to the Applicant to provide the necessary arguments and evidence in support of his allegation that the Constitutional Court

v Republic of Benin, ACtHPR, Application No 062/2019, Judgment 4 December 2020 (merits and reparations) § 287.

32 *Ibid.*

33 Dictionnaire de droit international public, sous la direction de Jean Salmon, Bruylant, Bruxelles, 2001, p. 562.

34 *Alfred Agbesi Woyome v Republic of Ghana*, ACtHPR, Application No 001/2017, Judgment of 28 June 2019 (merits and reparations), § 128; *XYZ v Republic of Benin*, ACtHPR, Application 010/2020, Judgment of 27 November 2020 (merits and reparations); § 82; *Sébastien Marie Aïkoué Ajavon v Republic of Benin*, ACtHPR, Application No 062/2019, Judgment of 4 December 2020 (merits and reparations), § 293.

35 Paragraph 60 of this judgment.

of the Respondent State is not impartial, which, in the instant case, has not been done.

93. The Court therefore considers that Respondent State has not violated Article 7(1)(d) of the Charter.

B. Alleged violation of the rights to equality before the law and to equal protection of the law

94. The Applicant alleges a violation of the right to equality before the law and to equal protection of the law. In support of this, he argues, on the one hand, that the President of the Republic, who was a candidate for his own succession, and the President of the National Assembly appoint six (6) of the nine (9) members of the Constitutional Court.
95. On the other hand, he further argues that the payment of the parliamentary allowances of opposition parliamentarians and the annual subsidy of his party, due under Articles 29, 32 and following of Law 05-047 of 18 August 2005 on the charter of political parties, was made late.
96. The Respondent State submits that that the Malian laws are the same for everyone and that there is no inequality before the law, as is shown by the participation of independent candidates in elections.
97. The Respondent State further points out that the appointment of some members of the Constitutional Court by the President of the Republic and the President of the National Assembly is provided for in Article 91 of the Constitution. The Respondent State further contends that such as appointment does not in any way undermine equality before the law and equal protection of the law. According to the Respondent State, this provision was not made for the benefit of a particular President of the Republic but was drawn up by the National Conference in 1991.
98. The Respondent State further contends that the annual subsidy to political parties is not intended to finance the electoral campaign, since candidates contest elections in their personal capacity.

99. The Court notes that Article 3 of the Charter provides:
Every individual shall be equal before the law.
Every individual shall be entitled to equal protection of the law.
100. This provision enshrines the rights to equality before the law and to equal protection of the law, which are inseparable from the right to non-discrimination.
101. The Court emphasises that the right to full equality before the law means that “all persons shall be equal before the courts and tribunals”,³⁶ that is, the authorities responsible for enforcing or applying the law must do so without discrimination in the situations in question.
102. As for the right to equal protection of the law, it means that
All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³⁷
103. The Court notes that the Applicant bases the allegations of violations of these rights on three facts; first, the power to appoint three (3) of the nine judges of the Constitutional Court is conferred on the President of the Republic, second, the late payment of the Applicant’s parliamentary allowances, and third, the late payment of the subsidy to the SADI party, for which the Applicant was the flagbearer in the 29 July 2018 presidential election.
104. With regard to the appointment of members of the Constitutional Court by the President of the Republic, the Court notes that this is a matter relating to the functioning of the Respondent State’s institutions. The Applicant has not demonstrated that how conferring this power on the Head of State³⁸ constitutes inequality before the law.
105. With regard to the late payment of parliamentary allowances, the Applicant has not produced any evidence.
106. The Court notes that the same applies to the late payment of the subsidy due the SADI party. The Court observes that, except producing as exhibit statement of account of the said party with a credit balance of an amount of seventy-one million eight hundred

36 *Kijiji Isiaga v Republic of Tanzania* (merits) (Judgment of 21 March 2018), § 85.

37 *Ibid.* § 84 quoting Article 26 of ICCPR.

38 Article 91 paragraph 2 of the Constitution: “The nine (9) members of the Constitutional Court are designated as follows: three (3) appointed by the President of the Republic (...).”

and sixty-six thousand five hundred and seventeen (71,866,517) francs, the origin of which was not stated, the Applicant has not adduced any other evidence to demonstrate the late payment or the source of the said amount.

107. In any case, the Applicant cannot invoke this claim without having demonstrated that SADI party had met all requirements for receiving the said subsidy, pursuant to Article 30 of the Respondent State's Political Parties Charter.³⁹
108. In this case, the Court holds that the Applicant's allegation is unfounded. Accordingly, the Court finds that the Respondent State has not violated the Applicant's rights to equality before the law and to equal protection of the law.

C. Alleged violation of the obligation to establish an independent and impartial electoral body

109. The Applicant argues that the Respondent State has violated its obligation to establish an independent and impartial electoral body on the grounds that the powers of the Independent National Electoral Commission (INEC), which is in charge of electoral operations, have been rendered meaningless by the dominant role of the General Delegation for Elections (DGE) and the Ministry of Territorial Administration (MAT).
110. He maintains that DGE is under the authority of MAT and is responsible for the actual management of the electoral roll, which it compiles and revises.
111. The Applicant further contends that MAT is involved in essential electoral tasks and that its substantial powers compromise the transparency of elections, given that the Minister is a member of the executive branch whose hierarchical head is the President of the Republic, who was running for a second term.
112. On its part, the Respondent State points out that the Electoral Law was the result of political dialogue between the Government

39 Article 29 of Law 05-047 18 August 2005, on the political parties' charter, states: "Political parties receive financial assistance from the State, which is included in the State budget (...): to justify the regular holding of the party's statutory bodies; to have a national headquarters exclusively intended for the party's activities, distinct from a private residence or office; to keep an annual inventory of movable and immovable property and to submit the annual accounts to the accounts section of the Supreme Court no later than 31 March of each year; to justify, under the conditions provided for in Article 27, an account whose veracity is established by the audit report of the Accounts Section of the Supreme Court; to justify the origin of its financial resources and their use; to have participated in the last legislative or municipal elections. Producing a false balance sheet by any political party entails the loss of the right to public financing for the following year, without prejudice to legal proceedings.

and the political class in 1997. It points out that it was within the framework of this political dialogue that INEC was established by Law 97-008 of 14 January 1997. It further contends that the responsibility for organizing elections was subsequently decoupled.

- 113.** The Court notes that Article 17(1) of the ACDEG provides:
 State Parties re-affirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union's Declaration on the Principles Governing Democratic Elections in Africa.
 To this end, State Parties shall: establish and strengthen independent and impartial national electoral bodies responsible for the management of elections.
- 114.** The Court further notes that according to Article 3 of the ECOWAS Protocol on Democracy:
 The bodies responsible for organizing the elections shall be independent or neutral and shall have the confidence of all the political actors. Where necessary, appropriate national consultations shall be organized to determine the nature and the structure of the bodies
- 115.** The Court emphasises that independence is the fact that a person or entity is not dependent on any authority other than its own or, at the very least, is not dependent on the State in whose territory it exercises its functions. Impartiality, on the other hand, is the absence of bias, prejudice and conflict of interest.⁴⁰
- 116.** The Court observes that the question it is called upon to decide is not whether INEC is intrinsically independent and impartial. Rather, it is to examine whether adding DGE⁴¹ and MAT⁴² to INEC invalidates the latter's jurisdiction and, therefore, constitutes a violation of Article 17(1) of ACDEG and Article 3 of the ECOWAS Protocol on Democracy.
- 117.** The Court considers that such an examination must be based on an analysis of the jurisdictions of the various bodies and the relations between them.

40 *Dictionnaire de Droit International Public, sous la direction de Jean Salmon, Bruylant, Bruxelles*, 2001, pp570 and 562.

41 Article 27 of the Elections Law.

42 Article 28 of the Elections Law.

118. The Court notes that in relation to the powers of the various organs, INEC⁴³ is “responsible for the supervision and monitoring of referendum operations, the election of the president of the Republic, parliamentarians and councillors of the territorial communities.”⁴⁴
119. As for DGE, its mission is “to compile the electoral list and to manage the public financing of political parties (...) It assists INEC at the latter’s request”.⁴⁵
120. As for MAT, it is responsible for “the technical and material preparation of all referenda and electoral operations, the material organization of all referenda and elections, the elaboration of procedures and acts relating to referendum electoral operations, the collation and declaration of provisional results of referenda and presidential and legislative elections, forwarding of the minutes of referendum, presidential and legislative polls, accompanied by the documents that must be annexed to them, to the Constitutional Court [...]”.⁴⁶
121. The Court notes that the jurisdictions of these bodies overlap. On the one hand, with regard to the electoral list, which is common to all elections,⁴⁷ it is “compiled and managed” by INEC.⁴⁸ These overlaps with the mission “to compile and manage the electoral list, which overlaps with the mission of “compiling and managing the electoral roll”⁴⁹ entrusted to DGE. On the other hand, INEC’s mission of “counting of ballots, enumeration of votes, transmission of reports, collation and declaration of results”⁵⁰ is almost similar to that of “collation and declaration of provisional results [...] of presidential elections, [...] and of the transmission of the minutes of presidential [...] polls [...] accompanied by the documents that must be attached to them to the Constitutional Court”⁵¹ devolved to the MAT.

43 Article 3 to 26 of the Elections Law.

44 Article 3 of the Elections Law.

45 Article 27 of the Elections Law.

46 Article 28 of the Elections Law.

47 Article 40 of the Electoral Law states: “The electoral lists are permanent, and are compiled from the biometric database of civil status, which includes both photos and fingerprints. The National Identification Number (NINA) is the unique identification number assigned to each voter.

48 Article 14 of the Elections Law.

49 Article 27 of the Elections Law.

50 Article 27 of the Elections Law.

51 Article 28 of the Elections Law.

122. Regarding the relations between the three (3) bodies, the Court emphasises that, according to the Electoral Law, the DGE “shall assist the INEC at its request.”⁵² However, the Electoral Law does not determine the scope and conditions of such assistance.
123. On the other hand, the Electoral Law is silent on the relationship between INEC and MAT. The Court further notes that MAT is part of the executive branch of the Respondent State and as such, cannot provide the guarantees of independence expected of an electoral body.
124. In conclusion, the Court considers that the overlapping jurisdictions of the various bodies provided for in the Electoral Law, and the lack of transparency in their relations, have a negative impact on the independence and impartiality of the INEC, which, as an electoral body, already has sufficiently clear attributions.
125. The Court holds that the devolution of powers to DGE and MAT, as analysed in the preceding paragraphs, does not contribute to the proper performance by the Respondent State of its obligation to establish and strengthen CENI as an electoral body.
126. Consequently, the Court finds that the Respondent State has violated its obligation to establish and strengthen electoral bodies, as provided for in Article 17(1) of ACDEG and Article 3 of the ECOWAS Protocol on Democracy.

D. Alleged violation of the obligation to establish mechanisms to settle electoral disputes

127. The Applicant asserts that the Respondent State has not established a mechanism for settling electoral disputes. He contends that the legal framework is at variance with the composition and functioning of the bodies responsible for settling disputes. According to him, the President of the Republic and the President of the National Assembly, who are of the same political party, each appoints three (3) members out of the nine (9) members of the Constitutional Court, and this does not guarantee any credibility in the management of electoral disputes.
128. He contends that the President of the Constitutional Court showed a lack of neutrality in the electoral process by publicly giving a personal opinion on the preparatory acts for the electoral operations and by sending emissaries to supervise voting operations.

52 Article 27 paragraph 2 of the Elections Law.

- 129.** In response, the Respondent State argues that electoral disputes are governed by Article 87 of the Constitution,⁵³ Article 32 of the Organic Law on the Constitutional Court⁵⁴ and Article 169 of the Electoral Law.⁵⁵
- 130.** It further submits that the fact that the members of the Constitutional Court are appointed by the President of the Republic and the President of the National Assembly does not compromise their independence or impartiality since they do not receive orders or instructions from any public or administrative authority.

- 131.** The Court notes that Article 17(2) of ACDEG reads:
State Parties re-affirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union's Declaration on the Principles Governing Democratic Elections in Africa. To this end, State Parties shall: (2) establish and strengthen national mechanisms that redress election-related disputes in a timely manner.
- 132.** The Court further notes that under Article 7 of the ECOWAS Protocol on Democracy: "Adequate arrangements shall be made to hear and dispose of all petitions relating to the conduct of elections and announcement of results".
- 133.** The Court notes that, the above-mentioned provisions constitute the source of the obligation for State Parties to these instruments to set up a mechanism which will be in charge of electoral disputes.

53 Article 87 of the Constitution states: "The validity of an election may be challenged before the Constitutional Court by any candidate, any political party or the delegate of the Government, under the conditions laid down by an Organic Law.

54 Article 32 of the Organic Law on the Constitutional Court stipulates: "The Constitutional Court, within the five days following the date of the ballot, may be seized of any challenge to the election of the President of the Republic or the deputies (...)". Within forty-eight (48) hours following the declaration of the provisional results of the first and second rounds of the election of the President of the Republic or of the deputies, any candidate may contest the validity of the election of a candidate before the Constitutional Court".

55 Article 169 of the Electoral Law states: "Litigation relating to the election of the President of the Republic and the deputies to the National Assembly is the responsibility of the Constitutional Court in accordance with the Organic Law determining the rules of organization and operation of the Constitutional Court and the procedure followed before it.

134. In this respect, the Court emphasises that in the instant case, Articles 87⁵⁶ of the Constitution, Articles 31⁵⁷ and 32⁵⁸ of the organic law on the Constitutional Court and Article 169 of the Electoral Law⁵⁹ place the election dispute arising out of the presidential election under the jurisdiction of the said Court.
135. The Court notes that based on the provisions earlier referred to, the Respondent State's Constitutional Court exercises this jurisdiction in three stages.
136. Firstly, the Constitutional Court hears all objections in relation to the registration of candidacies or the validity of candidacies received. It rules in a timely manner and, in any event, before the beginning of the electoral campaign.
137. Secondly, in the five (5) days following the date of voting, any objection can be brought before the Constitutional Court in respect of the presidential election.
138. Finally, in the forty-eight (48) hours following the provisional declaration of the results of the first and second rounds of the presidential elections, any objection can be brought before the Constitutional Court in respect of the presidential election.
139. In view of the foregoing, the Court considers that the Respondent State has established an electoral dispute resolution mechanism.
140. In this regard, the Court notes that the Applicant's allegations relate to the independence and impartiality of the Respondent State's Constitutional Court.
141. The Court recalls that it has ruled on this point, from paragraph 70 to 93 of this judgment.
142. In view of the foregoing, the Court considers that the alleged violation of Article 17(2) of ACDEG and Article 7 of the ECOWAS Protocol on Democracy is moot.

56 See note 54.

57 This Article states: "All disputes relating to the election of the President of the Republic (...) fall within the jurisdiction of the Constitutional Court.

58 This article states: "The Constitutional Court, during the five (5) days following the date of the ballot, may be seized of any challenge to the election of the President of the Republic (...) Within forty-eight (48) hours of the proclamation of the provisional results of the first and second rounds of the election of the President of the Republic (...) any candidate, any party may challenge the validity of the election of a candidate before the Constitutional Court.

59 This text provides: "Litigation relating to the referendum for the election of the President of the Republic (...) is the responsibility of the Constitutional Court in accordance with the organic law on the rules of organisation and functioning of the Constitutional Court as well as the procedure followed before it"

E. Alleged violation of the obligation to establish electoral lists in a transparent manner

- 143.** The Applicant maintains that the electoral list for the 29 July 2018 presidential election was not compiled in compliance with international standards and was discredited by the reports of domestic and international experts, which confirm his complaints and those of the other candidates regarding the lack of transparency and reliability of the said list.
- 144.** He notes that despite the diligence he had carried out, particularly by seizing the Supreme Court, the situation remained the same. The Applicant further contends that the culpable inertia of the CENI, the Supreme Court, the Constitutional Court and MAT is a serious breach of Article 5 of the ECOWAS Protocol on Democracy.
- 145.** The Respondent State contends that electoral lists are compiled in each commune, embassy or consulate by an administrative commission.
- 146.** It maintains that electoral lists are revised annually and that, for the purpose of the said revision, political parties are invited to communicate the names of their representatives at the latest fifteen (15) days before the start of operations. The Respondent State specifies that after a new census, new lists are compiled and that, if necessary, an exceptional revision of electoral lists may be carried out.

- 147.** The Court notes that Article 5 of the ECOWAS Protocol on Democracy states that:
- The voters' lists shall be prepared in a transparent and reliable manner, with the collaboration of the political parties and voters who may have access to them whenever the need arises.
- 148.** It follows from this provision that in order to be reliable, the electoral lists must be compiled in an inclusive manner; political parties and voters must participate in the process and be able to consult them when necessary.
- 149.** In fact, it follows from Article 41 of the Electoral Law that electoral lists are compiled and revised by an administrative commission, in each commune, embassy or consulate, composed of members designated by the administration and the political parties.

150. In addition, any voter may file a complaint with the Administrative Commission regarding the lists, and the decision may be appealed before a civil court and subsequently before the Court of Appeals.⁶⁰
151. The Court notes that it is for the Applicant to prove that the electoral list is not reliable and was not compiled in a transparent manner.
152. The Court notes that the Applicant's allegation is vague and imprecise. Moreover, the only evidence he provides in support of his claim is an election observation report which states that "the electoral register remains perfectible", but which at the same time refers to "an audit including representatives of the opposition which judged (the said register) to be sufficiently reliable for the organization of the election".
153. The Court finds that at no point in the report is it stated that the electoral lists are unreliable. Moreover, the Applicant has not adduced any other evidence in support of his allegations which should be corroborated by irrefutable proof
154. In this regard, the Court notes that, the Respondent State has a legal framework that is consistent with Article 5 of the ECOWAS Protocol on Democracy and that evidence of non-implementation of this legal framework or of the violation of any obligation whatsoever has not been provided in the instant case.
155. Consequently, the Court finds that the Respondent State has not violated its obligation to compile electoral lists in a transparent manner under Article 5 of the ECOWAS Protocol on Democracy.

F. Alleged violation of the right to vote and to be voted for at periodic and, free and fair elections

156. The Applicant asserts that in the 29 July 2018 presidential election, he was the victim of unfair procedures. In support of this allegation, he argues that the non-payment of the subsidy

60 Article 55 of the Electoral Law states: "In case of rejection by the Administrative Commission of a registration request, this decision shall be notified by the representative of the State in the district, the district and the ambassador or the consul to the interested party within five (05) days, in writing or by any other means. The notice of notification shall specify the reasons for the decision, the date of publication of the electoral list or the corrective table and shall inform the interested party that he or she may, within ten (10) days of the notification, contest the decision of refusal before the civil judge. A note of this notification and its date shall be made in the register provided for this purpose. Article 56 of the aforementioned law states: "The judge must rule within ten (10) days, without costs. He must give notice of the decision within seven (7) days. The judge's decision may be appealed within ten (10) days of notification to the interested party. The Court of Appeals shall rule within fifteen (15) days.

due to the SADI party of which he was the flagbearer, the late examination by the Supreme Court of measures to guarantee his electoral rights, the unreliability of the electoral lists are elements that prove the violation of his right to elect and be elected.

157. On its part, the Respondent State submits that the legal regime for presidential elections was set out in Articles 30 to 33,⁶¹ 86,⁶² 87⁶³ and 94⁶⁴ of the Constitution, the Organic Law relating to the Supreme Court and the law on elections.
158. The Respondent State contends that the Applicant's candidacy in the presidential election was unimpeded and that he enjoyed all the guarantees offered by legal provisions.

159. The Court notes that Article 25 of the ICCPR provides:

- a. Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions (...):
- b. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

61 Article 30 of the Constitution states: "The President of the Republic is elected for five (5) years by direct universal suffrage and a majority vote in two rounds. He may be re-elected only once", Article 31 of the Constitution states: "All candidates for the office of President of the Republic must be of Malian nationality and enjoy all their civic and political rights". Article 32 of the Constitution states: "Presidential election shall be held not earlier than twenty-one (21) days and no later than forty (40) days to the end of the incumbent President's term of office"; Article 33 of the Constitution states: "The law determines the procedure, the conditions of eligibility and presentation of candidacies for the presidential elections, the conduct of the ballot, the counting and the proclamation of the results. It shall provide for all the provisions required to ensure that the elections are free and fair. The President of the Republic is elected by a majority of the votes cast (...). The Constitutional Court controls the regularity of these operations, rules on the complaints and proclaims the election.

62 Article 86 of the Constitution states: "The Constitutional Court must rule on the regularity of presidential elections and declare the results".

63 *Idem*, footnote 50.

64 Article 94 of the Constitution states: "The decisions of the Constitutional Court are not subject to appeal. They are binding on the public authorities, on all administrative and jurisdictional authorities and on all natural and legal persons. The rules of organization and functioning of the Constitutional Court, as well as the procedure followed before it, are determined by an Organic Law."

160. Article 2 of the ICCPR provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

161. The Court observes that this provision enshrines the right to free elections, which are part of the right to participate in the conduct of public affairs. The right to free elections has two aspects, namely, the right to elect and be elected. This does not include the right to necessarily win elections, which must be periodic, fair, universal, equal, and conducted in a secret ballot. These rights may not be infringed upon by any discriminatory or arbitrary restrictions whatsoever.

162. The Court notes that the right to vote or elect is enshrined in the Respondent State's Constitution⁶⁵ and its electoral law.⁶⁶ The Applicant has not demonstrated that by law or any procedure whatsoever, the Respondent State has violated his right to vote in the 29 July 2018 presidential election.

163. With regard to the right to be elected, that is, the right to stand as a presidential candidate, the Court notes that this right is also enshrined in the Respondent State's Constitution⁶⁷ and Electoral Law.⁶⁸ The Court notes that through its laws, the Respondent State regulates the conditions for its exercise.

164. The Court considers that none of the complaints raised by the Applicant constitutes a violation of the right to elect and be elected. Indeed, the Applicant has not demonstrated the existence of any impediment to these rights, especially since his candidacy for the 29 July 2018 presidential election was cleared by the Constitutional Court by Judgment No 2018-02/CC-EP of 4 July 2018 on the final list of candidates for the 29 July 2018 presidential election.

165. With regard to the characteristics of the presidential election, as set out in paragraph 161 of this judgment, the Constitution and the Electoral Law provide that, presidential elections must be

65 Article 27 of the Constitution states: "All citizens of voting age who enjoy their civic and political rights are eligible to vote under the conditions determined by law."

66 Articles 29 et seq. of the Electoral Law are devoted to the right to vote, the requirements to be a voter and the exercise of the right to vote.

67 Article 33 of the Constitution states: "The law determines (...) the conditions of eligibility and submission of candidacies for presidential elections (...)"

68 See Note 26.

periodic⁶⁹ and must be conducted under genuine conditions and⁷⁰ additionally, by universal⁷¹ and secret⁷² suffrage.

166. The Applicant has not demonstrated that these criteria were not met in the 29 July 2018 presidential election.
167. In view of the foregoing, the Court considers that the Respondent State has not violated the Applicant's right to elect and be elected in periodic and fair elections, by universal and equal suffrage and by secret ballot.

VIII. Reparations

168. The Applicant seeks the refund of the sum of Twenty-Five Million (25,000,000) CFA francs paid as a deposit for the 29 July 2018 presidential election as well as the payment of the sum of one hundred million (100,000,000) CFA francs for all other causes of prejudice, including moral prejudice.
169. The Applicant further requests the Court to issue any measure to ensure that the violations do not recur, taking into account the circumstances of the case.
170. In particular, the Applicant requests the Court to order the Respondent State to amend Article 91 of the Malian Constitution and the Organic Law on the Constitutional Court to provide a framework for the recusal of its members and to make it independent and impartial, and to amend the Electoral Law to make it compliant with Article 17(1) of the ACDEG and Article 3 of the ECOWAS Protocol on Democracy.
171. On its part, the Respondent State submits that the Applicant's request for reparations be dismissed.

69 Article 30 paragraph 1 of the Constitution states: "The President of the Republic is elected for (5) years (...)", Article 32 of the Constitution states: "Presidential elections shall be held at least twenty-one days and not more than forty days before the expiration of the term of office of the incumbent President.

70 Article 33 states: "...the law shall make all necessary provisions for free and fair elections.

71 Article 27 of the Constitution states: "The vote is universal, equal (...)", Article 2 para. 1 of the Electoral Law contains the same terms.

72 Article 27 of the Constitution states: "The ballot shall be ... secret. Article 2 of the Electoral Law contains the same words.

172. The Court notes that Article 27(1) of the Protocol provides that:
If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of the fair compensation or reparation.
173. The Court has consistently held that reparations are only awarded when the responsibility of the Respondent State for an internationally wrongful act is determined and a causal link is established between the wrongful act and the alleged harm.⁷³
174. The Court emphasises that the burden of proof of the causal link lies, in principle, with the Applicant, who must provide the elements on which the claim is based.⁷⁴
175. The Court further emphasises that it cannot order reparation measures based on allegations for which no human rights violation has been found.
176. The Court recalls that it found a violation by the Respondent State of the following rights: the right to be tried within a reasonable time, the right to an effective remedy, and the right to have the adversarial principle respected. In addition, the Court found a violation of the obligation to guarantee the independence of the Constitutional Court and to establish and strengthen independent and impartial electoral bodies.
177. The Court also recalls that the Applicant claims that he suffered harm as a result of the Respondent State's violation of his rights. He seeks (A) pecuniary reparation and (B) non-pecuniary reparation.

A. Pecuniary reparations

178. The Court notes that the Applicant has requested the award of sums of money as compensation for material harm (i) and moral harm (ii).

i. Material prejudice

179. With regard to the request for return of the Twenty-Five Million (25,000,000) CFA francs deposit paid for the Applicant's candidacy in the 29 July 2018 presidential election, the Court notes that according to Article 150 of the electoral law, it is refundable up

73 *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*, Application 062/2019, Judgment (merits and reparations), 4 December 2020, § 139; *Houngue Eric Noudhouenou v Republic of Benin*, Application No 003/2020, Judgment (merits and reparations), 4 December 2020, § 117.

74 *Ibid.* § 140.

to fifty percent (50%) for candidates who obtained, at least, five percent (5%) of the votes cast in the first round.

180. In the instant case, the Applicant obtained 2.33% of votes. However, the Applicant has not shown how he is entitled to a refund, having obtained only 2.33% of the votes.
181. Accordingly, the Court dismisses the request.
182. With regard to the payment of the sum of one hundred million (100,000,000) CFA francs, the Court notes that the Applicant has not provided any material proof. In any event, the violations found played no part in the Applicant's loss of the 29 July 2018 presidential election, given that the Applicant came 23rd out of the 24 candidates.
183. Consequently, the Court dismisses the request.

ii. Moral prejudice

184. The Court recalls its jurisprudence according to which, in the event of a violation of human rights, moral harm is presumed.⁷⁵ It may be considered as an automatic consequence of the violation, without the need to establish it by any other means.⁷⁶
185. The Court also emphasises that the amount to be awarded for moral harm is determined on the basis of equity, taking into account the specific circumstances of each case.⁷⁷
186. In the instant case, the Court considers that an amount of One Million (1,000,000) CFA francs is sufficient to redress the moral harm suffered by the Applicant.
187. It is appropriate to award it to him and to order the Respondent State to pay him the said amount within six (6) months from the date of notification of this Judgment, at the expiration of which it shall pay interest on the arrears calculated on the basis of the applicable rate of the Central Bank of West African States.

B. Non-pecuniary reparations

188. The Court notes that certain measures requested by the Applicant constitute a deterrence to future violations. In order to remedy certain violations that have been found, non-pecuniary

75 *Armand Guehi v United Republic of Tanzania* (merits and reparations), § 55; *Lohé Issa Konaté v Burkina Faso* Judgment (merits) (5 December 2014), 1 AfCLR 314 § 41 *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*, 168;

76 *Beneficiaries of Norbert Zongo and Others v Burkina Faso* (reparations),

77 *Zongo v Burkina Faso*, Judgment (merits), § 55.

reparations including guarantees of non-repetition are the most appropriate in the instant case.

189. For this reason, by way of reparation for the violation of the principle of adversarial proceedings, the Court orders the Respondent State to amend the laws governing the Constitutional Court to include provisions that ensure respect for this principle.
190. Furthermore, as reparation for the violation of the obligation to guarantee the independence of the Respondent State's Constitutional Court, the Court orders the Respondent State to take all necessary measures to guarantee the independence of the said Court, in accordance with international human rights protection standard, within three (3) years.
191. Furthermore, as a remedy for the violation of the obligation to establish and strengthen independent and impartial electoral bodies, the Court orders the Respondent State to repeal Sections 27 and 28 of the Electoral Law within three (3) years from the notification of this judgement.

IX. Costs

192. The Applicant requests that the Respondent State be ordered to pay costs.
193. On its part, the Respondent State submits that the request be dismissed.

194. The Court notes that under Rule 32(2) "Unless otherwise decided by the Court, each party shall bear its own costs, if any".
195. The Court considers that, in the instant case, there is no reason to depart from the principle laid down in that text. Consequently, each party shall bear its own costs.

X. Operative part

196. For these reasons,
The Court
Unanimously,
Jurisdiction

- i. *Declares* that it has jurisdiction;

Admissibility

- ii. *Declares* the Application admissible;

Merits

- iii. *Finds* that the Respondent State has not violated the Applicant's right to be tried by an impartial tribunal, protected under Article 7(1)(d) of the Charter;
- iv. *Finds* that the Respondent State has not violated the Applicant's rights to full equality before the law and equal protection of the law, protected under Article 3 of the Charter;
- v. *Finds* that the Respondent State has not violated the Applicant's right to elect and to be elected at free and fair periodic elections held on the basis of universal and equal suffrage and by secret ballot, guaranteeing the free expression of the will of the electorate, protected under Article 25(2) of the International Covenant on Civil and Political Rights;
- vi. *Finds* that the Respondent State has not violated the obligation to establish electoral lists in a transparent and reliable manner, with the participation of political parties and voters, guaranteed under Article 5 of the ECOWAS Protocol on Democracy;
- vii. *Finds* that the allegation of the obligation to establish and strengthen domestic mechanisms to resolve electoral disputes in a timely manner, as guaranteed by Article 17(2) of the African Charter on Democracy, Elections and Governance and Article 7 of the ECOWAS Protocol on Democracy and Good Governance is moot;
- viii. *Finds* that the Respondent State has violated the right of the Applicant to be tried within a reasonable time, protected under Article 7(1)(d) of the Charter;
- ix. *Finds* that the Respondent State has violated the Applicant's right to be heard protected under Article 7(1)(d) of the Charter and Article 14(1) of the International Covenant on Civil and Political Rights by failing to respect the adversarial principle;
- x. *Finds* that the Respondent State has violated its obligation to guarantee the independence of the Constitutional Court, under Article 26 of the Charter;
- xi. *Finds* that the Respondent State has violated its obligation to establish and strengthen an independent and impartial electoral body, guaranteed under Article 17(1) of the African Charter on Democracy, Elections and Governance and Article 3 of the ECOWAS Protocol on Democracy and Good Governance;

Reparations

Pecuniary reparations

- xii. *Dismisses* the Applicant's request for reparation for material prejudice;
- xiii. *Awards* the Applicant the sum of One Million (1,000,000) CFA francs for moral prejudice;
- xiv. *Orders* the Respondent State to pay the said sum free from tax within six (6) months from the date of notification of this Judgement, at the expiration of which it shall pay interest on the arrears calculated on the basis of the applicable rate of the Central Bank of West African States;

Non-pecuniary reparations

- xv. *Orders* the Respondent State to amend the laws governing the Constitutional Court to include provisions that ensure respect for the principle of adversarial proceedings, within three (3) years from the notification of this judgement;
- xvi. *Orders* the Respondent State to amend the laws governing the Constitutional Court to include provisions on the procedure for recusal of judges within three (3) years from the notification of this judgement;
- xvii. *Orders* the Respondent State to take all necessary measures to fully fulfil its obligation to guarantee the independence of the Constitutional Court, within three (3) years from the notification of this judgement;
- xviii. *Orders* the Respondent State to take all necessary measures, in any case before any election, to repeal Sections 27 and 28 of the Electoral Law, within three (3) years from the notification of this judgement;
- xix. *Orders* the Respondent State to take all necessary measures to fully fulfil its obligation to establish and strengthen independent and impartial electoral bodies, within three (3) years from the notification of this judgement;

Implementation and reporting

- xx. *Orders* the Respondent State to submit to the Court a first report on the status of implementation of this judgement and thereafter, every six (6) months until the full implementation thereof;

Costs

- xxi. *Orders* each party to bear its own costs.

Masanja v Tanzania (striking out) (2022) 6 AfCLR 111

Application 002/2018, *Henry Masanja v United Republic of Tanzania*

Order, 24 March 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENS AOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant, a citizen of the Respondent State, was serving a prison term for an undisclosed offence at the time he filed this Application. He challenged the domestic proceedings that led to his conviction and sentence, alleging that the Respondent State had violated some of his human rights by the conduct of its Court of Appeal. After the Application was filed, both the Applicant and the Respondent State failed to respond to correspondence from the Court. Accordingly, the Court ordered the Application to be struck out.

Procedure (duty of parties to be diligent, 13-14; Court's discretion, 15)

I. The Parties

1. Mr. Henry Masanja (hereinafter, "the Applicant") is a Tanzanian national, who at the time of filing this Application, was incarcerated at Uyui Central Prison, for reasons that were undisclosed in the Application. He contests the procedure that led to his conviction and sentence.
2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol, through which it accepted the jurisdiction of the Court to receive applications from individuals and NGOs (hereinafter referred to as "the Declaration"). On 21 November 2019, the Respondent State deposited, with the African Union Commission, an instrument withdrawing the said Declaration. The Court has held that this withdrawal has no bearing on pending cases and new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period of one year after its deposit.

II. Subject of the Application

A. Facts of the matter

3. It emerges from the record that the Applicant was incarcerated in Uyui Central Prison in Tabora, when he filed the Application before the Court. However, the Applicant had not indicated the reasons for his incarceration, nor did he give any indication of the factual circumstances relating to the alleged human rights violations.

B. Alleged violations

4. The Applicant claims that the Respondent State violated his rights under Article 2 of the Charter because the Court of Appeal of the Respondent State had allegedly procured its judgment by error by not evaluating all the evidence on record.
5. The Applicant further claims that the sentence passed by the Court of Appeal of the Respondent State violated Article 5 of the Charter and Article 14 of the Respondent State's constitution.

III. Applicant's prayers

6. The Applicant prays the Court to restore justice where it was overlooked, quash the sentence imposed upon him and order his immediate release from prison. He further prays the Court to grant any other legal remedy that may be appropriate in these circumstances.

IV. Summary of the Procedure before the Court

7. The Application was filed on 19 February 2018 and was served on the Respondent State on 23 July 2018.
8. The Court requested the Applicant to provide more specification of the claims and supporting evidence of his Application on 2 March 2018, on 18 July 2018, on 26 November 2018, on 28 January 2019 and on 28 August 2019. The Applicant has not responded to the Court's requests.
9. The Court also requested the Applicant to file submissions on reparations on 18 July 2018 and granted an extension to file the same on 26 November 2018, on 28 January 2019 and on 28 August 2019. The Applicant has not filed his submissions on reparations.

10. The Court gave an extension to the Respondent State to submit its Response to the Application on 26 November 2018, on 12 March 2019 and on 28 August 2019.
11. The deadline for the Respondent State to submit its Response lapsed on 14 October 2019.

V. On the striking out of the Application

12. The Court notes that the relevant Rule on striking out of Applications is Rule 65(1) of the Rules, which provides that:
 1. The Court may at any stage of the proceedings decide to strike out an Application from its cause list where:
 - a. An Applicant notifies the Court of his/her intention not to proceed with the case;
 - b. An Applicant fails to pursue his case within the time limit provided by the Court;
 - c. It, for any other reason, concludes that it is no longer justified to continue with the examination of the Application.
13. The Court reiterates that parties to an application should pursue their case with diligence.¹ Where they fail or implicitly or expressly indicate their lack of interest to do so, Rule 65 of the Rules empowers the Court to remove the application from its cause list. The Court may also strike out an application if in the circumstances, it is no longer justified to continue with the determination of the matter.
14. The rationale behind Rule 65 of the Rules, is to encourage parties to demonstrate some level of diligence in pursuing their case or else their application could be struck out from the Court's cause list.
15. Subject to the circumstances of each case, the Court retains the discretion to decide on whether a particular application should be struck out or not.
16. In the instant case, the Applicant filed his Application on 19 February 2018.
17. The Court requested the Applicant to provide more specification of the claims and evidence in support of his Application on 2 March 2018, on 18 July 2018, on 26 November 2018, on 28 January 2019 and on 28 August 2019.
18. The Court also requested the Applicant to file his submissions on reparations on 18 July 2018 and granted an extension to file

¹ *Abdallah Ally Kulukuni v the United Republic of Tanzania*, AfCHPR, Application No 007/2018 Order (strike Out) of 25 September 2020, § 18.

the same on 26 November 2018, on 28 January 2019 and on 28 August 2019.

19. The Court notes that despite the extensions of time granted to the Applicant to file more specification of the claims and evidence in support of his Application and to file his submissions on reparations, the Applicant has failed to do so. Similarly, the Respondent State has failed to file its Response to the Application in spite of the fact that the Court granted it several extensions of time to do so. In this regard, the Court notes from the record that there is proof of delivery of the notices sent to both parties.
20. In view of the circumstances of this case, the Court thus finds that it is no longer justified to continue with the examination of the Application. Consequently, the Court decides to strike it out from its Cause List.
21. The Court notes that, the striking out of the Application is without prejudice to the Applicant's right to file for restoration of his Application in accordance with Rule 65(3) of the Rules.

VI. Operative part

22. For these reasons:

The Court

Unanimously,

Strikes out the instant Application from its Cause List.

Métongnon & Ors v Benin (ruling) (2022) 6 AfCLR 115

Application 031/2018, *Laurent Métongnon, Coovi Célestin Ahonon, Alabi Edouard Adegoke and Aboubou Saliou Youssou v Republic of Benin*

Ruling, 24 March 2022. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

The Applicants, all citizens of the Respondent State and former executives of a social security fund, brought this Application alleging that some of their human rights were violated as a result of criminal proceedings initiated against them by the Respondent State. In its Response, the Respondent State challenged the jurisdiction of the Court and the admissibility of the Application. The Court held that the Applicants did not exhaust local remedies available in the Respondent State and declared the Application inadmissible.

Jurisdiction (material jurisdiction, 29-31)

Admissibility (exhaustion of local remedies, 50-57, 63-65; requirements are cumulative 66)

I. The Parties

1. Laurent Métongnon, Coovi Célestin Ahonon, Alabi Edouard Adegoke and Aboubou Saliou Youssou (hereinafter referred to as “the Applicants”), all nationals of Benin, were Executives of the National Social Security Fund (NSSF), at the time of filing this Application. They allege human rights violations in connection with criminal proceedings brought against them.
2. The Application is filed against the Republic of Benin (hereinafter “the Respondent State”), which became a party to the African Charter on Human and Peoples’ Rights (hereinafter “the Charter”) on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (hereinafter “the Protocol”) on 22 August 2014. On 8 February 2016, the Respondent State deposited the Declaration provided for in Article 34(6) of the said Protocol (hereinafter referred to as “the Declaration”) by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 25 March 2020, the Respondent State deposited with the Chairperson of the African Union Commission the instrument

of withdrawal of the said Declaration. The Court ruled that this withdrawal has no effect on pending cases and on new cases, filed before the entry into force of the withdrawal, that is, 26 March 2021.¹

II. Subject of the Application

A. Facts of the matter

3. It emerges from the record that, on 2 November 2017, the Minister of Economy and Finance presented to the Cabinet of the Respondent State the report of a fact-finding audit mission carried out by the West African Monetary Union (WAMU) from 13 June to 1 July 2016 at the International Bank of Benin (IBBE). This was in connection with kickbacks allegedly received by the Applicants, who at the time, were of NSSF.
4. The Applicants further aver that according to the findings of the complementary investigation carried out by the General Inspectorate of Finance (GIF), the kickbacks were estimated at Seventy-one Million Nine Hundred and Ninety-nine Thousand Seven Hundred and Thirty-seven (71,994,737) francs CFA. These kickbacks were allegedly in return for deposits (DAT) totalling more than Seventeen Billion, Five Hundred Million (17,500,000,000) CFA francs that they made from April 2014 to October 2015.
5. The Applicants further allege that, the findings by the GIF, disclosed that these risky investments, which were made in a bank declared by the WAMU Banking Commission to be in distress, were made in the sole interest of the NSSF executives. This thereby putting the savings of contributors to the NSSF at risk by jeopardising pension payments to thousands of pensioners.
6. The Applicants aver that based on these unproven facts, criminal proceedings were brought against them.
7. Following their detention by the Cotonou Public Prosecutor, the Applicants and twelve (12) other persons prosecuted for the same or related facts filed separate Applications before the Constitutional Court alleging violations of their rights in relation to their arrest and detention, the unconstitutional nature of the Cabinet minutes, and the fact that the Public Prosecutor flouted

1 *Houngue Éric Noudehouenou v Republic of Benin*, ACTHPR, Application No 003/2020, Order of 5 May 2020 (provisional measures), §§ 4-5 and corrigendum of 29 July 2020.

Article 35 of the Code of Criminal Procedure.

8. They allege that by Decision DCC-18-098 of 19 April 2018, the Constitutional Court of the Respondent State ruled that their arrest and detention was not unconstitutional and that the Cabinet minutes were contrary to the Constitution and that the Public Prosecutor flouted Article 35 of the Constitution.²
9. By Judgment No 258/1FR-18 of 31 July 2018, the Court of First Instance of Cotonou (hereinafter referred to as “CFI of Cotonou”) found them guilty of abuse of office and corruption and sentenced each of them to five (5) years imprisonment. They state that despite having appealed the judgment, they were arraigned before the Court of Repression of Economic Offences and Terrorism (CRIET).

B. Alleged violations

10. The Applicants allege violation of the following rights:
 - i. The right to liberty and security of the person, protected by Article 6 of the Charter;
 - ii. The right to have their cause heard, protected by Article 7(1)(a)(b) (c) and (d) of the Charter and Articles 8 and 10 of the Universal Declaration of Human Rights;
 - iii. The right not to be convicted for an act or omission which was not a legally punishable offence at the time it was committed, protected by Article 7(2) of the Charter.

III. Summary of the procedure before the Court

11. The Application was received at the Registry on 6 December 2018. The Application was served on the Respondent State on 12 December 2018 for it to file its Response within Sixty (60) days of receipt.
12. Pleadings were filed within the time stipulated by the Court. Pleadings were closed on 15 March 2022 and the Parties were duly notified.

IV. Prayers of the Parties

13. In their Application, the Applicants request the Court to:
 - i. Find that they were convicted of offences they never committed;

2 This article provides: “Citizens holding public position or elected to a political office have the duty to perform it with conscience, competence, probity, dedication and loyalty in the interest and respect of the common good.”

- ii. Find that the Respondent State has violated Articles 6 and 7 of the Charter and Articles 8 and 10 of the Universal Declaration of Human Rights (UDHR);
- 14.** In their additional submission, the Applicants request the Court to find that the Respondent State violated:
- i. Article 6 of the Charter (the right to liberty and security of the person and the prohibition of arbitrary arrest or detention) insofar as Court of First Instance of Cotonou convicted them despite Decision 18-098 of 19 April 2018 by which the Constitutional Court (Constitutional Court Decision) declared their detention arbitrary;
 - ii. Article 7(1)(a)(b)(c) and (d) of the Charter, insofar as the Cotonou Court of First Instance convicted them despite the decision of the Constitutional Court finding that the Cabinet had not respected their rights of defence, nor complied with the principle of adversarial proceedings and the right of defence;
 - iii. Articles 8 and 10 of the UDHR, insofar as their appeal was rendered ineffective, or even impossible, by the Respondent State which, despite the said remedy, referred the case to CRIET, thereby infringing the principle of double jurisdiction and the principle of *non bis in idem*.
- 15.** Regarding reparations, the Applicants pray the Court to:
- i. Annul their conviction by the judges of the Respondent State and “*any future conviction by CRIET judges appointed and manipulated by the Executive in violation of legislation in force*”;
 - ii. Order their immediate release under irrevocable and liquidated penalty of Ten Million (10,000,000) CFA francs per day, starting as from the date of the Judgment;
 - iii. Order the Respondent State to pay all costs, including the fees of Advocate Lionel AGBO.
- 16.** The Applicants further request the Court to order the Respondent State to pay them the following amounts for all prejudice suffered:
- i. Five Billion (5,000,000,000) CFA francs to Laurent Métognon;
 - ii. Three Billion (3,000,000,000) CFA francs to Célestin Ahonon;
 - iii. Two Billion (2,000,000,000) CFA francs to Edouard Adegoke;
 - iv. Two Billion (2,000,000,000) CFA francs to Saliou Aboudou Yousoa.
- 17.** On its part, the Respondent State prays the Court to:
- i. Find that in their Application of 5 December 2018, the Applicants seek the annulment of Judgment No 258/1FD-18 of 31 July 2018;
 - ii. Find that the procedure relating to the appeal lodged on 2 August 2018 by the Applicants against Judgment No 258/1FD-18 of 31 July 2018 is pending before Beninese courts;

- iii. Find that it was heard for the first time on 15 November 2018, that is, three (3) months and thirteen (13) days after the Applicants lodged appeal;
- iv. Find that at that hearing, the case was adjourned to 20 December 2018, owing to the formal opening of the Benin Bar Association legal year, and then to 21 February 2019;
- v. Find that the case will again be heard on Thursday, 7 March 2019;
- vi. Find that the Application contains clearly disparaging language directed against the Beninese executive and judicial authorities, without providing the slightest proof;

Accordingly,

- i. Hold that regional courts lack jurisdiction to annul domestic laws or court decisions;
 - ii. Hold that regional courts lack jurisdiction to issue orders to Member States in respect of their domestic laws and procedures;
 - iii. Rule that the African Court cannot substitute itself for the domestic courts to take measures falling within their prerogatives in a case pending before them;
 - iv. Hold that the African Court cannot grant the Application of 5 December 2018 without interfering in the Beninese internal judicial system, thereby seriously departing from the scope of its jurisdiction;
 - v. Therefore, the African Court must declare that it lacks jurisdiction to hear the Application filed by the Applicants;
 - vi. Hold that filing an Application before the African Court is subject to the exhaustion of local remedies;
 - vii. Find that the Applicants have not exhausted local remedies;
 - viii. Consequently, and pursuant to Articles 56(5) of the Charter and Rule 40(5) of the Rules of Court, find the Application of 5 December 2018 inadmissible for failure to exhaust local remedies;
 - ix. Rule that the Applicants shall not, in their Application, use any insulting or disparaging language against the Respondent State and its institutions;
 - x. Therefore, pursuant to Articles 56(3) of the Charter and Rule 40(3) of the Rules of Court, find the Application of 5 December 2018 inadmissible insofar as it contains disparaging and insulting language directed against the Beninese Executive and Judicial authorities;
 - xi. Reserve costs.
- 18.** In their Reply to the preliminary objections raised by the Respondent State, the Applicants request the Court to:
- i. Find that the Respondent State's objection based on jurisdiction cannot succeed in law;
 - ii. Find that the Respondent State's objections based on admissibility are unfounded;

Accordingly,

- i. Declare that it has jurisdiction;
 - ii. Dismiss the Respondent State's objection based on jurisdiction;
 - iii. Dismiss the Respondent State's objection based on admissibility;
 - iv. Declare the Application of 5 December 2018 admissible;
 - v. Join all objections on the merits and order the parties to submit on the merits.
- 19.** In its submission on the merits, the Respondent State prays the Court to:
- i. Sustain the Respondent State's preliminary objections in their entirety;
 - ii. Find that the violations alleged by the Applicants are non-existent;
 - iii. Find that the Applicants' claims are untimely;
 - iv. Find and rule that the alleged violations are pure inventions;
 - v. Find that the Respondent State has not violated any of the Applicants' rights;
 - vi. Find that the Respondent State has not violated Articles 6 and 7 of the Charter and Articles 8 and 10 of the UDHR;
 - vii. Find and rule that Judgment No 258/1FR-18 of 31 July 2018 was rendered in accordance with the laws in force in Benin;
 - viii. Find that the Applicants have appealed Judgment No 258/1FR-18 of 31 July 2018;
 - ix. Find that CRIET is the competent court to hear the Applicants' appeal;
 - x. Hold that the African Court cannot issue orders to a State to overturn a court decision or an administrative act that is allegedly contrary to the Charter;
 - xi. Hold that Community Courts lack jurisdiction to issue orders to Member States in respect of their domestic laws and procedures;
 - xii. Find that the Applicants' requests to annul the judgment and release are untimely and unfounded;
 - xiii. Hold that the African Court cannot annul the conviction of the Applicants as it is not an appellate court of decisions rendered by domestic courts;
 - xiv. Dismiss outright the Applicants' requests for annulment of the judgment and for release from detention;
 - xv. Subsequently, dismiss all their requests, claims and submissions;
 - xvi. Order the Applicants to pay all costs, including the fees of Cyrille Y. Djikui, Elie N. Vlanovou-Kponou and Charles Badou, lawyers, who made the required legal representations.

V. Jurisdiction

20. The Court notes that Article 3 of the Protocol reads as follows
 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
21. Under Rule 49(1) of the Rules of Court,³ “[t]he Court shall ascertain its jurisdiction and the admissibility ... in accordance with the Charter, the Protocol and these Rules.”
22. Based on the above-mentioned provisions, the Court must, in each application, ascertain its jurisdiction and rule on objections to its jurisdiction, if any.
23. The Court notes that the Respondent State has raised an objection based on material jurisdiction. The Court will rule on the objection before considering the other aspects of its jurisdiction.

A. Objection based on material jurisdiction

24. The Respondent State contends that the Court lacks material jurisdiction on the ground that it cannot substitute itself for the domestic courts to annul Judgment No 258/1FD-18 of 31 July 2018, as requested by the Applicants, who were duly convicted at trial, in strict compliance with the procedure and laws.
25. The Respondent State notes that international human rights courts lack jurisdiction to “annul laws or judicial decisions”, as confirmed by the Economic Community of West African States Court of Justice in its Judgment No ECW/CCJ/JUG/04/013 of 22 February 2013 – *Karim M. Wade v Republic of Senegal*.
26. For their part, the Applicants submit that the objection be overruled, arguing that under Article 3 of the Protocol, the Court may be seized of all cases of violations of human rights protected by the Charter and by other human rights instruments whenever such violations are committed by State Parties to the Protocol.
27. The Applicants further contend that, in this context, the Court has double adjudicative jurisdiction when seized, namely, to interpret or apply the provisions of these instruments.

3 Rule 39(1) of the Rules of Court of 2 June 2010.

28. The Court notes that under Article 3(1) of the Protocol, it has jurisdiction over “all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the States concerned.”
29. The Court emphasises that for it to have material jurisdiction, it is sufficient that the Applicant alleges violations of human rights protected by the Charter or by any other human rights instrument ratified by the Respondent State.⁴
30. In the instant case, the Court notes that the Applicant alleges violation of the right to liberty and security of the person and the right to a fair trial, protected, respectively, by Articles 6 and 7 of the Charter ratified by the Respondent State.⁵
31. Furthermore, the Court emphasises, in line with its jurisprudence, that it is not an appellate court of decisions delivered by domestic courts. However, “that does not preclude it from assessing whether domestic proceedings were conducted in accordance with international standards set out in the Charter and other international human rights instruments ratified by the State concerned.”⁶
32. In view of the foregoing, the Court dismisses the objection based on material jurisdiction and declares that it has the material jurisdiction to hear the Application.

B. Other aspects of jurisdiction

33. The Court notes that no objection has been raised to its personal, temporal and territorial jurisdiction.
34. Having found that there was no indication on record that it lacks jurisdiction in these respects, the Court concludes that it has:
 - i. Personal jurisdiction, insofar as the Respondent State is a party to the Charter, the Protocol and has deposited the Declaration. The Court recalls, as stated in paragraph 2 of this Ruling, that on 25 March 2020 the Respondent State deposited the instrument of withdrawal of its Declaration. In this respect, the Court reiterates its

4 *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*, ACTHPR, Application No 027/2020, Judgment of 2 December 2021, § 37.

5 The Respondent State became a party to the Charter on 21 October 1986.

6 *Ibid.* Footnote 3, § 46.

position that the withdrawal of the Declaration has no retroactive effect and has no bearing on cases filed before the deposition of the instrument of withdrawal or on new cases filed before it comes into effect on 26 March 2021. As the present Application was filed on 6 December 2018, that is, prior to the withdrawal of the Declaration, the said withdrawal has no bearing on it.

- ii. Temporal jurisdiction, insofar as the alleged violations were committed after the entry into force of the above-mentioned instruments in relation to the Respondent State
 - iii. Territorial jurisdiction, insofar as the facts of the case and the alleged violations took place in the territory of the Respondent State.
- 35.** Accordingly, the Court considers that it has jurisdiction to hear the instant Application.

VI. Admissibility

- 36.** Under Article 6(2) of the Protocol:
The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter.
- 37.** Rule 50(1) of the Rules⁷ provides that:
The Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules.
- 38.** Rule 50(2), which essentially restates Article 56 of the Charter, reads as follows:
Applications filed before the Court shall comply with all the following conditions:
- a. Indicate their authors even if the latter request anonymity,
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter,
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union,
 - d. Are not based exclusively on news disseminated through the mass media,
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
 - f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date the Commission is seized with the matter, and
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the

⁷ Rule 39 of the Rules of 2 June 2010.

United Nations, or the Constitutive Act of the African Union or the provisions of the Charter.

39. The Court notes that the Respondent State has raised two objections on admissibility, first, based on non-exhaustion of local remedies and second, based on the use of insulting or disparaging language directed against the Respondent State and its institutions.

A. Objection based on non-exhaustion of local remedies

40. The Respondent State submits that the Applicants have not exhausted local remedies since there are domestic courts that they could have seized. The Respondent State further submits that exhaustion of local remedies implies that all the claims have been heard at all levels of domestic courts.
41. With regard to domestic courts, the Respondent State emphasises that the Applicants could have brought a case not only before the Constitutional Court pursuant to Articles 114,⁸ 121⁹ and 122¹⁰ of the Constitution, but also before ordinary courts, in particular the Judicial Chamber of the Supreme Court, pursuant to Articles 580 and following of Law 2012-15 of 18 March 2013 on the Code of Criminal Procedure.
42. Regarding the exhaustion of complaints, the Respondent State notes that, the Applicants did not raise before the Beninese courts the complaints brought before this Court, namely, the alleged violations of Articles 6 and 7 of the Charter and Articles 8 and 10 of the UDHR.
43. Regarding the exhaustion of local remedies, the Respondent State states that this presupposes that *“all possible levels of appeal have been exhausted or a final judgment has been delivered.”* It submits, in this regard, that the criminal procedure

8 This article provides: “The Constitutional Court shall be the highest court of the State in constitutional matters. It shall be the judge of the constitutionality of laws and it shall guarantee the fundamental human rights and the public liberties. It shall regulate the functioning of institutions and the activity of public authorities.”

9 This article provides: “The Constitutional Court, at the request of the President of the Republic or of any member of the National Assembly, shall rule on the constitutionality of laws prior to their promulgation. Regulatory text deemed to infringe on the fundamental human rights and on the public liberties. It shall decide more generally on the violations of the rights of the individual and its decision must be reached within a period of eight days.”

10 This article provides: “Any citizen may petition the Constitutional Court on the constitutionality of laws, either directly or by means of a procedure objecting to the unconstitutionality of a matter which concerns him before a court of law. The said court must stay proceedings until the decision of the Constitutional Court, which must be issued within a period of thirty days.”

brought against the Applicants is pending¹¹ before CRIET sitting as an appellate court, pursuant to Article 20 of Law 2018-13 of 2 July 2018¹² and was first heard on 15 November 2018, and subsequently adjourned to 20 December 2018, 21 February 2019 and 7 March 2019.

44. The Applicants pray the Court to dismiss the objection based on admissibility, arguing that they have exhausted some remedies, while others proved to be ineffective. They state, in fact, that they brought the matter before the Constitutional Court, which, by Decision DCC No 18-098 of 19 April 2018, ruled that their detention was arbitrary, so that by keeping them in pre-trial detention beyond the period provided for by law, the Public Prosecutor flouted Article 35 of the Constitution¹³ of 11 December 1991.
45. The Applicants further submit that on 2 August 2018, they appealed judgment No 258/1FD-18 rendered on 31 July 2018 by the Cotonou First Instance Court and that the case was referred to CRIET, which deprived them of a double level of jurisdiction.
46. They further point out that, in line with the Court's consistent jurisprudence, the Application remains admissible even if all remedies have not been exhausted. In their view, this is the case when local remedies are inapplicable or ineffective, that is, when they do not offer any prospect of success, or if they are unavailable or if they are discretionary. In this respect, they refer to the Commission's Recommendation in Communication 71/92, *Rencontre africaine pour la défense des droits de l'homme v Zambia*, and *Rights International v Nigeria*.
47. The Applicants point out that the Respondent State's Constitutional Court issued a similar ruling, by affirming in its

11 At the time the instant case was brought before the African Court.

12 Article 20 of Law 2018-13 of 2 July 2018 amending and supplementing Law 2001-37 of 27 August 2002, as amended, on the organisation of the judiciary in the Republic of Benin and the establishment of the Court for the Repression of Economic Offences and Terrorism provides: "As soon as the Court for the Repression of Economic Offences and Terrorism is set up, the proceedings falling within the area assigned to its jurisdiction, the investigation and inquiry of which would be in progress, are, at the request of the representatives of the competent public prosecutor's office, transferred to the special prosecutor of the Court for continuation, as the case may be, of the investigation by the special prosecutor's office, of the inquiry by the Investigation Commission, of the settlement of the litigation of liberties and detention by the Chamber of Liberties and Detention of the judgment by the Court."

13 Article 35 of the Constitution states: "*Citizens holding with a public position or elected to political office have the obligation to discharge their duties with conscience, competence, probity, dedication and loyalty in the interest and respect of the common good*".

Decision DCC-19-055 of 31 January 2019 that “Article 12¹⁴ of the law referred to (law on CRIET) is contrary to the Constitution” insofar as “it creates an appellate process exclusively in respect of a dismissal in favour of a person prosecuted (and) breaches the equality of arms which is an essential component of the equality of all before the law, protected by Article 3 of the Charter (...).”

48. Finally, the Applicants submit that contrary to the affirmations of the Respondent State, CRIET is not an appellate court and that, in any case, local remedies are ineffective and unavailable, since the judiciary, being totally controlled by the Executive, has taken the decision to have the Applicants retried by CRIET.

49. The Court notes that in accordance with Article 56(5) of the Charter and Rule 50(2) of the Rules of Court, Applications must be filed after the exhaustion of local remedies, if any, unless it is obvious that the proceedings in respect of such remedies have been unduly prolonged.
50. The Court emphasises that the local remedies to be exhausted are those of a judicial nature, which must be available, that is, they can be used without hindrance by the Applicant, be effective and satisfactory in the sense that they are “capable of satisfying the complainant or of remedying the situation in dispute”.¹⁵
51. The Court also notes that exhaustion of local remedies implies not only that the Applicant utilises local remedies, but also that the Applicant awaits the outcome thereof.¹⁶ In the same vein, the Court notes that in order to determine if the requirement to exhaust local remedies has been met, it is necessary that the

14 This article provides: “The decisions of the investigating committee are not subject to ordinary appeal. However, the decision dismissing the case may be appealed to the Court of Repression of Economic Offences and Terrorism by the special prosecutor or the civil party.”

15 *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema dit Ablassé, Ernest Zongo, Blaise Iboulo and Mouvement Burkinabè des droits de l'homme et des peuples v Burkina Faso*, Judgment (merits) (5 December 2014), 1 AfCLR 219. § 68; *Ibid. Konaté v Burkina Faso* (merits), § 108; *Sébastien Germain Marie Ajavon v Republic of Benin*, AfCHPR, Application 027/2020, § 73.

16 *Sébastien Germain Marie Ajavon v Republic of Benin*, ACtHPR, Application 027/2020, § 74; *Yacouba Traoré v Republic of Mali*, ACtHP, Application No 010/2018, Judgment of 25 September 2020, § 41.

domestic proceedings to which the Applicant was a party should have been completed by the time the Application was filed before the Court, unless the proceedings are unduly prolonged.¹⁷

52. The Court also emphasises that the requirement to exhaust local remedies is assessed, in principle, as at the date of filing the Application before it.¹⁸
53. The Court recalls that to justify bringing this Application before the Court while the criminal proceedings brought against them were still pending, the Applicants argue, on the one hand, that CRIET, before which the appeal was brought, is not an appellate court and that the law establishing it contains clauses that render local remedies non-existent, ineffective or illegal. On the other hand, they state that they seized the Constitutional Court which issued Decision No DCC 18-098 of 19 April 2018.
54. The Court notes that in the Respondent State's judicial system, depending on the existing remedies, a criminal case ends with the judgment of the Judicial Chamber of the Supreme Court.
55. The Court notes that in the present case, as of the date of filing the instant Application, that is, 6 December 2018, the criminal proceedings initiated against the Applicants were pending before the domestic courts. The Court recalls, in this regard, that by Judgment No 258/1FD-18 rendered on 31 July 2018 by the Cotonou Court of First Instance, they were found guilty of the offences of corruption and abuse of office and were each sentenced to five (5) years in prison and a fine of One Million (1,000,000) CFA francs, in addition to damages. The Applicants appealed this judgment on 2 August 2018. The appeal case was heard for the first time on 15 November 2018 and then adjourned to 20 December 2018.
56. The Court observes that the Applicants therefore brought their case before this Court between two adjournments of their case, that is, after a first adjournment of their case on appeal and, with full knowledge that it would be heard again fourteen (14) days later, that is, on 20 December 2018.
57. The Court considers that in such a case, the Applicants should have waited until the end of the criminal proceedings to which they were parties before bringing their case before it, unless the

17 *Komi Koutché v Republic of Benin*, ACtHPR, Application No 020/2019, Judgment of 25 June 2021, § 61; *Sébastien Germain Marie Aikoué Ajavon v Republic of Benin*, ACtHPR, Application 027/2020, § 74.

18 *Yacouba Traoré v Republic of Mali*, ACtHPR, Application No 010/2018, Judgment of 25 September 2020, § 41.

said proceedings had been unduly prolonged.¹⁹ In this respect, the Court notes that, on the one hand, the Applicants brought the case before it four (4) months and two (2) days after filing their appeal and, on the other hand, the appeal decision was handed down on 24 June 2019, that is, six (6) months and eighteen (18) days after the procedure before it was instituted and eleven (11) months and twenty-four (24) days after the first instance decision. The Court considers that the appeal proceedings were not unduly prolonged, given the complexity of the case, which in this case can be inferred from the nature of the offences being prosecuted²⁰ and the number of persons involved.²¹

58. The Court further observes that even after the appeal decision, the Applicants could, if necessary, file a cassation appeal before the Judicial Chamber of the Respondent State's Supreme Court, pursuant to Article 19 of the law on CRIET,²² 577 of the Code of Criminal Procedure²³ and Article 55 of Law No 2004-20 of 17 August 2007 on the rules of procedure applicable before the judicial chambers of the Supreme Court.²⁴
59. The Court further notes that the question of whether or not CRIET is an appellate court and, by extension, whether it can hear the Applicants' appeal is a matter of the merits insofar as it could determine the answer to the alleged violation of the right to a second hearing.²⁵
60. The Court emphasises that, in any event, if the Applicants consider that their rights were violated as a result of judgment No 258/1FD-18 rendered on 31 July 2018 by the Cotonou Court of First Instance and during the appeal proceedings, there was a remedy

19 *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*, ACtHPR, Application 027/2020, § 82.

20 The Applicants were prosecuted for the offences of corruption and abuse of power.

21 Twelve (12) people were prosecuted.

22 This article states: "The procedure applicable before the Court for the Repression of Economic Offences is that provided for by the Code of Criminal Procedure in both criminal and penal matters before the criminal courts. The judgments of the Court for the Repression of Economic Offences and Terrorism shall be reasoned. They are pronounced in open court. They may be appealed by the convicted person, the Public Prosecutor and the civil parties.

23 This Article provides: "*Except in disciplinary or extradition matters, the judgments of the Indictment Division and the final decisions of the trial courts may be set aside on appeal to the Cassation Court by the Public Prosecutor's Office or the party against whom the complaint is made (...)*".

24 This provision states: "*The appeal (in criminal matters) is open to the public prosecutor, the convicted person, the civil party and the civilly liable person.*"

25 § 11.iii of this Judgment.

available to them before the Respondent State's Constitutional Court to raise the complaints they have brought before this Court.

61. It follows from Articles 114, 119 and 122 of the Constitution that the constitutional court “guarantees the fundamental rights of the human person” and may, in this sense, be seized by any person “with a complaint of violation of human rights and public freedoms”.
62. In this respect, the Court considers that the allegations of the Applicants that were the subject of the Constitutional Court's Decision DCC 18-098 of 19 April 1998 are not the same as those raised before this Court.
63. The Court states that this remedy is available and effective, insofar as Beninese citizens can exercise it without hindrance and that the decisions of the Constitutional Court “are binding on the public authorities and on all civil, military and judicial authorities”²⁶
64. The Court considers, in this respect, that the violations alleged by the Applicants in the remedy before the Constitutional Court, which gave rise to decision DCC-18-098 of 19 April 1998, are not the same as those alleged before this Court.
65. In view of the foregoing, the Court considers that the Applicants have not exhausted local remedies and have therefore filed their Application prematurely.

B. Objection based on the use of insulting language

66. Having concluded that the instant Application does not meet the requirements of Article 56(5) of the Charter and Rule 50(2)(e) of the Rules, and in view of the cumulative nature of the admissibility requirements,²⁷ the Court considers it superfluous to rule on the objection based on admissibility in relation to the use of offensive or insulting language.
67. Consequently, the Court finds that the Application is inadmissible.

²⁶ Article 124 *in fine* of the Constitution of the Respondent State.

²⁷ *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (jurisdiction and admissibility) (21 March 2018) 2 AfCLR 247, § 63; *Rutabingwa Chrysanthé v Republic of Rwanda* (jurisdiction and admissibility) (11 May 2018) 2 AfCLR 361, § 48; *Collectif des anciens travailleurs ALS v Republic of Mali*, ACTHPR, Application No 042/2015 (jurisdiction and admissibility) (28 March 2019), 3 AfCLR 73 § 39.

VII. Costs

68. Both parties prayed the Court to order the other party to pay costs.

69. According to Article 32(2) of the Rules of Court, “unless otherwise decided by the Court, each party shall bear its own costs, if any.”

70. The Court notes that in the instant case there is no reason to depart from the requirement of this provision. Accordingly, the Court decides that each party shall bear its own costs.

VIII. Operative part

71. For these reasons,

The Court

Unanimously,

Jurisdiction

- i. *Dismisses* the objection based on material jurisdiction;
- ii. *Declares* that it has jurisdiction.

Admissibility

- i. *Sustains* the objection based on admissibility in relation to the non-exhaustion of local remedies;
- ii. *Finds* the Application inadmissible.

Costs

- iii. *Orders* each party to bear its own costs.

Mukwano v Tanzania (judgment) (2022) 6 AfCLR 131

Application 021/2016, *Joseph Mukwano v United Republic of Tanzania*

Judgment, 24 March 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSOUOLA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant, a citizen of the Respondent State, was in prison, having been tried, convicted, and sentenced to death for murder. He alleged that his trial, leading to his conviction and sentencing by the domestic court was in violation of his rights to a fair hearing, non-discrimination, and equal protection of law. The Court held that the Applicant had not exhausted local remedies in respect of one of the alleged violations but ruled the allegations admissible. However, the Court found that the Respondent State had not violated any of the Applicant's rights.

Jurisdiction (material jurisdiction, 19, 21-22; appellate jurisdiction, 19-20; personal jurisdiction, 25)

Admissibility (exhaustion of local remedies, 40-45; filing within reasonable time, 50-54)

Fair hearing (obligation to undertake proper assessment of arguments, 67)

Equality (implication of non-discrimination, 76; proof of discrimination, 77)

Equal protection of law (duty to lead evidence, 82)

I. The Parties

1. Joseph Mukwano (hereinafter referred to as "the Applicant") is a Tanzanian national, who at the time of filing this Application was incarcerated at Butimba Central Prison in Mwanza after being convicted and sentenced to death for murder. The Applicant challenges, among others, the violation of his rights to a fair trial during the proceedings that led to his sentencing.
2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration"), through which it accepted the jurisdiction

of the Court to receive applications from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission an instrument withdrawing its Declaration. The Court has held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect, that is, on 22 November 2020.¹

II. Subject of the Application

A. Facts of the matter

3. It emerges from the record before this Court that, on 11 August 2003 the Applicant and two others, stole items from the house of Professor Israel Katote where they worked and in the course of which they murdered him. On 15 July 2010, the Applicant was sentenced to death by the High Court of Tanzania at Bukoba for the said murder.
4. On 7 March 2013, the Court of Appeal confirmed the death sentence. The Applicant then, on 30 April 2013, filed an application to the Court of Appeal for review of its judgment. On 28 February 2014, the Court of Appeal struck out the application for review for being lodged out of time. A subsequent request for extension of time was denied on 13 March 2015 on the ground that the Applicant had failed to meet the legal threshold set out by the prevailing case-law.

B. Alleged violations

5. The Applicant alleges that:
 - i. The Court of Appeal failed to consider some vital points of evidence and prejudiced to make its judgment review.
 - ii. The conviction was based on the alleged doctrine of recent possession of alleged stolen articles and the retracted confession/extra-judicial statement.
 - iii. The Court of Appeal violated his right to non-discrimination.
 - iv. The Court of Appeal violated his right to equal protection of the law.

¹ *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application No 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.

III. Summary of the Procedure before the Court

6. The Application was filed on 5 April 2016 and served on the Respondent State on 10 May 2016.
7. The Parties filed their pleadings within the time stipulated by the Court. The said pleadings were filed first on the merits and subsequently on reparations after several extensions were granted to the Parties to do so.
8. Pleadings were closed on 23 August 2017 and 11 October 2021 for the merits and reparations proceedings, respectively and the Parties were duly notified.

IV. Prayers of the Parties

9. The Applicant prays the Court to:
 - i. Quash both conviction and sentence imposed upon him and set him at liberty;
 - ii. Grant any other relief that it may deem fit in the circumstances.
10. The Respondent State prays the Court to rule that:
 - i. The Court does not have jurisdiction to hear the matter and the Application is inadmissible;
 - ii. The Respondent State has not violated any of the provisions of the Charter as alleged by the Applicant; and
 - iii. The Application is dismissed and the costs be borne by the Applicant.

V. Jurisdiction

11. The Court observes that Article 3 of the Protocol provides as follows:
 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
12. The Court further observes that pursuant to Rule 49(1) of the Rules, it “shall conduct a preliminary examination of its jurisdiction [...] in accordance with the Charter, the Protocol and these Rules.”²

2 Rule 39(1), Rules of Court, 2 June 2010.

13. In view of the foregoing, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.
14. In the present Application, the Court notes that the Respondent State has raised an objection to its material jurisdiction.

A. Objection to material jurisdiction

15. The Respondent State alleges that this Court does not have jurisdiction to hear the present Application given that the Applicant is seeking the Court to exercise appellate jurisdiction by reviewing matters which the Court of Appeal had already examined to their finality. According to the Respondent State, the jurisdiction of this Court is limited to interpreting and applying the Charter and other relevant human rights instruments. The Respondent State also avers that the Applicant is requesting this Court to act as a court of first instance as it is being asked to consider issues that were not raised before domestic courts.
16. The Applicant rebuts the Respondent State's allegation and asserts that the Application is only seeking that this Court examines whether the proceedings in national courts were in abidance with the Charter.

17. The Court recalls that, as it has previously held, it has jurisdiction to examine any application submitted to it, provided that the rights of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.³
18. In the instant matter, the first issue arising is whether, by examining the present Application, this Court exercises appellate jurisdiction *vis-à-vis* domestic courts. The second issue arising is whether, by examining the Application, the Court would be acting as a court of first instance.
19. Regarding the first issue, the Court recalls that, as is now firmly established in its case-law, it does not exercise appellate jurisdiction with respect to claims already examined by national

3 *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application No 028/2015, Judgment of 26 June 2020, § 18.

courts.⁴ However, the Court reiterates its position that it retains the power to assess the propriety of domestic proceedings as against standards set out in international human rights instruments ratified by the State concerned.⁵

20. In the present matter, the Applicant is asking this Court to determine whether the proceedings before domestic courts were conducted in line with the Respondent State's obligations under the Charter. Furthermore, the allegations made by the Applicant relate to fair trial rights guaranteed under Article 7(1) of the Charter. It cannot therefore be said that this Court is exercising appellate jurisdiction.
21. With regard to the second issue, that this Court is being requested to act as a court of first instance, the Court notes that, as mentioned in the earlier stated submissions of the Respondent State, the Applicant is raising issues which were never raised before domestic courts.
22. The Court recalls that, as it has previously held, its material jurisdiction is established as long as the Application brought before it raises allegations of violation of human rights; and it suffices that the subject of the Application relates to the rights guaranteed by the Charter or any other human rights instruments to which the Respondent State is a party.⁶ The Court notes that, in the present matter, the Applicant alleges the violation of rights guaranteed in the Charter. As such, the Application cannot be said to invoke a first instance jurisdiction of this Court.
23. In light of the above, the Respondent State's objection is dismissed; and the Court consequently holds that it has material jurisdiction to hear this Application.

B. Other aspects of jurisdiction

24. The Court observes that no objection has been raised with respect to its personal, temporal and territorial jurisdiction. Nonetheless,

4 *Ernest Francis Mtingwi v Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, §§ 14-16.

5 *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; *Werema Wangoko Werema and Another v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520, § 29 and *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 130.

6 See *Kenedy Ivan v United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 48, § 20; *Shukrani Masegenya Mango and Others v United Republic of Tanzania* (merits and reparations) (26 September 2019) 3 AfCLR 439, § 29.

in line with Rule 49(1) of the Rules, it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

25. In relation to its personal jurisdiction, the Court recalls, as stated in paragraph 2 of this judgment that, on 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration made under Article 34(6) of the Protocol. The Court further recalls that it has held that the withdrawal of a Declaration does not have any retroactive effect and it also has no bearing on matters pending prior to the filing of the instrument withdrawing the Declaration, or new cases filed before the withdrawal takes effect.⁷ Since any such withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is deposited, the effective date for the Respondent State's withdrawal was 22 November 2020.⁸ This Application having been filed before the Respondent State deposited its notice of withdrawal is thus not affected by it.
26. In light of the foregoing, the Court finds that it has personal jurisdiction to examine the present Application.
27. In respect of its temporal jurisdiction, the Court notes that all the violations alleged by the Applicant arose after the Respondent State became a Party to the Charter and the Protocol. Furthermore, the alleged violations are continuing in nature since the Applicant remains convicted on the basis of what he considers an unfair process.⁹
28. Given the preceding, the Court holds that it has temporal jurisdiction to examine this Application.
29. As for its territorial jurisdiction, the Court notes that the violations alleged by the Applicant occurred within the territory of the Respondent State, which is a state party to the Protocol. In the circumstances, the Court holds that it has territorial jurisdiction.
30. In light of the above, the Court holds that it has jurisdiction to determine the present Application.

7 *Andrew Ambrose Cheusi v Tanzania*, §§ 35-39.

8 *Ingabire Victoire Umuhoza v United Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562, § 67.

9 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197, §§ 71-77.

VI. Admissibility

- 31.** Pursuant to Article 6(2) of the Protocol, “The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.
- 32.** In line with Rule 50(1) of the Rules,¹⁰ “the Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules.”
- 33.** The Court notes that Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:
Applications filed before the Court shall comply with all of the following conditions:
 - a. Indicate their authors even if the latter request anonymity;
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter;
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
 - d. Are not based exclusively on news disseminated through the mass media;
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 - f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of African Union or the provisions of the Charter.

A. Objections to the admissibility of the Application

- 34.** The Respondent State raises two objections to the admissibility of the Application. The first objection relates to the requirement of exhaustion of local remedies while the second one relates to whether the Application was filed within a reasonable time.

¹⁰ Rule 40 of the Rules of Court, 2 June 2010.

i. Objection based on non-exhaustion of local remedies

35. The Respondent State argues that the Application does not meet the requirement of exhaustion of local remedies as the Applicant should have raised some of the allegations as grounds of review before the Court of Appeal, which he failed to do although he was duly directed by the said Court. According to the Respondent State, these issues include the failure of the Court of Appeal to address vital points of evidence and review its judgment, as well as allegations that the same Court violated the Applicant's rights under Articles 2, and 3(2) of the Charter in the course of appeal proceedings.
36. It is also the Respondent State's objection that local remedies have not been exhausted because the Applicant should have raised the claim that his conviction was based on the doctrine of recent possession, and consideration of his extra-judicial statement, as grounds of appeal before the Court of Appeal.
37. The Applicant refutes the Respondent State's objection and argues that the Application meets the requirement of exhaustion of local remedies. It is the Applicant's submission that his application for review was struck out by the Court of Appeal for being filed out of time. The Applicant further submits that his request to file a new application for review out of time was dismissed for failing to cross the legal threshold set by the prevailing jurisprudence.

38. The Court notes that pursuant to Article 56(5) of the Charter, whose provision is restated in Rule 50(2)(e) of the Rules, any application filed before it shall fulfil the requirement of exhaustion of local remedies. The rule of exhaustion of local remedies aims at providing States the opportunity to deal with human rights violations within their jurisdictions before an international human rights body is called upon to determine the State's responsibility for the same.¹¹
39. The issues arising for determination in the present case regarding compliance with this requirement are, firstly, whether the Applicant

¹¹ *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.

did not exhaust local remedies by failing to raise some of the issues as grounds for review; and secondly, whether the Applicant ought to have raised claims related to some of the alleged violations during the proceedings before the Court of Appeal.

40. On the first issue, the Court restates its consistent position that, when it comes to the judicial system of the Respondent State, the review procedure at the Court of Appeal is an extraordinary remedy, which the Applicant is not required to exhaust prior to filing an application before this Court.¹² The Respondent State's objection on this point is therefore dismissed.
41. On the second issue, the Respondent State avers that for this Application to fulfil the condition of exhaustion of local remedies, the Applicant should have specifically raised some issues before the Court of Appeal. These issues are, the failure of the Court of Appeal to address vital points of evidence namely in relation to the Applicant's conviction based on the doctrine of recent possession and admission of his retracted confession without taking into account his complaint therefore leading to a breach of his rights to equality and equal protection of the law. The critical determination therefore consists in assessing whether domestic remedies have been exhausted in respect of these allegations.
42. As a preliminary observation, it is paramount to note that the Applicant raised a single ground of appeal before the Court of Appeal, which is that "his extra-judicial statement was not voluntary and therefore wrongly admitted and acted upon by the trial court to convict him."¹³ It is in respect of this ground that the Applicant avers in his Reply, that, he was subjected to torture for six (6) days prior to giving the statement.¹⁴
43. This Court notes that the issue at hand was considered by the Court of Appeal, which dismissed the Applicant's appeal upon concluding that the statement was rightly admitted.¹⁵ It is evident that domestic remedies have been exhausted in respect of this issue, and the Respondent State's objection is consequently dismissed.

12 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACTHPR, Application No 004/2015, Judgment of 26 June 2020, § 53; *Kenedy Ivan v United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 48, § 42; *Shukrani Masegenya Mango and others v United Tanzania* (merits and reparations) (26 September 2019) 3 AfCLR 439, § 57; *Alex Thomas v Tanzania* (merits), § 65.

13 *Deogratias Nicholas and Joseph Mukwano v The Republic*, Court of Appeal of Tanzania at Mwanza, Criminal Appeal No 211 of 2010, Judgment of 7 March 2012, p 14.

14 Applicant's Reply to the Respondent State's Response, 19 June 2017, § 8.

15 *Ibid*, pp 14-18.

44. Conversely, it is beyond dispute that the Applicant did not raise as a ground of appeal the issue of his conviction based on the doctrine of recent possession. The issue was not brought to the knowledge and assessment of the Court of Appeal, being the highest court of the Respondent State. As such, it cannot be considered that domestic remedies have been exhausted in respect thereof. This Court therefore upholds the Respondent State's objection on this point.
45. As a consequence of the above, the Court finds that domestic remedies have been exhausted in this Application only in respect of the alleged failure of the Court of Appeal to consider the Applicant's views while assessing the propriety of his statement.

ii. Objection based on the failure to file the Application within a reasonable time

46. The Respondent State claims that the Application was not filed within a reasonable time as three (3) years elapsed between the date of the Court of Appeal's judgment and that of the filing of the present Applicant. According to the Respondent State, the Applicant should have filed the Application within six (6) months after the date of the Court of Appeal's judgment and did not face any difficulty which justified doing so later.
47. The Applicant on his part refutes the Respondent State's objection and argues that the Rules do not provide for any timeframe to file an Application and such time should be determined on a case-by-case basis. According to the Applicant, assessing reasonable time in this case should take into account the time spent to exhaust all possible remedies.

48. The issue arising for determination is whether the time observed by the Applicant before bringing his Application before this Court is reasonable within the meaning of Article 56(6) of the Charter.
49. The Respondent State contends that it took the Applicant three (3) years to file the present Application considering that the judgment of the Court of Appeal was delivered on 7 March 2013 while the application for extension of time to file a review was dismissed on 13 February 2015. The Applicant does not dispute these dates.

50. The Court recalls that in assessing reasonable time under Article 56(6) of the Charter, the determinative date for reckoning of time should be the decision rendered following the last ordinary remedy which the Applicant attempted to exhaust. In the instant case, the relevant remedy is, the appeal the Applicant filed at the Court of Appeal which delivered its judgment on 7 March 2013. Given that the present Application was filed on 5 April 2016, the time to be considered is three (3) years and twenty-eight (28) days. The arising issue is whether such a time is reasonable in the meaning of the Article 56(6) of the Charter.
51. The Court notes that neither the Charter nor the Rules specify the exact time within which Applications must be filed, after exhaustion of local remedies. Article 56(6) of the Charter and Rule 50(2)(f) of the Rules merely provide that applications must be filed "... within reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter". As such, the Respondent State's reference to the period of six (6) months cannot be justified.
52. In its previous decisions, the Court has held that "...[the] reasonableness of the time frame for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."¹⁶ Factors taken into consideration by the Court include the facts that the Applicant is incarcerated and self-represented. Furthermore, in instances where the judicial system of the Respondent State provides for a review procedure, such as is the case in the present Application, attempts made by the Applicant to use the said procedure should be considered as a factor in assessing reasonableness.¹⁷
53. The Court notes that in the present case, after filing an application for review of the Court of Appeal's judgment, which was dismissed on 28 February 2014 for being filed out of time, the Applicant was directed to request for an extension of time to make a fresh application.¹⁸ The Applicant then, on 6 March 2014, filed the application for extension of time but the latter was dismissed on

16 *Norbert Zongo and Others v Burkina Faso* (preliminary objection) (25 June 2013) 1 AfCLR 197, § 121.

17 *Andrew Ambrose Cheusi v Tanzania, op.cit.*, § 68; *Majid Goa alias Vedastus v United Republic of Tanzania* (merits and reparations) (26 September 2019) 3 AfCLR 498, § 41; *Werema Wangoko Werema and Another v Tanzania* (merits), §§ 29, 56; *Armand Guehi v Tanzania* (merits and reparations), § 56.

18 See *Joseph Mukwano and Another v The Republic*, Criminal Application No 6 of 2013. Ruling of 28 February 2014, p 2.

13 February 2015 for being baseless. The present Application was subsequently filed before this Court on 5 April 2016.

54. This chronology serves to establish that the bulk of the time used by the Applicant before filing the present Application was exhausted in attempting to pursue the review procedure. Furthermore, the Applicant then required some time to prepare his Application before this Court. Peculiarities of this case also include the facts that the Applicant is incarcerated and self-represented.¹⁹ In the circumstances, this Court considers that the period of time of three (3) years and twenty-eight (28) days that it took the Applicant to file the present Application should be deemed reasonable.
55. In light of the foregoing, the Court dismisses the Respondent State's objection and finds that the Application has been filed within a reasonable time.

B. Other conditions of admissibility

56. The Court notes, from the record, that the Application's compliance with the requirements in Article 56 sub-articles (1), (2), (3), (4) and (7) of the Charter, which are reiterated in sub-rules 50(2)(a), (b), (c), (d), and (g) of the Rules, are not in contention between the Parties. Nevertheless, the Court must ascertain that these requirements have been fulfilled.
57. In particular, the Court notes that the requirement laid down in Rule 50(2)(a) of the Rules is met since the Applicant's identity is known.
58. The Court also notes that the claims made by the Applicant seek to protect his rights guaranteed under the Charter. Furthermore, one of the objectives of the Constitutive Act of the African Union, as stated in Article 3(h) thereof, is the promotion and protection of human and peoples' rights. Besides, the Application does not contain any claim or prayer that is incompatible with a provision of the Act. Therefore, the Court considers that the Application is compatible with the Constitutive Act of the African Union and the Charter, and thus holds that it meets the requirement of Rule 50(2)(b) of the Rules.
59. The Court further notes that the Application does not contain any disparaging or insulting language with regard to the Respondent

19 *Christopher Jonas v Tanzania* (merits) § 54; *Amiri Ramadhani v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344 § 83; *Armand Guehi v Tanzania* (merits and reparations) § 56; *Werema Wangoko v Tanzania* (merits and reparations) § 49; *Kijiji Isiaga v Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 55.

State, which makes it consistent with the requirement of Rule 50(2)(c) of the Rules.

60. Regarding the condition stated in Rule 50(2)(d) of the Rules, the Court notes that the Application fulfils the said condition as it is not based exclusively on news disseminated through the mass media.
61. Finally, with respect to the requirement laid down in Rule 50(2)(g) of the Rules, the Court finds that the present case does not concern a case which has already been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, or the provisions of the Charter. The Application therefore meets this condition.
62. As a consequence of the foregoing, the Court finds the Application partially admissible in respect of the alleged failure of the Court of Appeal to consider the Applicant's views while assessing the propriety of his statement.

VII. Merits

63. The Applicant alleges the violation of his rights to non-discrimination, to equal protection of the law and to a fair trial guaranteed under Articles 2, 3(2), and Article 7(1) of the Charter respectively. In light of its earlier finding on the admissibility of the present Application, this Court will consider only allegations made in respect of the failure of the Court of Appeal of the Respondent State to consider the Applicant's views on his conviction based on a retracted confession.
64. This Court will first consider the alleged violation of the Applicant's right to have his cause heard under Article 7(1) before examining allegations in respect of Articles 2 and 3(2) of the Charter.

A. Alleged violation of the right to have one's cause heard

65. The Applicant avers that the Court of Appeal did not undertake a thorough examination of evidence that he adduced in respect of his retracted statement. According to the Applicant, his right to have his cause heard was breached when the Court of Appeal did not consider the allegation that he was subjected to torture for six (6) days prior to be taken to the justice of peace who even recorded in the statement that the Applicant had some fresh bruises.
66. The Respondent State rebuts these allegations and submits that domestic law allows conviction based on extra-judicial statements and in any event, the Applicant made the statement voluntarily

as proved by a statement given by one witness in the case. The Respondent State further submits that the Applicant's conviction was not based solely on the retracted statement but also on the doctrine of recent possession and common intention and the trial court was satisfied of the same as proved by prosecution. According to the Respondent State, the fact that the Applicant's objection to the admissibility of the extra judicial statement was dismissed cannot be said to constitute a breach of his right to have his cause heard.

67. The Court notes that Article 7(1) of the Charter provides that "every individual shall have the right to have his cause heard ...". In its case law, this Court has held that such right imposes an obligation on the judicial authorities to undertake a proper assessment of arguments and evidence submitted by the Applicant.²⁰
68. The question arising in the present Application is whether the Court of Appeal failed to consider the Applicant's submission that his conviction based on his retracted statement allegedly provided after he was subjected to torture; and whether such failure constitutes a breach of his right to have his cause heard.
69. It emerges from the record of the case that, subsequent to an objection by Counsel for the Applicant, the trial court, which was the High Court, conducted a trial within a trial.²¹ Those proceedings were aimed at considering the objection raised by the Applicant to the Prosecution's reliance on his extra judicial statement which he avers was obtained under torture.²² After hearing both parties, and against a thorough examination of their submissions, as well as related facts, the High Court dismissed the Applicant's objection upon finding that the Applicant made the statement freely and

20 See *Sadick Marwa Kisase v United Republic of Tanzania*, ACtHPR, Application No 005/2015, Judgment of 2 December 2021, § 65; *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, §§ 97-111; *Mohmed Abubakari v United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 559, §§ 174, 193, 194.

21 See *The Republic v Deogratias Nicholaus Jeshi, Josephat Mkwano, and Audax Felician*, Criminal Session No 113/2004, Ruling of 22 June 2010.

22 *Ibid*, pp 1-2.

voluntarily and what he said was nothing but the truth.²³

70. This Court further notes that the Court of Appeal equally considered whether the trial court properly admitted the Applicant's extra judicial statement and that the Court of Appeal held that the High Court could not be faulted for deciding as it did.²⁴ The Court of Appeal therefore dismissed the Applicant's appeal on that single ground.²⁵
71. Considering the foregoing, it cannot be said that the domestic courts of the Respondent State ignored the Applicant's objection or failed to consider the propriety of his extra judicial statement in arriving at his conviction. The claim is therefore unfounded.
72. In the circumstances, this Court dismisses the Applicant's claim and finds that there is no violation of the right to be heard guaranteed under Article 7(1) of the Charter.

B. Alleged violation of the right to equality

73. The Applicant alleges that the Court of Appeal discriminated against him when it "isolated him by its judgment to rely unfairly on the side of the Respondent".
74. The Respondent State on the contrary avers that the allegation is not proved; and the only fact that the Court of Appeal dismissed the Applicant's claims cannot amount to discrimination.

75. Article 2 of the Charter provides that "Every individual shall be entitled to the enjoyment of the rights [...] recognized [...] in the present Charter without distinction of any kind [...]".
76. In its earlier decisions, this Court has held that non-discrimination entails that the law should provide for everyone and is applicable to everyone in equal measure without any distinction. This implies that persons in a similar or identical situation ought not to be

23 *Ibid*, pp 3-8.

24 See *Deogratias Nicholas and Joseph Mukwano v The Republic*, Court of Appeal of Tanzania at Mwanza, Criminal Appeal No 211 of 2010, Judgment of 7 March 2012, pp 14-17.

25 *Ibid*, p 18.

treated differently.²⁶ The issue to be determined in this case is whether such distinction is established in respect of the Applicant.

77. The Court observes that, in attempting to prove discrimination, the Applicant avers that the prosecution was treated in a manner that was comparatively different from how he was treated, resulting in a breach of the principle of equality. The Court notes, however that, the Applicant makes a general statement and fails to demonstrate how the Court of Appeal discriminated against him, in comparison to the prosecution during the proceedings before it. Furthermore, as established above in respect of the right to be heard, the Court of Appeal did not discard the Applicant's submissions or lean towards the arguments of the Respondent State. Discrimination cannot be said to have occurred on the sole basis that the Court of Appeal made a finding that did not favour the Applicant.
78. As a consequence of the foregoing, this Court dismisses the Applicant's claim and finds that there has been no violation of the right to equality protected under Article 2 of the Charter.

C. Alleged violation of the right to equal protection of the law

79. The Applicant submits that he “had no any ability neither control on the procedure as he was represented by the counsel who was settled by the Respondent State without his choice”, and “the procedure isolated the applicant” therefore violating his right to equal protection of the law.
80. The Respondent State refutes this allegation and prays the Court to disregard the same for being unsubstantiated and baseless.

81. The Court notes that the situation described by the Applicant as a violation of his right to equal protection of the law relates to Article 3(2) of the Charter, which stipulates that: “Every individual shall be entitled to equal protection of the law”.
82. The Court notes that the Applicant has not provided any specific argument or evidence that he was treated differently from other

26 *Sébastien Germain Ajavon v Republic of Benin* (merits) (29 March 2019) 3 AfCLR 130, § 221; *Kijiji Isiaga v Tanzania* (merits), § 85.

persons in similar conditions and circumstances. Furthermore, the Court recalls that, as earlier found, there is no evidence on file suggesting that the manner in which domestic courts conducted the proceedings amounts to a breach of the Applicant's right to an equal protection of the law. The Applicant's claim is therefore dismissed.

83. In light of the above, the Court finds that the Respondent State did not violate the Applicant's right to equal protection of the law provided under Article 3(2) of the Charter.

VIII. Reparations

84. The Applicant prays the Court to order the Respondent State to set him at liberty. He also requests the Court to grant him reparation the amount of which should be assessed based on the time spent in custody and the national annual ratio per citizen applicable in the Respondent State.
85. The Respondent State prays the Court to find that the Applicant is not entitled to any reparation given that he failed to prove and justify the claims made.

86. The Court notes that Article 27(1) of the Protocol stipulates that If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.
87. The Court notes that since no violation has been established, the issue of reparation does not arise.²⁷ Consequently, the Applicant's prayers for reparation are dismissed.

²⁷ *Alfred Agbesi Woyome v Republic of Ghana* (merits and reparations) (28 June 2019) 3 AfCLR 235, § 142; *Werema Wangoko Werema and Another v Tanzania* (merits), § 99.

IX. Costs

88. None of the Parties makes a prayer as to costs.

89. Pursuant to Rule 32(2) of the Rules, “unless otherwise decided by the Court, each party shall bear its own costs”.²⁸

90. In the instant Case, the Court decides that each Party will bear its own costs.

X. Operative part

91. For these reasons,

The Court

Unanimously,

Jurisdiction

- i. *Dismisses* the objection to material jurisdiction;
- ii. *Declares* that it has jurisdiction.

Admissibility

- iii. *Upholds* the objection to the admissibility of the Application for failure to exhaust local remedies in respect of the Applicant’s conviction based on the doctrine of recent possession;
- iv. *Dismisses* the objections to the admissibility of the Application in other respects;
- v. *Declares* the Application partially admissible.

Merits

- vi. *Finds* that the Respondent State has not violated the Applicant’s right to have his cause heard, as guaranteed by Article 7(1) of the Charter as regards the assessment of evidence during the domestic proceedings.
- vii. *Finds* that the Respondent State has not violated the Applicant’s right to equality protected under Article 2 of the Charter as regards the alleged discrimination in the course of domestic proceedings.
- viii. *Finds* that the Respondent State has not violated the Applicant’s right to equal protection of the law under Article 3(2) of the Charter

28 Rule 30(2) of the Rules of Court, 2 June 2010.

as regards the alleged failure to examine evidence tendered and consider submissions of the Applicant.

Reparations

ix. *Dismisses* the Applicant's prayers for reparations.

Costs

x. *Orders* each party to bear its own costs.

Muwinda & Ors v Tanzania (judgment) (2022) 6 AfCLR 150

Application 030/2017, *Almas Mohamed Muwinda and 58 Others v United Republic of Tanzania*

Judgment, 24 March 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSOUOLA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicants, citizens of the Respondent State and former employees of a State-owned textile milling company were retrenched from their employment, following dissolution of the mill by the Respondent State. They successfully brought a domestic suit for subsistence allowance on the grounds that the Respondent State did not pay them their terminal benefits. However, the award by the High Court was overturned by the Court of Appeal. The Applicants brought this Application, alleging that the non-payment of the full subsistence allowance by the Respondent State was a violation of their individual rights to work as well as the right to non-discrimination. The Court found that the Respondent State had not violated any of the Applicants' rights and dismissed the Application.

Procedure (conditions for default judgment, 25-28)

Work (source of right, 53; relation to other socio-economic rights and dignity, 54; remuneration as component, 54)

Non-discrimination (meaning of discrimination, 63-64; proscription of discrimination, 64; proof of discrimination, 65)

I. The Parties

1. Almas Mohamed Muwinda and fifty-eight (58) others (hereinafter referred to as "the Applicants") are Tanzanian nationals and former employees of Urafiki Textile Mills. They bring this action alleging a violation of their right to work as well as their right to non-discrimination.
2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and the Protocol on 10 February 2006. It further deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol through which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission, an instrument

withdrawing its Declaration. The Court has held that this withdrawal had no effect on pending cases as well as all new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period of one (1) year after its deposit.¹

II. Subject matter of the Application

A. Facts of the matter

3. It emerges from the record that through a Government Notice dated 21 March 1997, the Respondent State dissolved Urafiki Textile Mills (hereinafter referred to as “UTM”), a public company, and retrenched all the Applicants. All the Applicants received letters which indicated that the effective date for the termination of their employment was 31 March 1997. As part of UTM’s dissolution, all its liabilities were vested in the Respondent State’s Treasury Registrar and these included those pertaining to employees’ terminal, retirement or similar benefits.
4. Due to disagreements about the timing of the payment of the Applicants’ terminal benefits, one-hundred and five (105) former employees of UTM, inclusive of the present Applicants, brought a civil suit (Civil Cause No 394 of 1998) at the High Court in Dar es Salaam seeking the payment of subsistence allowance for the time they had been awaiting payment of their terminal benefits. On 12 July 2002, the High Court found in favour of the Applicants and ordered that they be paid subsistence allowances at the rate of Tanzanian Shillings Six Thousand Four Hundred (TZS 6,400) per day from the date of retrenchment to the date of the High Court’s decision.
5. On the Respondent State’s appeal to the Court of Appeal, it was held, on 30 May 2006, that the subsistence allowance due to the Applicants was only up to the date when they actually received their terminal benefits and not up to the date of the judgment of the High Court. In its judgment, the Court of Appeal found that the Applicants terminal benefits were paid in three batches that is on 30 April 1997, 31 May 1997 and 31 July 1997. It thus ordered that subsistence allowances be paid to the Applicants for the period between the date of their termination of employment, 31 March

¹ *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACTHPR, Application No 004/2015, Judgment of 26 June 2020 (merits and reparations) § 38.

1997 and the date on which their terminal benefits were actually paid.

6. The Applicants filed an application for review of the Court of Appeal's decision, on the ground that it had an error on the face of the record, but this was dismissed on 2 September 2008.
7. Subsequently, the Applicants filed an application for extension of time to file application for review of the Court of Appeal's decision of 2 September 2008 but this was dismissed on 7 August 2017.

B. Alleged violations

8. The Applicants submit that the Respondent State has violated their right to work and to just remuneration under articles 22(1) and 23 of its Constitution, respectively, by not paying in full their subsistence allowances.
9. The Applicants also allege that the Respondent State has violated the same rights under the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR"),² Article 23 of the Universal Declaration of Human Rights (hereinafter referred to as "the UDHR") and Articles 15 and 1 of the Charter.
10. The Applicants further allege that the Respondent State has violated their right not to be discriminated against by paying some employees daily subsistence allowances of Tanzanian Shillings Nine Thousand Two Hundred (TZS 9,200) instead of the Tanzanian Shillings Six Thousand Four Hundred (TZS 6,400) that the Applicants' were awarded by the Court of Appeal.

III. Summary of the Procedure before the Court

11. The Application was filed on 25 September 2017 and served on the Respondent State on 23 February 2018. The Respondent State was given thirty (30) days to file its List of Representatives and sixty (60) days to file its Response to the Application.
12. On 2 July 2018, the Court, *suo motu*, granted the Respondent State an extension of forty-five (45) days to file its Response.
13. On 17 August 2018, the Applicants filed their Submissions on Reparations, which were transmitted to the Respondent State on 21 August 2018 for the Response thereto to be filed within thirty (30) days of notification.

2 The Court notes that the ICCPR does not include provisions on the right to work but that the same are contained in the International Covenant on Economic Social and Cultural Rights.

14. On 27 August 2018, the Respondent State filed a request for extension of time to file its Response. Subsequently, on 18 October 2018, the Court granted the Respondent State an extension of thirty (30) days to file its Response on the merits as well as its Submissions on Reparations. On 6 December 2018, the Court granted the Respondent State another *suo motu* extension of thirty (30) days effective that date.
15. On 16 January 2019, the Court, acting under Rule 63 of the Rules,³ notified the Respondent State that it would proceed and pass judgment in default both on the merits and reparations should it not hear from the Respondent State within forty-five (45) days of the receipt of the notice.
16. On 21 January 2019, the Respondent State requested an extension of six (6) months to file its Response. On 8 March 2019, the Court granted the Respondent State an extension of sixty (60) days to file both its Response as well as Submissions on Reparations.
17. Pleadings were closed on 28 May 2019 and the parties were duly notified
18. On 26 November 2020, the Respondent State, citing the need to conduct further consultations with other government agencies, filed a further request for extension of time by thirty (30) days to file its Response and Submissions on Reparations.
19. On 5 March 2021, the Court issued an order re-opening pleadings and giving the Respondent State an extension of thirty (30) days to file their List of Representatives, Response, and Submissions on Reparations.
20. Pleadings were, again, closed on, 4 March 2022 and the Parties were duly notified. The Respondent State, however, had not filed any submissions by this time.

IV. Prayers of the Parties

21. The Applicants pray that “since [they] are victims of the violation of human rights done by the [Respondent] State, then it is prudential and reasonable to order the [R]espondent State to pay subsistence allowances to the Applicants and other forms of reparations as this Honourable Court may deem fit and just to grant for the sake of justice.”
22. Specifically, the Applicants pray that the Respondent State pay them their subsistence allowance “to the tune of TSHs.6400/

3 Rule 55, Rules of Court, 2 June 2010.

day from 31 March 1997 to the finalisation of this dispute.” The Applicants further pray that the Court “makes an order to the Respondent State to pay interest at commercial rate, costs of this Application, or any other order(s) for reparations of the Applicants for the interests of justice thereof as this Honourable Court may deem fit and just to grant.”

23. It is also the Applicants’ prayer that the “Respondent State should also be ordered to report back to this Honourable Court every six months until they satisfy the orders this court shall make when considering the submission for reparations.”

V. On the default of the Respondent State

24. The Court recalls that Rule 63(1) of the Rules provides as follows:⁴ Whenever a party does not appear before the Court, or fails to defend its case within the period prescribed by the Court, the Court may, on the Application of the other party, or on its own motion, enter a decision in default after it has satisfied itself that the defaulting party has been duly served with the Application and all other documents pertinent to the proceedings.
25. As the Court has recognised, Rule 63(1) sets out three conditions that must be satisfied before it can utilise the default judgment procedure and these are:⁵ first, the default of one of the parties; second, the request made by the other party or on its own motion; and, third, the notification to the defaulting party of both the application and documents on file.
26. As to the first condition, the Court recalls that this Application was filed on 25 September 2017. It further recalls that from 23 February 2018, the date of service of the Application, to the date of close of pleadings, the Registry notified the Respondent State of all pleadings filed by the Applicant. The record also shows proof of delivery, to the Respondent State, of all notifications. The Court concludes, therefore, that the Respondent State is in default.
27. In relation to the second condition, the Court observes that there is no request by the Applicant for it to adopt the default judgment procedure. Nevertheless, the Court finds that the present case is one where of its own motion it must, in the interests of the due administration of justice, have recourse to the default judgment

4 Rule 55, Rules of Court 2 June 2010.

5 *Leon Mugesera v Republic of Rwanda*, ACtHPR, Application No 012/2017, Judgment of 27 November 2020 (merits and reparations) § 14-17 and *Fidel Mulindahabi v Republic of Rwanda*, ACtHPR, Application No 004/2017, Judgment of 26 June 2020 (merits and reparations) § 21.

procedure.⁶

28. In connection to the third condition, the Court notes that it is important to recall the various procedural steps taken by the Registry in this case especially in so far as dealing with the Respondent State is concerned. As captured in the “Summary of the Procedure before the Court” hereinabove, it is clear that the Respondent State was aware of the proceedings as demonstrated by the various requests for extension of time that it filed but it still failed to file submissions on both merits and reparations. The Court, therefore, concludes that the Respondent State was duly notified of all the proceedings in relation to this Application.
29. The required conditions having been fulfilled, the Court concludes that it may rule by default.⁷

VI. Jurisdiction

30. In terms of Article 3(1) of the Protocol, the “jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned.” Furthermore, according to Rule 49(1) of the Rules, “the Court shall conduct preliminary examination of its jurisdiction...”.
31. The Court observes that no objection has been raised in respect of its personal, temporal, territorial, or material jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules,⁸ it must satisfy itself that all aspects of its jurisdiction are fulfilled.
32. Having conducted a preliminary examination of its jurisdiction and noting that nothing on file indicates that it does not have jurisdiction, the Court holds as follows:
 - i. It has material jurisdiction since the Applicants have alleged a violation of their right to work under Article 15 of the Charter as well as in Article 23 of the UDHR. In this connection, the Court notes that the Respondent State is party to the Charter. In respect of the UDHR, the Court recalls that it has held that while the UDHR is not a human rights instrument subject to ratification by States, it has been recognised that many of its provisions have morphed into customary

6 *Robert Richard v United Republic of Tanzania*, ACtHPR, Application No 035/2016, Judgment of 2 December 2021 (merits and reparations) § 17.

7 *Laurent Munyandikirwa v Republic of Rwanda*, ACtHPR, Application No 023/2015, Ruling of 2 December 2021 § 46.

8 Rule 40, Rules of Court 2 June 2010.

law.⁹

- ii. It has personal jurisdiction since the Application has been filed by a national of the Respondent State, which is a party to the Protocol. Additionally, and as earlier noted, even though the Respondent State deposited an instrument withdrawing its Declaration under Article 34(6), the said withdrawal only took effect twelve (12) months from the date of its deposit which is 22 November 2020.¹⁰ This Application having been filed before the Respondent State's withdrawal was effective is, therefore, not affected by the said withdrawal.
 - iii. It has temporal jurisdiction since although the violations alleged by the Applicants stem from the dissolution of UTM in 1997, these violations were the subject of litigation that was only concluded with the dismissal, by the Respondent State's Court of Appeal, of the Applicants' application for extension of time to file review on 7 August 2017. The Court finds, therefore, that the violations alleged by the Applicant, though commencing before the Respondent State became party to the Protocol, continued after the Respondent State became a party to the Protocol.¹¹
 - iv. It has territorial jurisdiction since the alleged violations are all said to have occurred within the territory of the Respondent State.
33. In light of the above, the Court holds that it has jurisdiction to examine the Application.

VII. Admissibility

34. The Applicant contends that the Application meets all the admissibility requirements in the Charter and as reiterated in the Protocol.

35. Pursuant to Article 6(2) of the Protocol, "[t]he Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter." Pursuant to Rule 50(1) of the Rules,¹²

9 *Anudo Ochieng Anudo v United Republic of Tanzania* (merits) (22 March 2018) 2 AfCLR 248 §76.

10 *Andrew Ambrose Cheusi v Tanzania* §§ 35-39.

11 Cf. *Jebra Kambole v United Republic of Tanzania*, ACTHPR, Application No 018/2018 Judgment of 15 July 2020 (merits and reparations) § 52.

12 Rule 40 Rules of Court, 2 June 2010.

“[t]he Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules.”

- 36.** The Court notes that Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

Applications filed before the Court shall comply with all of the following conditions:

- a. Indicate their authors even if the latter request anonymity;
- b. Are compatible with the Constitutive Act of the African Union and with the Charter;
- c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
- d. Are not based exclusively on news disseminated through the mass media;
- e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
- f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter; and
- g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of African Union or the provisions of the Charter.

- 37.** The admissibility conditions set out in Rule 50(2) of the Rules are not in contention between the Parties since the Respondent State did not file anything to counter the Applicants’ assertions. Nevertheless, and pursuant to Rule 50(1) of the Rules, the Court is required to determine if the Application fulfils all the requirements set out in Rule 50(2) of the Rules.

- 38.** The Court notes, from the record, that the Applicants are well identified thereby fulfilling the requirements of Rule 50(2)(a) of the Rules.

- 39.** The Court also notes that the claims made by the Applicants seek to protect their rights guaranteed under the Charter. It further notes that one of the objectives of the Constitutive Act of the African Union is the promotion and protection of human and peoples’ rights. The Court, therefore, holds that the Application is compatible with the Constitutive Act of the African Union and the Charter thereby fulfilling the requirements of Rule 50(2)(b) of the Rules.

- 40.** The Court further notes that the language used in the Application is not offensive or insulting thus making it consistent with the

requirements of Rule 50(2)(c) of the Rules.

41. The Court observes that the Applicants have submitted documents of various types as evidence in support of their claims thereby establishing that the Application is not based exclusively on news disseminated through the media which makes the Application compliant with Rule 50(2)(d) of the Rules.
42. With regard to Rule 50(2)(e) of the Rules, which relates to exhaustion of local remedies, the Court confirms that all applicants must exhaust domestic remedies unless the same are manifestly unavailable, ineffective and insufficient or the proceedings to secure the local remedies are unduly prolonged.¹³ In the present case, the Court notes that the Applicants approached the highest court in the Respondent State, the Court of Appeal, which dismissed their application for extension of time to file an application for review on 7 August 2017. The Court concludes, therefore, that the Applicants exhausted domestic remedies as required by Rule 50(2)(e) of the Rules.
43. With regard to Rule 50(2)(f) of the Rules, the Court observes that this Rule requires applications to be “...submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter.”
44. As the Court has established, the reasonableness of the period for seizure depends on the particular circumstances of each case and must be determined on a case-by-case basis.¹⁴ In the present case, the Applicants filed their Application on 25 September 2017 which was forty-nine (49) days after the last pronouncement by the Court of Appeal. The Court holds, therefore, that the Application was filed within a reasonable period of time within the meaning of Rule 50(2)(f) of the Rules.
45. The Court observes that the Application does not deal with matters or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union. It thus holds that the Application complies with the requirements of Rule 50(2)(g) of the Rules.
46. Given the above, the Court holds that the Application meets all the admissibility requirements in Article 56 of the Charter which are reiterated in Rule 50(2) of the Rules and thus declares the Application admissible.

13 *Peter Joseph Chacha v United Republic of Tanzania* (admissibility) (28 March 2014) 1 AfCLR 398 §§ 142-144.

14 *Anudo v Tanzania* (merits) § 57.

VIII. Merits

- 47.** The Applicants allege a violation of their right to work, especially the right to remuneration, and their right to non-discrimination.

A. Alleged violation of the right to work

- 48.** The Applicants' argue that after UTM was dissolved and all the employees' contracts were terminated they were not paid their terminal benefits on time. The Applicants claim, therefore, that they are entitled to subsistence allowance for the time when they were waiting for the payment of their terminal benefits. According to the Applicants, the Respondent State's conduct is a violation of Article 15 of the Charter and Article 23(1), (2), (3), of the UDHR.
- 49.** The Respondent State did not file any response to the Applicants' submissions.

- 50.** The Court notes that Article 15 of the Charter provides that "[e]very individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work."
- 51.** The Court further notes that Article 23 of the UDHR provides as follows:
1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
 2. Everyone, without any discrimination, has the right to equal pay for equal work.
 3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
 4. Everyone has the right to form and to join trade unions for the protection of his interests.
- 53.** In light of the above, the international law basis for the right to work, including the right to remuneration, is beyond dispute. The Court has also, previously, noted that there is substantive congruence between the provisions of Article 15 of the Charter and Articles 6 and 7 of the International Covenant on Economic,

Social and Cultural Rights.¹⁵

54. As the Court has conceded in its jurisprudence, the right to work is essential for the realisation of other economic, social and cultural rights and it forms an inseparable and inherent part of human dignity.¹⁶ As the Court has further conceded, the right to remuneration is a critical component of the right to work such that unjustly withholding remuneration could amount to a violation of the right.
55. In the present Application, the Court observes that the dispute between the Parties revolves around the payment of subsistence allowance to the Applicants for the time they spent waiting for the payment of their terminal benefits after they were retrenched. According to the Applicants, while their employment was terminated on 31 March 1997, their terminal benefits were paid in four batches, to wit, June 1997, September 1997, December 1997 and March 1998. The Court also observes, however, that the Applicants failed to mention the exact dates when their terminal benefits were paid. In the circumstances, there is nothing to contradict the finding of the Court of Appeal that the Applicants were actually paid in three batches, to wit, 30 April 1997, 31 May 1997 and 31 July 1997.
56. The Court recalls that as a result of disagreements about the payment of subsistence allowance, the Applicants, and their co-workers, commenced action before the Respondent State's High Court in Dar es Salaam (Civil Cause No 394 of 1998). On 12 July 2002, the High Court entered judgment in favour of the Applicants and ordered the Respondent State to pay the Applicants Tanzanian Shilling Three Hundred and Eighteen Million Nine Hundred Seventy-Seven Thousand and Nine Hundred Thirty-Five (TZS 318 977 935) as subsistence allowance, this being a sum calculated at the rate of Tanzanian Shillings Six Thousand Four Hundred (TZS6 400) per day from the date of termination of employment till the date of judgment of the High Court.
57. However, on the Respondent State's appeal to the Court of Appeal, the High Court's decision was reversed. According to the Court of Appeal "...the award of TZS318 977 935 was neither proved nor substantiated by the pleadings." The Court of Appeal further held that "...the plaintiffs did not establish the claim of subsistence

15 *Ernest Karata and others v United Republic of Tanzania*, ACtHPR, Application No 002/2017 Judgment of 30 September 2021 (merits and reparations) § 100. The Respondent State acceded to the International Covenant on Economic, Social and Cultural Rights on 11 June 1976.

16 *Karata and others v Tanzania* §§101-102.

allowance on the balance of probabilities because they adduced no evidence at all to substantiate the same at trial.” Overall, the Court of Appeal found that the Applicants were actually paid their terminal benefits in three batches, as earlier pointed out, and that their entitlement to subsistence allowance would, therefore, be commensurate to the salary for the period the Applicants spent waiting for their payments. The Court of Appeal thus ordered that the Applicants be paid salaries for the time that they had spent waiting for their terminal benefits.

58. The Court observes that in their submissions before the Court, the Applicants have not addressed the evidential gaps that were pointed out by the Court of Appeal. For example, the Applicants have not demonstrated that they were owed a duty of repatriation by UTM which would in turn have generated the liability to pay allowances while awaiting the repatriation and payment of terminal benefits. The Court finds, therefore, that the Applicants have failed to prove any grounds necessitating its interference with the findings of the Court of Appeal.
59. Given all the above, the Court thus dismisses the Applicants’ claim alleging a violation of their right to work by reason of the non-payment of subsistence allowance.

B. Alleged violation of the right to non-discrimination

60. In their submissions on reparations, the Applicants allege that the Respondent State paid other employees of UTM, whose employment was terminated on the same day as them, subsistence allowance at the rate of Tanzanian Shillings Nine Thousand and Two Hundred (TZS9200) per day. According to the Applicants, this constitutes unacceptable discrimination.
61. The Respondent State did not file any submissions in response to the Applicants’ allegations.

62. The Court recalls that Article 2 of the Charter provides as follows:
Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

63. The Court reiterates its position that Article 2 of the Charter is imperative for the respect and enjoyment of all other rights and freedoms protected in the Charter.¹⁷ The provision proscribes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment. In this regard, the Court recalls that it has accepted that discrimination is “a differentiation of persons or situations on the basis of one or several unlawful criterion/criteria.”¹⁸
64. While the Charter is unequivocal in its proscription of discrimination, not all forms of distinction or differentiation can be considered as discriminatory.¹⁹ A distinction or differential treatment becomes discrimination, contrary to Article 2 of the Charter, when it does not have any objective and reasonable justification and in circumstances where it is not necessary and proportional.²⁰
65. In respect of the present case, the Court notes that the Applicants have not specified the ground(s), among those outlined in Article 2 of the Charter, on the basis of which they allege to have been discriminated. The Court reiterates that with regard to discrimination, the burden lays with the person who alleges discrimination to establish the basis on which the discrimination can be inferred before the defendant is required to demonstrate whether or not the discriminatory conduct can be justified.²¹ While the payment of a different sum of money as subsistence allowance as between similarly situated employees may suggest discrimination, the Court was not provided with information relating to the other employees who were, allegedly, treated differently. The Court thus had no basis on which it could have assessed the payment of Tanzanian Shillings Nine Thousand Two Hundred (TZS9 200) so as to fairly conclude whether this was discriminatory or not. Notably, the Applicants did not provide the Court with a copy of the judgment which they allege ordered the

17 *African Commission on Human and Peoples' Rights (ACHPR) v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9 § 137.

18 *Actions pour la Protection des Droits de l'Homme (APDH) v Republic of Côte d'Ivoire* (merits) (18 November 2016) 1 AfCLR 668 §§146-147.

19 *ACHPR v Kenya* §139.

20 *APDH v Côte d'Ivoire* § 139. See also, *Tanganyika Law Society and others v United Republic of Tanzania* (merits) (14 June 2013) 1 AfCLR 34 § 106.

21 Cf. *Mohamed Abubakari v United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599 § 153-154.

other former UTM employees to be paid subsistence allowance at the rate of Tanzanian Shillings Nine Thousand Two Hundred (TZS9 200).

66. Resultantly, the Court finds that the Applicants have simply made a general allegation of discrimination which they have failed to substantiate.²² In the circumstances, the Court dismisses their allegation of a violation of their right to non-discrimination under Article 2 of the Charter.

IX. Reparations

67. The Applicants prayed the Court to award them reparations.
68. The Respondent State did not make any prayers on reparations

69. Article 27(1) of the Protocol provides that:
If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation including the payment of the fair compensation or reparation.
70. The Court having found that the Respondent State has not violated any of the Applicants' rights dismisses the claim for reparations.

X. Costs

71. The Applicants pray for "costs of this Application" while the Respondent State did not make any submission on costs.

72. The Court notes that Rule 32(2) of its Rules provides that "unless otherwise decided by the Court, each party shall bear its own

²² See, *Alex Thomas v Tanzania* (merits) (20 September 2015) 1 AfCLR 465 § 140; *George Kemboge v Tanzania* (merits) (11 May 2018) 2 AfCLR 369 § 51 and *Kennedy Owino Onyachi and Charles John Njoka v Tanzania* (merits) (28 September 2017) 2 AfCLR 65 § 152.

costs, if any".²³

- 73.** In the present Application, the Court orders that each Party shall bear its own costs.

XI. Operative part

74. For these reasons,
The Court

*Unanimously,
On jurisdiction*

- i. *Declares* that it has jurisdiction.

On admissibility

- ii. *Declares* that the Application is admissible.

On merits

- iii. *Finds* that the Respondent State has not violated the Applicants' right to work under Article 15 of the Charter.
iv. *Finds* that the Respondent State has not violated the Applicants' right to non-discrimination under Article 2 of the Charter;

On reparations

- v. *Dismisses* the Applicants' prayers for reparations;

On costs

- vi. *Orders* each party to bear its own costs.

23 Rule 30(2), Rules of Court, 2 June 2010.

Rutakikirwa v Tanzania (judgment) (2022) 6 AfCLR 165

Application 013/2016, *Stephen John Rutakikirwa v United Republic of Tanzania*

Judgment, 24 March 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENS AOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant, a citizen of the Respondent State, was serving a prison term following a conviction for the offence of armed robbery. He brought this Application, alleging that the conduct of his trial by the domestic courts was in violation of some of his Charter rights. The Court found that the Respondent State had violated the Applicant's right to free legal assistance and awarded the Applicant a sum of money as pecuniary reparation.

Jurisdiction (material jurisdiction, 21-23; withdrawal of Declaration, 24-25)

Admissibility (exhaustion of local remedies, 36-38; filing within a reasonable time, 45-49)

Fair trial (assessment of evidence, 62, 64-65; free legal assistance, 70-73)

Reparations (basis of, 77; scope of, 78; measures of, 79; material prejudice, 80; pecuniary reparations, 83-85; non-pecuniary reparations, 88-90)

I. The Parties

1. Mr. Stephen John Rutakikirwa (hereinafter referred to as "the Applicant") is a national of Tanzania, who at the time of filing of the Application was at Butimba Central Prison, serving a term of thirty (30) years' imprisonment having been convicted, at the District Court of Bukoba, of the offence of armed robbery of Mr. Aziz Karamuna. He challenges the conduct of his trial in the national courts.
2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol, through which it

accepted the jurisdiction of the Court to receive applications from individuals and NGOs (hereinafter referred to as “the Declaration”). On 21 November 2019, the Respondent State deposited, with the African Union Commission an instrument withdrawing the said Declaration. The Court has held that this withdrawal has no bearing on pending cases and new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period of one year after its deposit.¹

II. Subject of the Application

A. Facts of the matter

3. The record before this Court indicates that on 12 November 1998 at 3.30 am within the Kagera region, the Applicant broke into and entered the home of Mr. Aziz Karamuna. Mr Karamuna raised an alarm and confronted the Applicant, who stabbed him with a knife on both arms. The Applicant tried to make away with “a TV deck, four cushions and a radio cassette” but was apprehended by the neighbours, and was handed over to the police.
4. On 9 July 1999, he was charged, before the District Court at Bukoba, with armed robbery. On 12 November 1999, he was convicted of the charge and sentenced to thirty (30) years imprisonment.
5. The Applicant appealed against his conviction and sentence to the High Court, which on 4 March 2008, dismissed his appeal. On 26 May 2008, he appealed to the Court of Appeal of Tanzania, which confirmed the conviction and sentence on 11 November 2011.

B. Alleged violations

6. The Applicant alleges the violation of his rights to a fair trial, namely the right to be heard and the right to defence.

III. Summary of the Procedure before the Court

7. The Application was filed on 3 March 2016, served on the Respondent State on 21 March 2016 and transmitted to the

¹ *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application No 004/2015, Judgment of 26 June 2020 (merits and reparations) §§ 37-39.

entities listed under Rule 42(4) of the Rules² on 12 April 2016.

8. The parties filed their pleadings on the merits and reparations of the Application having benefited from several extensions of time.
9. Pleadings were closed on 12 April 2021 and the Parties were duly notified.

IV. Prayers of the Parties

10. The Applicant prays the Court to:
 - i. Find that his rights were violated as alleged; quash his conviction and set aside his sentence ;
 - ii. Grant him reparations pursuant to Article 27(1) of the Protocol to the tune of five million, seven hundred thousand (TZS 5,700,000) Tanzanian Shillings;
 - iii. Grant him any other reliefs that the Court may deem fit.
11. The Respondent State prays the Court to grant the following orders:
 - i. That the Honourable Court is not vested with jurisdiction to adjudicate the Application;
 - ii. That the Application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules of Court;
 - iii. That the Applicant's prayers be dismissed;
 - iv. That the Applicant continue to serve his lawful sentences;
 - v. That the Applicant not be granted reparations;
 - vi. That the Application be dismissed in its entirety for lack of merit.
12. The Respondent State also prays the Court to find that it has not violated any of the rights of the Applicant.

V. Jurisdiction

13. The Court observes that Article 3 of the Protocol provides as follows:
 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
14. In accordance with Rule 49(1) of the Rules, "[t]he Court shall conduct preliminary examination of its jurisdiction ... in accordance

2 Rule 35(3) of the Rules of Court, 2 June 2010.

with the Charter, the Protocol and these Rules”.

15. On the basis of the above-cited provisions, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.
16. The Respondent State raises an objection to the material jurisdiction of the Court.

A. Objection to material jurisdiction

17. The Respondent State objects to the material jurisdiction of the Court on the basis that the Applicant is requesting the Court to sit as an appellate court on matters that have already been concluded by its municipal courts.
18. According to the Respondent State, Rule 26 of the Rules³ clearly delimits the Court’s jurisdiction and thus the Court does not have the power to “quash the conviction delivered by the Court of Appeal, set aside sentences nor order the release of the Applicant from prison.”
19. The Applicant argues that the Court has jurisdiction to consider this Application as the Application raises alleged violations of Article 3(1) and (2) and 7(1)(c) and (d) of the Charter.

20. The Court recalls that under Article 3(1) of the Protocol, it has jurisdiction to examine any application submitted to it, provided that the rights in relation to which a violation is alleged are protected by the Charter, the Protocol or any other human rights instrument ratified by the Respondent State.⁴
21. The Court recalls, its established jurisprudence, “that it is not an appellate body with respect to decisions of national courts”. However “this does not preclude it from examining relevant proceedings in the national courts in order to determine whether

3 Rule 29(1)(a) of the Rules of Court, 25 September 2020.

4 *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015), 1 AfCLR 465 §§ 45 ; *Kennedy Owino Onyachi and Another v United Republic of Tanzania* (merits) (28 September 2017), 2 AfCLR 65 § 34-36 ; *Jibu Amir alias Mussa and another v United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 329 § 18; *Masoud Rajabu v United Republic of Tanzania*, ACtHPR, Application No 008/2016 Judgment of 25 June 2021 (merits and reparations) § 21.

they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned.”⁵

22. The Court notes that, in the instant case, the Applicant alleges the violation of his right to a fair trial which is provided for in the Charter, to which the Respondent State is a party. Thus, the Court is not being requested to sit as an appellate court, but rather is acting within the confines of its powers.
23. In view of the foregoing, the Court therefore rejects the Respondent State’s objection and finds that it has material jurisdiction to consider this Application.

B. Other aspects of jurisdiction

24. The Court notes, with respect to its personal jurisdiction that, as earlier stated in this Judgment, the Respondent State is a party to the Protocol and on 29 March 2010, it deposited with the African Union Commission, the Declaration made under Article 34(6) of the Protocol. Subsequently, on 21 November 2019, it deposited an instrument withdrawing its Declaration.
25. The Court recalls its jurisprudence that, the withdrawal of a Declaration does not apply retroactively and only takes effect twelve (12) months after the notice of such withdrawal has been deposited, in this case, on 22 November 2020.⁶This Application having been filed before the Respondent State deposited its notice of withdrawal, is thus not affected by it. Consequently, the Court finds that it has personal jurisdiction.
26. With respect to its temporal jurisdiction, the Court notes that the alleged violations occurred after the Respondent State became a Party to the Charter and the Protocol. Furthermore, the alleged violations are continuing in nature since the Applicant remains incarcerated on the basis of what he considers an unfair process. Consequently, the Court holds that it has temporal jurisdiction to

5 *Kenedy Ivan v United Republic of Tanzania* (merits) (March 2019) 3 AfCLR 48 § 26; *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 247 § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287 § 35.

6 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 540 § 67; *Cheusi v Tanzania* (merits), *op.cit.*, §§ 35-39.

consider the Application.⁷

27. The Court also notes that it has territorial jurisdiction given that the alleged violations occurred in the Respondent State's territory.
28. In light of the foregoing, the Court holds that it has jurisdiction to hear this Application.

VI. Admissibility

29. In terms of Article 6(2) of the Protocol, "the Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter."
30. Rule 50(2) of the Rules, which in substance restates the content of Article 56 of the Charter, provides as follows:
Applications filed before the Court shall comply with the following conditions:
 - a. Disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
 - b. Comply with the Constitutive Act of the Union and the Charter;
 - c. Not contain any disparaging or insulting language;
 - d. Not based exclusively on news disseminated through the mass media;
 - e. Be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 - f. Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the Matter;
 - g. Not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union.

A. Objections to the admissibility of the Application

31. The Respondent State submits that the Application does not comply with Rule 40(5) and 40(6)⁸ of the Rules in relation to exhaustion of local remedies and on the requirement to file applications within a reasonable time after exhaustion of local remedies.

⁷ *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197 §§ 71-77.

⁸ Rule 50(2)(e) and (f) of the Rules, 25 September 2020.

i. Objection based on non-exhaustion of local remedies

32. Citing the decision of the African Commission on Human and Peoples' Rights of *Southern African Human rights NGO Network and others v Tanzania*, the Respondent State submits that the exhaustion of local remedies is an essential principle in international law and that the principle requires a complainant to "utilise all legal remedies" in the domestic courts before seizing the International body like the Court.⁹
33. Referring to *Article 19 v Eritrea*, the Respondent State submits that the onus is on the Applicant to demonstrate that he took all the steps to exhaust the domestic remedies and not merely to cast aspersions on the effectiveness of those remedies.¹⁰
34. In this regard, the Respondent State avers that there were remedies available to the Applicant which he should have exhausted. The Respondent State also contends that it enacted the Basic Rights and Duties Enforcement Act, to provide the procedure for the enforcement of constitutional and basic rights as set out in Section 4 thereof.¹¹ It argues that, the Applicant should have filed a petition to the High Court alleging the violations of his rights. It adds that, the Applicant also had the option of filing an Application for review of the Court of Appeal judgment, if he was not satisfied with the same.
35. The Applicant submits that his Application should be found admissible according to "Articles 5(3) and 6(1) and (2) of the Protocol".

36. The Court notes pursuant to Article 56(5) of the Charter, whose provisions are restated in Rule 50(2)(e) of the Rules, that, any application filed before it, has to fulfil the requirement of exhaustion of local remedies. The rule of exhaustion of local remedies aims

9 ACHPR, *Southern African Human rights NGO Network and others v Tanzania* Communication No 333/2006.

10 ACHPR, *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007).

11 "If anybody alleges that any of the provisions of Section 12 to 29 of the Constitution has been, is being, or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress."

at providing States the opportunity to deal with human rights violations within their jurisdictions before an international human rights body is called upon to determine the State's responsibility for the same.¹²

37. This Court has also stated in a number of cases involving the Respondent State that the remedies of filing a constitutional petition in the High Court and use of the review procedure in the Tanzanian judicial system are extraordinary remedies that an Applicant is not required to exhaust prior to seizing this Court.¹³
38. In the instant case, the Court notes from the record, that the Applicant having been convicted at the District Court of Bukoba filed an appeal against his conviction and sentence to the High Court, which dismissed his appeal and then appealed before the Court of Appeal of Tanzania, the highest judicial organ of the Respondent State, and on 11 November 2011, the Court of Appeal upheld the judgment of the High Court. The Court further notes that the claims raised by the Applicant herein were also raised in substance in the national courts, in that he had also challenged the assessment of evidence in the High Court and Court of Appeal.¹⁴ The Respondent State thus had the opportunity to redress the alleged violations. Therefore, the Applicant exhausted all the available domestic remedies.
39. For this reason, the Court dismisses the objection relating to the non-exhaustion of local remedies.

ii. Objection on failure to file the Application within a reasonable time

40. The Respondent State submits that the Applicant has not complied with the requirement under Rule 40(6) of the Rules,¹⁵ that an application must be filed before the Court within a reasonable time after exhaustion of local remedies. It asserts that the Applicant's case at the national courts was concluded on 11 November 2011, and it took four (4) years and four (4) months for the Applicant to

12 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017), 2 AfCLR 9 §§ 93-94.

13 See *Alex Thomas v Tanzania* (merits), *op. cit.* § 65; *Mohamed Abubakari v Tanzania* (merits) (3 June 2016) 1 AfCLR 599 §§ 66-70; *Christopher Jonas v Tanzania* (merits) (28 September 2017) 2 AfCLR 101 § 44.

14 See *Alex Thomas v United Republic of Tanzania* (merits) (2015) 1 AfCLR 465, § 60; *Kennedy Owino Onyanchi and Njoka v United Republic of Tanzania* (merits) (2017) 2 AfCLR 65 § 54.

15 Rule 50(2)(f) of the Rules of the Court.

seize this Court.

41. Noting that Rule 40(6) of the Rules¹⁶ does not prescribe the time limit within which individuals are required to file an application, the Respondent State draws this Court's attention to the fact that the African Commission¹⁷ has held a period of six (6) months to be the standard of reasonable time.
42. The Respondent State argues that the Applicant allowed a reasonable amount of time to elapse before filing the matter in this Court. Thus, it argues that the Application is improper and should be "dismissed".
43. The Applicant did not address this objection specifically but reiterated that his Application should be found admissible according to "Articles 5(3) and 6(1) and (2) of the Protocol."

44. The Court notes that Rule 50(2)(f) of the Rules which in substance restates the contents of Article 56(6) of the Charter, requires an Application to be filed within: "a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter."
45. The Court recalls its jurisprudence, that: "...the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."¹⁸ Some of the circumstances that the Court has taken into consideration include: imprisonment, being lay without the benefit of legal assistance,¹⁹ indigence, illiteracy, lack of awareness of the existence of the Court, intimidation and fear of reprisals²⁰ and

16 *Ibid.*

17 *Michael Majuru v Zimbabwe* (2008) AHRLR 146 (ACHPR 2008).

18 *Norbert Zongo v Burkina Faso* (merits), *op. cit.*, § 92. See also *Alex Thomas v Tanzania* (merits) *op. cit.*, § 73;

19 *Alex Thomas v Tanzania* (merits), *op. cit.*, § 73, *Christopher Jonas v Tanzania* (merits) *op. cit.*, § 54, *Ramadhani v Tanzania* (merits) (11 May 2018) 2 AfCLR 344 § 83.

20 *Association Pour le progress et la Defense des droit des Femmes Maliennes and the Institute for Human Rights and Development in Africa v Republic of Mali* (merits) (11 May 2018), 2 AfCLR 380 § 54.

the use of extra-ordinary remedies.²¹

46. In the instant Application, the Court observes that the judgment of the Court of Appeal in Criminal Appeal No 47 of 2003 was delivered on 11 November 2011. The Court notes that four (4) years, four (4) months and (2) days elapsed between 11 November 2011 and 13 March 2016 when the Applicant filed the Application before this Court. The issue for determination is whether the period that the Applicant took to file the Application before the Court is reasonable.
47. The Court recalls its jurisprudence where it held that the period of five (5) years and one (1) month was reasonable because the Applicants were imprisoned, restricted in their movements and with limited access to information; they were lay, indigent, did not benefit from the assistance of a lawyer in their trials at the domestic court, were illiterate and were not aware of the existence of the Court.²²
48. The Court recalls that in the present case, the Applicant is incarcerated, restricted in his movements and with limited access to information, he was also not assisted by counsel in the cases at the national courts. Taking into consideration these circumstances, the Court finds the period of four (4) years, four (4) months and two (2) days to be reasonable.
49. Accordingly, the Court dismisses the objection relating to the non-compliance with the requirement of filing the Application within a reasonable time after exhaustion of local remedies.

iii. Other conditions of admissibility

50. The Court notes that there is no contention regarding the compliance with the conditions set out in Rule 50(2)(a), (b), (c), (d) and (g) of the Rules. Even so, it must satisfy itself that these conditions have been met.
51. From the record, the Court notes that, the Applicant has been clearly identified by name in fulfilment of Rule 50(2)(a) of the Rules.
52. The Court notes that the claims made by the Applicant seek to protect his rights guaranteed under the Charter. It further notes that

21 *Armand Guehi v Tanzania* (merits and reparations) *op.cit* § 56; *Werema Wangoko v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520 § 49, *Alfred Agbes Woyome v Republic of Ghana* (merits and reparations) (28 June 2019) 3 AfCLR 235 §-§ 83-86.

22 *Christopher Jonas v Tanzania* (merits) (28 September 2017) 2 AfCLR 101 § 54, *Amiri Ramadhani v Tanzania* (merits) (11 May 2018), 2 AfCLR 344 § 50.

one of the objectives of the Constitutive Act of the African Union as stated in Article 3(h) thereof is, the promotion and protection of human and peoples' rights. Furthermore, nothing on file indicates that the Application is incompatible with the Constitutive Act of the African Union. Therefore, the Court holds that the requirement of Rule 50(2)(b) of the Rules is met.

53. The language used in the Application is not disparaging or insulting to the Respondent State or its institutions in fulfilment of Rule 50(2)(c) of the Rules.
54. The Application is not based exclusively on news disseminated through mass media as it is founded on legal documents in fulfilment with Rule 50(2)(d) of the Rules.
55. Furthermore, the Application does not concern a case which has already been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union in fulfilment of Rule 50(2)(g) of the Rules.
56. The Court, therefore, finds that all the admissibility conditions have been met and that this Application is admissible.

VII. Merits

57. The Applicant avers that the Respondent State has violated Articles 7(1)(c) and (d) of the Charter in relation to the following allegations:
 - i. The Court of Appeal erred in its assessment of the evidence;
 - ii. Violation of the right to free legal assistance.

A. Allegation relating to the assessment of evidence

58. The Applicant argues that the Court of Appeal erred in reaching its decision as it did not consider all the evidence that he adduced. He further avers that he submitted several grounds of appeal with evidence to substantiate the same but the Court of Appeal "combined his grounds of appeal to (6) six" thereby violating his right under Article 3(1) and (2) of the Charter.
59. The Respondent State disputes the submission of the Applicant herein and argues that the Court of Appeal noted that the Applicant advanced "a total of five (5) grounds of appeal" and then considered all of them before making its finding. Consequently, it avers that this allegation lacks merit and should be dismissed.

60. The Court notes that although the Applicant has relied on Article 3 of the Charter to support the alleged violation, his claim questions the fairness of the conduct of his appeal and more aptly falls under Article 7 of the Charter.
61. Article 7(1) of the Charter provides: “[e]very individual shall have the right to have his cause heard”.
62. This Court has in the past noted “.... that a fair trial requires that the imposition of a sentence in a criminal offence, and in particular a heavy prison sentence, should be based on strong and credible evidence. That is the purport of the right to the presumption of innocence also enshrined in Article 7 of the Charter.”²³
63. In the instant case, the Applicant alleges that the Court of Appeal only considered some of his grounds of appeal which resulted in prejudice against him. Nevertheless, he did not substantiate this allegation.
64. Furthermore, the Court observes from the record that the Court of Appeal noted that the Applicant advanced five (5) grounds of appeal during the hearing of the appeal. Subsequently, the Court evaluated each and every ground on its merit and concluded that the Applicant’s appeal lacked merit.
65. The Court thus finds that the manner in which the Court of Appeal evaluated the Applicant’s appeal does not disclose any manifest error or miscarriage of justice. The Court therefore, dismisses this allegation and finds that the Respondent State has not violated Article 7(1) of the Charter.

B. Alleged violation of the right to free legal assistance

66. The Applicant contends that he was not provided with free legal assistance during the proceedings in the national courts in violation of Article 7(1)(c) of the Charter.
67. The Respondent State submits that the provision of legal aid is not mandatory according to its Criminal Procedure Act. It further argues that the fact that the Applicant did not benefit from free legal assistance did not occasion miscarriage of justice because

23 *Mohamed Abubakari v Tanzania* (merits) § 174; *Diocles Williams v United Republic of Tanzania* (merits and reparations) (21 September 2018) 2 AfCLR 426 § 72. *Majid Goa v United Republic of Tanzania* (merits and reparations) (2019) 3 AfCLR 498 § 72.

he was afforded other fair trial guarantees such as being allowed to provide his evidence and also call witnesses.

68. Consequently, the Respondent State submits that the allegation herein is “utterly baseless and devoid of merit.”

69. Article 7(1)(c) of the Charter provides as follows:

“[e]very individual shall have the right to have his cause heard. This comprises: [...] c) The right to defence, including the right to be defended by counsel of his choice.”

70. The Court notes that Article 7(1)(c) of the Charter does not provide explicitly for the right to free legal assistance. This Court has however, interpreted this provision in light of Article 14(3) (d) of the International Covenant on Civil and Political Rights (hereinafter referred to as “ICCPR”),²⁴ and determined that the right to defence includes the right to be provided with free legal assistance.²⁵ The Court has also held that an individual charged with a criminal offence is entitled to free legal assistance without having requested for it, provided that the interests of justice so require. This will be the case where an accused is indigent and is charged with a serious offence which carries a severe penalty.²⁶
71. The Court notes that the Applicant was not afforded free legal assistance throughout the proceedings in the national courts. The Court further notes that the Respondent State does not dispute that the offence is serious and the penalty provided by law is severe, it only contends that the denial of legal aid did not occasion miscarriage of justice.
72. Given that the Applicant was charged with the serious crime of armed robbery, carrying a severe mandatory punishment of thirty (30) years’ imprisonment; the interest of justice warranted that he be provided with free legal assistance.²⁷

24 The Respondent State became a State Party to ICCPR on 11 June 1976.

25 *Alex Thomas v Tanzania* (merits) § 114; *Isiaga v Tanzania* (merits), § 72; *Onyachi and Njoka v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65 § 104.

26 *Alex Thomas v Tanzania op.cit.*, § 123, see also *Mohammed Abubakari v Tanzania* (merits) § § 138-139.

27 *Ibid.*

73. By failing to provide free legal assistance, the Court finds that the Respondent State violated Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR.

VIII. Reparations

74. The Applicant prays the Court to quash his conviction and sentence and order his release. Further, he prays that the Court grant him reparations for the violations suffered.
75. The Respondent State prays the Court to deny the Applicant's request for reparations.

76. Article 27(1) of the Protocol provides: "if the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."
77. The Court recalls its earlier judgments and restates its position that, "to examine and assess Applications for reparation of prejudices resulting from human rights violations, it takes into account the principle according to which the State found guilty of an internationally wrongful act is required to make full reparation for the damage caused to the victim".²⁸
78. The Court also restates that reparations "...must, as far as possible, erase all the consequences of the wrongful act and restore the state which would presumably have existed if that act had not been committed."²⁹
79. Measures that a State may take to remedy a violation of human rights include: restitution, compensation and rehabilitation of the victim, as well as measures to ensure non-repetition of the violations taking into account the circumstances of each case.³⁰

28 *Mohamed Abubakari v Tanzania* (merits) § 242 (ix), *Umuhoza v Republic of Rwanda* (reparations) (7 December 2018) 2 AfCLR 202 § 19.

29 *Mohamed Abubakari v United Republic of Tanzania* (reparations) (4 July 2019) 3 AfCLR 334 § 21; *Alex Thomas v United Republic of Tanzania* (reparations) (4 July 2019) 3 AfCLR 287 § 12; *Wilfred Onyango Nganyi and 9 others v United Republic of Tanzania* (reparations) (4 July 2019) 3 AfCLR 308 § 16.

30 *Ingabire Umuhoza v Rwanda* (reparations) *op. cit.*, § 20.

80. The Court further reiterates that the general rule with regard to material prejudice is that there must be a causal link between the established violation and the prejudice suffered by the Applicant and the onus is on the Applicant to provide evidence to justify his prayers.³¹ With regard to moral prejudice, the Court exercises judicial discretion in equity.

A. Pecuniary Reparations

81. The Applicant in his submissions on reparations avers that he has suffered hardship as he was charged and convicted of armed robbery on the basis of unfair proceedings. He further submits that his wife and five (5) children have been deprived of a husband and a father and thus prays the Court to grant him a total amount of Five Million, Seven Hundred Thousand (5,700,000) Tanzanian shillings (TZS) as “compensation” for the time spent in prison illegally.
82. The Respondent State avers that the Applicant has failed to prove the wrongful act that it committed and failed to provide evidence that he suffered prejudice as alleged. Furthermore, that he has failed to show a causal link between the alleged violations and prejudice suffered and thus submits that the Applicant’s prayer for reparations should be dismissed.

83. The Court notes in the instant case, that the Applicant has not established the link between the violation found and the prejudice which he claims to have suffered. The Court thus rejects the prayer for Tanzanian Shillings Five million, Seven Hundred Thousand (TZS 5,700,000).
84. The Court recalls that its only finding in the present case was that the Respondent State violated the Applicant’s right to free legal assistance by failing to avail him the services of counsel in the course of his trials in the domestic courts.

31 *Christopher R. Mtikila v United Republic of Tanzania* (reparations) (13 June 2014) 1 AfCLR 72 § 40; *Lohé Issa Konaté v Burkina Faso* (reparations) (3 June 2016) 1 AfCLR § 15.

85. The Court notes that the violation it established caused moral prejudice to the Applicant and therefore, in exercising its discretion in equity, awards an amount of Tanzanian Shillings Three Hundred Thousand (TZS 300,000) as fair compensation.³²

B. Non-Pecuniary Reparations

86. The Applicant prays the Court to quash his conviction and order his release from prison.
87. The Respondent State submits that “this Court has no criminal jurisdiction to nullify the Applicant’s sentence and order his release from prison”.

88. Regarding the prayer to quash his conviction, the Court notes that it did not determine whether the conviction of the Applicant was warranted or not. Furthermore, the Court was satisfied that the manner in which the Respondent State determined the case did not occasion any error or miscarriage of justice to the Applicant that required its intervention.
89. As regards the prayer for release, the Court has stated that this measure can be ordered only in specific and compelling circumstances. This would be the case “if an Applicant sufficiently demonstrates or the Court by itself establishes from its findings that the Applicant’s arrest or conviction is based entirely on arbitrary considerations and his continued imprisonment would occasion a miscarriage of justice.”³³
90. In the instant case, the Court recalls that it has found that the Respondent State violated the Applicant’s right to a fair trial by failing to provide him with free legal assistance. Without minimising the gravity of the violation, the Court considers that the nature of the violation in the instant case does not reveal any circumstance that signifies that the Applicant’s imprisonment amounts to a miscarriage of justice or an arbitrary decision. The Applicant also

32 See *Anaclet Paulo v United Tanzania* (merits) (21 September 2018) 2 AfCLR 446 § 107; *Minani Evarist v United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 402 § 85.

33 *Minani Evarist v Tanzania* (merits) *op.cit.*, § 82.

failed to elaborate on specific and compelling circumstances to justify the order for his release.³⁴

91. In view of the foregoing, the Court dismisses the Applicant's prayer to quash his conviction and order his release.

IX. Costs

92. The Respondent State prays the Court to order the Applicant to bear its costs.
93. Pursuant to Rule 32(2) of the Rules³⁵ "unless otherwise decided by the Court, each party shall bear its own costs."
94. The Court finds no reason to depart from this provision. Consequently, it rules that each party shall bear its own costs.

X. Operative part

95. For these reasons,
The Court

*Unanimously,
On jurisdiction*

- i. *Dismisses* the objection to material jurisdiction;
- ii. *Declares* that it has jurisdiction.

On admissibility

- iii. *Dismisses* the objections to the admissibility of the Application;
- iv. *Declares* the Application admissible.

On merits

- v. *Finds* that the Respondent State has not violated the Applicant's right to a fair trial under Article 7(1) of the Charter as regards the Court of Appeal's assessment of the evidence;
- vi. *Finds* that the Respondent State has violated the Applicant's right to defence under Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR for failure to provide free legal assistance;

34 *Jibu Amir alias Mussa and another v Tanzania* (merits and reparations), § 97; *Kalebi Elisamehe v Tanzania* (merits and reparations), § 112; and *Minani Evarist v Tanzania* (merits and reparations), § 82.

35 Rule 30 of the Rules of Court, 2 June 2010.

On Reparations

On Pecuniary Reparations

- vii. *Rejects* the prayer for material prejudice;
- viii. *Grants* the Applicant's prayer for reparation for moral prejudice suffered and awards him the sum of Tanzanian Shillings Three Hundred Thousand (TZS 300, 000);
- ix. *Orders* the Respondent State to pay the sum of Tanzanian shillings Three Hundred Thousand free from tax as fair compensation to be made within six (6) months from the date of notification of this Judgment, failing which it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment until the amount is fully paid.

On Non-Pecuniary Reparations

- x. *Dismisses* the Applicant's prayer for the Court to quash his conviction and order his release from prison.

On Implementation and Reporting

- xi. *Orders* the Respondent State to submit to the Court, within six (6) months from the date of notification of this judgment, a report on the status of implementation of orders under paragraphs (viii) and (ix) of this operative part and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On costs

- xii. *Orders* each party to bear its own costs.

Touray & Ors v The Gambia (ruling) (2022) 6 AfCLR 183

Application 026/2020, *Emil Touray, Saikou Jammeh, Haji Suwareh, and Isatou Susso v Republic of The Gambia*

Ruling, 24 March 2022. Done in English and French, the English text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

The Applicants are all citizens of the Respondent State. Two of the Applicants who had unsuccessfully applied for permits to hold protests within the Respondent State were arrested and detained on account of holding a protest without a permit as required by the Public Order Act of the Respondent State. The Applicants brought this Application, challenging the validity of the Public Order Act and alleging that the arrest and detention of two of the Applicants violated some of their Charter protected rights. Following the failure of the Respondent State to file its Response, at the close of pleadings, the Court proceeded to render its judgment in default. The Court held that the Application was inadmissible on the ground that it had previously been settled in accordance with the principles of the African Charter.

Procedure (conditions for default decision, 13)

Admissibility (exhaustion of local remedies, 31-35; filing within a reasonable time, 37-38; previous settlement in accordance with the principles of the Charter, 40-45)

Joint Dissenting Opinion: BEN ACHOUR and TCHIKAYA

Admissibility (*res judicata*, 5-8; identity of parties, 9-10; jurisdictional settlement, 13-15)

I. The Parties

1. Emil Touray, Saikou Jammeh, Haji Suwareh, Isatou Susso (hereinafter referred to as the “First Applicant”, “Second Applicant”, “Third Applicant” and “Fourth Applicant” respectively, or “the Applicants” jointly) are nationals of the Republic of The Gambia. The First and Second Applicants are journalists while the Third and Fourth Applicants are entrepreneurs. The Applicants challenge the validity of Section 5 of the Respondent State’s Public Order Act No 7 of 1961 as revised in 1963 and 2009 (hereinafter referred to as “Public Order Act”).
2. The Application is filed against the Republic of The Gambia (hereinafter referred to as “the Respondent State”) which became a Party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and

to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights on 25 January 2004. On 3 February 2020, it deposited with the African Union Commission, the Declaration provided for under Article 34(6) of the Protocol through which it accepts the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.

II. Subject of the Application

A. Facts of the matter

3. It emerges from the record that, on 9 May 2019, the Third and Fourth Applicants, members of a group named "3 years jotna"¹ submitted an application to the Inspector General of Banjul for authorisation for a licence under Section 5 of the Respondent State's Public Order Act.²
4. Having not received a response, on 10 May 2019, the group assembled at the Senegambia area with the intention of holding the protest. However, they were arrested by the police and later charged with the offences of "unlawful assembly", "conduct likely to cause breach of peace" and "conspiracy to commit offences". The group subsequently re-applied for a licence to hold the

1 "3 years *Jotna*" literally means "3 years have arrived" in Wolof.

2 (1) The Inspector-General of Police in the city of Banjul or the Kanifing Municipality or; in any of the regions, the Governor or other person authorized by the president may direct the conduct of all public processions and prescribe the route by which and the times at which any procession may pass. (2) A person who is desirous of forming any public procession shall first make application for a license to the Inspector-General of Police or the Governor of the region, or other person authorized by the President, as the case may be, and if the Inspector-General of Police or the Governor of the region or other person authorized by the President is satisfied that the procession is not likely to cause a breach of the peace, he or she shall issue a license specifying the name of the license and defining the conditions on which the procession is permitted to take place. (3) A condition restricting the display of flags, banners, or emblems section shall not be imposed under subsection (2) of this section except such as are reasonably necessary to prevent risk of a breach of the peace. (4) A magistrate or police officer not below the rank of Sub-inspector may stop any public procession for which a license has not been issued or which violates any of the conditions of a license issued under subsection (2) of this section, and may order it to disperse. (5) A public procession which – (b) Takes place without a license under subsection (2) of this section, or (c) Neglects to obey any order given under subsection (4) of this section, is deemed to be an unlawful assembly, and all persons taking part in the procession, and in the case of a public procession for which no license has been issued, all persons taking part in the convening, collecting or directing of the procession commit a cognizable offence and on summary conviction before a Magistrate, are liable to imprisonment for a term of three years. Quoted from the ECOWAS CCJ judgment.

protest but never received a response. On 9 July 2019, the group was informed by the police that the charges levelled against them had been dropped.

B. Alleged violations

5. The Applicants allege the following:
 - i. Violation of the rights to freedom of assembly under Article 11 of the Charter and Article 21 of the International Covenant on Civil and Political Rights (hereinafter referred to as “the ICCPR”), and freedom of expression under Article 9(2) of the Charter and Article 19(2) of ICCPR;
 - ii. Violation of Article 1 of the Charter and Article 2(2) of ICCPR.

III. Summary of the procedure before the Court

6. The Application was filed on 16 September 2020 and served on the Respondent State on 23 September 2020. The Applicants filed their submissions on reparations on 13 October 2020 and these were transmitted to the Respondent State on 16 October 2020.
7. On 26 October 2020, the Respondent State filed its list of representatives. On 10 December 2020, the Respondent State was reminded to file its response but it failed to file a response.
8. On 15 April 2021, the Applicants filed a request for a judgment in default and this was transmitted to the Respondent State on 23 April 2021. On 17 June 2021, the Respondent State was further reminded to file its Response and that if it failed to file a Response within the stipulated time, the Court would proceed to deliver a judgment in default. The Respondent State has failed to file a Response.
9. Pleadings were closed on 22 September 2021 and the Parties were notified thereof.

IV. Prayers of the Parties

10. The Applicants pray the Court for the following:
 - a. Declaration that Section 5 of the Public Order Act of Gambia is a violation of the right to freedom of assembly under Article 11 of the Charter and Article 21 of ICCPR;
 - b. Declaration that Section 5 of the Public Order Act of Gambia is a violation of the right to freedom of expression under Article 9(2) of the Charter and Article 19(2) of ICCPR;
 - c. a Declaration that the rights of the Third and Fourth Applicants under

Article 11 of the Charter and Article 21 on one hand, and further under Article 9(2) of the Charter and 19(2) of the ICCPR on the other hand, were violated by the disbandment of the 10 May 2019 protest and their subsequent arrest.

- d. a Declaration that the Republic of the Gambia has violated Articles 1 of the Charter and 2(2) of the ICCPR.
 - e. Order the Republic of the Gambia to immediately repeal or amend Section 5 of the Public Order Act to align with provisions of the Article 9(2) and 11 of the Charter and Articles 19(2) and 21 of the ICCPR.
 - f. An order for costs;
 - g. Any other order that the Court deems fit in the circumstances.
11. The Respondent State did not participate in these proceedings and, therefore, did not make any prayers.

V. On the default of the Respondent State

12. Rule 63(1) of the Rules of the African Court on Human and Peoples' Rights (hereinafter referred to as "Rules") provides:
- Whenever a party does not appear before the Court, or fails to defend its case within the period prescribed by the Court, the Court may, on the Application of the other party, or on its own motion, enter a decision in default after it has satisfied itself that the defaulting party has been duly served with the Application and all other documents pertinent to the proceedings.
13. The Court notes that Rule 63(1) sets out three conditions for a decision in default: i) the notification to the Respondent State of all the documents on file ii) the default of the Respondent State; iii) application by the other party for a decision in default or the Court on its own motion decides to enter a decision in default.
14. On the first condition, the Court notes that, the Registry notified the Respondent State of all the pleadings submitted by the Applicant. With respect to the second condition, the Respondent State, was granted sixty (60) days to file its Response. However, it failed to do so. The Court also sent two reminders to the Respondent State on 10 December 2020 and 17 June 2021 granting it thirty (30) days respectively to file its Response but it failed to do so. The Court thus finds that the Respondent State has defaulted in appearing and defending the case.
15. With respect to the last condition, on 15 April 2021, the Applicants requested the Court for a decision in default thereby fulfilling this condition.

16. The required conditions having thus been fulfilled, the Court enters this decision in default.³

VI. Jurisdiction

17. The Court observes that Article 3 of the Protocol provides as follows:
 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
18. Pursuant to Rule 49(1) of the Rules “[t]he Court shall conduct preliminarily examination of its jurisdiction ... in accordance with the Charter, the Protocol and these Rules”.
19. From the record, the Court finds that it has personal jurisdiction, as the Respondent State is a party to the Protocol and has deposited the Declaration provided for under Article 34(6) of the Protocol with the African Union Commission.
20. The Court has material jurisdiction because the Applicants allege the violation of the Charter and the ICCPR⁴ to which the Respondent State is a party.
21. The Court has territorial jurisdiction as the facts of the case occurred in the Respondent State’s territory.
22. As regards temporal jurisdiction, the Court notes that the alleged violations occurred after the Respondent State became a Party to the Charter and the Protocol. Furthermore, the alleged violations are continuing in nature since the impugned law remains in the laws of the Respondent State.⁵
23. From the foregoing, the Court finds that it has jurisdiction to hear the instant case.

3 *African Commission on Human and Peoples’ Rights v Libya* (merits) (3 June 2016) 1 AfCLR 153 §§ 38-42; *Robert Richard v United Republic of Tanzania*, ACTHPR, Application No 035/2016, Judgment of 2 December 2021 (merits and reparations) § 16.

4 The Respondent State became a Party to the ICCPR on 22 March 1979.

5 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l’Homme et des Peuples v Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197 §§ 71-77.

VII. Admissibility

24. In terms of Article 6(2) of the Protocol, “the Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter.” Pursuant to Rule 50(1) of the Rules, “[t]he Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules.”
25. Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:
Applications filed before the Court shall comply with all the following conditions:
 - a. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
 - b. comply with the Constitutive Act of the Union and the Charter;
 - c. not contain any disparaging or insulting language;
 - f. not be based exclusively on news disseminated through the mass media;
 - e. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 - f. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
 - g. not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union.
26. The Court notes that the conditions of admissibility set out in Rule 50(2) of the Rules are not in contention between the parties. However, pursuant to Rule 50(1) of the Rules, the Court is required to determine if the Application fulfils all the admissibility requirements.
27. From the record, the Court notes that the Applicants have been identified by name, in fulfilment of Rule 50(2)(a) of the Rules.
28. The Court notes that the claims made by the Applicants seek to protect their rights guaranteed under the Charter. Furthermore, one of the objectives of the Constitutive Act of the African Union stated in Article 3(h) is the promotion and protection of human and peoples' rights. The Court therefore considers that the Application is compatible with the Constitutive Act of the African Union and the Charter, and holds that it meets the requirement of Rule 50(2) (b) of the Rules.

29. The language used in the Application is not disparaging or insulting to the Respondent State or its institutions in fulfilment of Rule 50(2)(c) of the Rules.
30. The Application is not based exclusively on news disseminated through mass media but on legal documents in fulfilment of Rule 50(2)(d) of the Rules.
31. With regard to the requirement of exhaustion of local remedies, the Court notes that pursuant to Article 56(5) of the Charter and Rule 50(2)(e) of the Rules, in order for an application to be admissible, local remedies must have been exhausted, unless the remedies are unavailable, ineffective, insufficient or the procedure to pursue them is unduly prolonged.⁶
32. In the instant case, the Court notes that the Applicants have made two claims. The first claim is related to the application of Section 5 of the Respondent State's Public Order Act, while the second claim is related to the alleged violations of the rights of the Third and Fourth Applicants.
33. For the first claim, the Applicants were required to seize the Supreme Court of the Respondent State to challenge the constitutionality of the Public Order Act. However, the Applicants adduced evidence showing that the Supreme Court of the Respondent State had already considered a case by other Applicants, that is Ousainou Darboe and others, challenging the constitutionality of Section 5 of the Public Order Act and it held that the impugned law was consistent with the Respondent State's constitution.⁷
34. In this regard, the Court holds that the Applicants could not have been expected to also seize the Supreme Court, the highest Court of the Respondent State, as there would have been no prospect of success, making the remedy ineffective.⁸
35. With regard to the claim that the rights of the Third and Fourth Applicant were violated in relation to the disbandment of the protest and their subsequent arrest in 2019, the Court notes that the Applicants were required to file their claims at the High Court of the Respondent State and exhaust other local remedies before seizing this Court. However, they did not make any submissions or adduce evidence on exhaustion of local remedies. The Court therefore holds that this claim will not be considered further for lack of exhaustion of local remedies.

6 *Zongo and Others v Burkina Faso* (preliminary objections) *op. cit.* § 84.

7 See SC/03/2016 *Ousainou Darboe and 19 others v Inspector General of Police and 2 others*

8 *Jebra Kambole v United Republic of Tanzania*, ACTHPR, Application No 018/2018, Judgment of 15 July 2020 (merits and reparations) §§ 37-38.

36. With respect to filing an Application within a reasonable time, the Court recalls that Article 56(6) of the Charter, requires that an Application be filed within: “a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter.”
37. In the present Application, the Court notes that the local remedies were ineffective as regards the challenge of the Public Order Act. However, the Court notes that Article 56(6) of the Charter empowers the Court to set a date as the commencement of the time limit. In this regard, the Court notes that the Respondent State deposited its Declaration under Article 34(6) of the Protocol on 3 February 2020 and therefore, the Applicants could only seize the Court after that date. The Applicants filed their Application on 16 September 2020, that is seven (7) months and thirteen (13) days after the Respondent State filed its Declaration.
38. The Court notes that the Applicants filing of their Application within seven (7) months and thirteen (13) days after the Respondent State deposited its Declaration under Article 34(6) of the Protocol is reasonable, given that it was filed within the same year as the Declaration was deposited.
39. Lastly, according to Article 56(7) of the Charter and Rule 50(2)(g) of the Rules of Court, an application will only be considered if it has not been “settled” “in accordance with the principles” of the Charter of the United Nation or the Constitutive Act of the African Union or the provisions of the Charter.⁹
40. The Court notes that the notion of “settlement” implies the convergence of three major conditions: (i) the existence of a first decision on the merits (ii) the identity of the parties; (iii) identity of the applications or their supplementary or alternative nature or whether the case flows from a request made in the initial case.¹⁰
41. With regard to a first decision on the merits, the Court recalls that on 20 January 2020, the Economic Community of West African States, Court of Justice (hereinafter referred to as “ECOWAS CCJ”) rendered judgment on the merits in *Ousainou Darboe and*

9 *Jean-Claude Roger Gombert v Côte d'Ivoire* (jurisdiction and admissibility) (22 March 2018) 2 AfCLR 270 § 44. *Dexter Johnson v Republic of Ghana* (jurisdiction and admissibility) (28 March 2019) 3 AfCLR 99 § 45.

10 See *Gombert v Côte d'Ivoire* (jurisdiction and admissibility) § 45; *Dexter Johnson v Ghana* (jurisdiction and admissibility) § 48; See *Suy Bi Gohoré v Côte d'Ivoire*, ACTHPR, Application No 044/2019, Judgment of 15 July 2020 (merits and reparations) § 104.

31 others v the Republic of the Gambia.¹¹ The ECOWAS CCJ held:

In light of actions of the agents of the Respondent in the instant case, the Court holds that the provisions of Section 5 of the Public Order Act of the Republic of The Gambia did not violate the provisions of Article 11 of the African Charter and further holds that the Public Order Act, Section 5 of the Laws of The Gambia is in tandem with permissible restrictions in ensuring law and order. However, the requirement of having to obtain the approval of the Inspector General of Police of the Gambian Police Force will undermine the exercise of such right and therefore needs a review.¹²

42. With respect to the identity of the parties, the Court notes that the Respondent State is the same in both cases, it is therefore only necessary to establish the identity of the Applicants. The Applicants before this court are Emil Touray, Saikou Jammeh, Haji Suwareh and Isatou Susso while the Applicants in the ECOWAS case were Ousainou Darboe and 31 others. None of the thirty-two Applicants in the ECOWAS case appear before this Court in the Emil Touray Application. However, in relation to this requirement, the Court recalls its previous judgment where it held that:

...nowhere in the file before the Court is there a connection between APDH and the Applicants suggested, let alone established. However since the current Application and *APDH v Côte d'Ivoire* (merits) can be qualified as public interest cases, the “identity of parties” can be considered as being similar, to the extent that they both aim to protect the interest of the public at large rather than only specific private interests.¹³

43. Consequently, given that the Applicants in the Emil Touray application challenge the validity of the law, which had been challenged at the ECOWAS CCJ, then both parties can be said to have filed public interest cases and thus both sets of Applicants are closely associated with the claim and can be deemed identical.
44. With regard to the identity of the claims, the Court must decide whether the legal and factual basis of the claims are the same. The Court notes that both cases challenge the validity of Section 5 of the Respondent State’s Public Order Act in relation to international instruments ratified by the Respondent State and the facts in both cases arise from the protests and the subsequent arrests and detention of the protesters. Furthermore, the prayers

11 ECOWAS, Suit No ECW/CCJ/APP/27/1 – *Ousainou Darboe and 31 others v the Republic of the Gambia*.

12 *Ibid* at p 34.

13 *Suy Bi Gohoré v Côte d'Ivoire* (merits and reparations) § 105.

in both cases are similar in that they request that the Section 5 of the Public Order Act be declared inconsistent with the provisions of the Charter. In light of the foregoing, the Court finds that the claims in both the ECOWAS CCJ and this Court arise from the same legal and factual basis and are therefore identical.

45. In light of the foregoing, the Court finds that the claim against Section 5 of the Public Order Act has been settled in accordance with the principles of the Charter and therefore, the Application fails to meet the requirement set out under Article 56(7) of the Charter and Rule 50(2)(g) of the Rules and is declared inadmissible.

VIII. Costs

46. The Applicant prays the Court, for the Respondent State to pay for the costs of the Application. The Respondent State did not file a Response.

47. The Court notes that Rule 32(2) of its Rules¹⁴ provides that “unless otherwise decided by the Court, each party shall bear its own costs.”
48. Therefore, the Court decides that each Party shall bear its own costs.

IX. Operative part

49. For these reasons,

The Court

Unanimously,

On jurisdiction

- i. *Declares* that it has jurisdiction;

By a majority of Nine (9) for, and Two (2) against, Justice Blaise TCHIKAYA, the Vice President and Justice Rafaâ BEN ACHOUR Dissenting

On admissibility

- ii. *Declares* the Application inadmissible;

14 Rule 30(2) of the Rules of Court, 2 June 2010.

On costs

- iii. Orders each Party to bear its own costs.

Joint Dissenting Opinion: BEN ACHOUR and TCHIKAYA

1. We deeply regret that we were unable to vote in favour of the Court's decision to declare Application No 026/2020 *Emil Touray et al. v The Republic of The Gambia* inadmissible pursuant to Article 56(7) of the African Charter on Human and Peoples' Rights (hereinafter "the Charter") and Rule 50(2)(g) of the Rules of Court (hereinafter "the Rules").
2. Indeed, in paragraph 41 of the judgment, the Court "[r]ecalls that on 20 January 2020, the Economic Community of West African States, Court of Justice (hereinafter referred to as "ECOWAS CCJ") rendered judgment on the merits in *Ousainou Darboe and 31 others v the Republic of the Gambia*.¹ The ECOWAS CCJ held as follows:

In light of actions of the agents of the Respondent in the instant case, the Court holds that the provisions of Section 5 of the Public Order Act of the Republic of The Gambia did not violate the provisions of Article 11 of the African Charter and further holds that the Public Order Act, Section 5 of the Laws of The Gambia is in tandem with permissible restrictions in ensuring law and order. However, the requirement of having to obtain the approval of the Inspector General of Police of the Gambian Police Force will undermine the exercise of such right and therefore needs a review.²

3. The Court draws a conclusion in § 43 unrelated to the foregoing, that: "Consequently, given that the Applicants in the Emil Touray application challenge the validity of the law, which had been challenged at the ECOWAS CCJ, then both parties can be said to have filed public interest cases and thus both sets of Applicants are closely associated with the claim and can be deemed identical". In other words, the Court considers that the case was

1 ECOWAS, Application No ECW/CCJ/APP/27/1 – *Ousainou Darboe and 31 others v the Republic of The Gambia*.

2 *Ibid.*, § 34.

not settled by the ECOWAS Court notwithstanding the fact that the parties are not identical.

4. In our view, the case before the Court was not “settled” by the ECOWAS Court of Justice. First, the identity of the parties before the ECOWAS Court on the one hand, and before this Court on the other, is not established (A). Secondly, and assuming that the identity of the parties is certain, we consider that the case was not settled by ECOWAS and that its referral to the Court was in order (B).

I. The identity of the parties is not established in the instant case

5. Article 56(7) of the Charter, which restates *in extenso* the provisions of Article 50(2)(g) of the Rules of Procedure, sets out the admissibility requirements of communications to the African Commission on Human Rights (hereinafter “the Commission”) and Applications brought before the Court, namely that they “do not raise any matter or issues previously settled³ by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union. As recognised by the doctrine, “[this condition is a factor of legal certainty. It refers to the concept of ‘*res judicata*’ and suggests that rules made on the basis of the African Charter have the force of *res judicata*]”.⁴
6. According to the jurisprudence of the African Commission,⁵ the purpose of such a provision is to avoid accusing member states twice for the same alleged violations of human rights. Indeed, this principle is linked to the recognition of the force of *res judicata* of decisions rendered by international and regional courts and/or institutions such as the African Commission.
7. However, as is clear from the concordant jurisprudence of the Commission and the Court, applying this condition requires that the parties, the case and the subject of the communication

3 “Settled” in English.

4 Fatsah Ouguergouz, “Article 56”, in Maurice Kamto (direction), *La Charte africaine des droits de l’homme et des peuples et le Protocole portant création de la Cour africaine des droits de l’homme et des peuples, commentaire article par articles*, Brussels. Éditions Bruylant and Éditions de l’Université de Bruxelles, 2011, pp. 1024-1050.

5 ACTHPR, Communication 260/02: *Bakweri Land Claims Committee v Cameroon*, 36th Ordinary Session of 23 November to 7 December 2004, § 49.

submitted to the Commission or the Application brought before the Court be the same as in the case already settled in accordance with the Charter.⁶

8. The African Court thus agrees with the position of the European Court that the Application must not be essentially the same as another Application, that is, the facts, parties and claims must not be the same.
9. In the instant case, the Court explicitly admits that the Applicants before the ECOWAS Court and those before the ACtHPR are not the same. Indeed, in § 43 of the judgment, this Court explicitly notes that “The Applicants before this court are Emil Touray, Saikou Jammeh, Haji Suwareh and Isatou Susso while the Applicants in the ECOWAS case were Ousainou Darboe and 31 others.”⁷ The Court elaborates on this finding in no uncertain terms by stating that “None of the thirty-two Applicants in the ECOWAS case *appear before this Court* in the Emil Touray Application”.
10. Curiously, the Court disregards this first fundamental requirement and draws a conclusion which could not be more astonishing, by ending § 43 with an erroneous reference to its own judgment in *Suy Bi Gohoré v Côte d’Ivoire*.⁸ In the said judgment, the Court considered if the parties were the same in the applications, namely, *Suy Bi Gohoré* and *APDH*, both of which were before it. It should be noted that, contrary to what this judgment suggests, the Court did not find that the *Suy Bi Gohoré* Application was inadmissible, but did deal with it on the merits, despite the fact that the parties were the same.

II. The case has not been settled by the ECOWAS Court of Justice

11. In paragraph 45 of its judgment, the Court “[c]onsiders the claim against Section 5 of the Public Order Act has been settled in

6 In this sense, see the judgments of the Court of Appeal: *Gombert v Côte d’Ivoire*, Judgment of 22 March 2018; *Dexter Johnson v Ghana*, Judgment of 28 March 2019; *Suy Bi Gohoré v Côte d’Ivoire*, Judgment of 15 July 2020.

7 The Applicants before the ECOWAS Court of Justice are: Oussainou Darboe, Kemmesseng Jammeh, Femi Peters, Lamin Dibba, Lamin Jatta, Yaya Bah, Baboucarr Camara, Fakebba Colley, Ismaila Ceesay, Mamodou Fatty, Dodou Ceesay, Samba Kinteh, Mamudu Manneh, Nfamara Kuyateh, Fanta Darboe-Jawara, Lamin Njie, Juguna Suso, Momodou L. K Sanneh, Yaya JammehMasaneh Lalo Jawlan, Lamin Sonko, Modou Toura, Lansana Beyai, Lamin Marong, Alhagie Fatty, Nогоi Njie, Fatoumata Jawara, Fatou Camara, Kafu Bayo, Ebrima Jadama, Modou Ngum, United Democratic Party (UDP), The Gambia (suing for himself and for the succession of *Ebrima Solo Sandeng (deceased)*).

8 § 105 of the *Suy Bi Gohoré* decision.

accordance with the principles of the Charter and therefore, the Application fails to meet the requirement set out under Article 56(7) of the Charter and Rule 50(2)(g) of the Rules and is declared inadmissible”.

12. The notion of settlement of a case refers, *a priori*, to a cardinal principle of international law, namely, the principle of peaceful settlement of international disputes enshrined in Article 2 § 3 of the Charter of the United Nations and specified in Chapter VI of the same Charter, particularly in Article 33 which sets out the various modes of settling disputes. This principle is also stated in Article 4(e) of the Constitutive Act of the African Union.
13. However, although commonly used, the notion of settlement, which, *a priori*, is simple, is by no means clear. In the context of this case, the settlement referred to is jurisdictional settlement. Jurisdictional settlement is defined as “[the process of ending an international dispute by the decision of a body that is external to the parties, empowered to render a decision that is based on law and is binding on the parties]”⁹
14. The European Court considers that, when it finds that the conditions laid down in Article 35 § 2 (b) have been met owing to the existence of a decision on the merits at the time it examines the case, it must declare inadmissible an application that has already been examined by another international body. According to the European Court, a decision on the merits of a case requires the following characteristics: the decision must be taken after an adversarial procedure;¹⁰ the decision must be reasoned,¹¹ notified to the parties and published; *the decision must aim to put an end to the violation*; the victims must be able to obtain reparation.
15. To come back to the ruling of the ECOWAS Court of Justice, it should be noted that the decision of the sister court did not put an end to the dispute over the inconsistencies between section 5 of the Public Order Act and Articles 1, 9(2) and 11 of the Charter and Articles 19(2) and 21 of the International Covenant on Civil and Political Rights. The Abuja Court did not stop the violation. It even implicitly admitted that the impugned section 5 of the Public Order Act and the requirement to obtain the approval of the Inspector General of the Gambia Police Force could lead to abuse: “In light

9 Jean Salmon (direction), *Dictionnaire de droit international public*, Brussels – Paris, Bruylant – AUF, 2001, p 962.

10 ECHR, Application No 21449/04, *Celniku v Greece*, Judgment of 5 July 2007, §§ 39-41.

11 ECHR, Application No 2096/05, *Peraldi v France*, Decision on admissibility of 7 April 2009.

of actions of the agents of the Respondent in the instant case, the Court holds that the provisions of Section 5 of the Public Order Act of the Republic of The Gambia did not violate the provisions of Article 11 of the African Charter and further holds that the Public Order Act, Section 5 of the Laws of The Gambia is in tandem with permissible restrictions in ensuring law and order. However, the requirement of having to obtain the approval of the Inspector General of Police of the Gambian Police Force will undermine the exercise of such right and therefore needs a review”.

16. In view of the foregoing, we believe that the Court could have declared the Application admissible and ordered the amendment of the challenged law in accordance with the Charter and the ICCPR.
17. In this regard, we recall the words of the Human Rights Committee's General Comment No 37 to the effect that a prior authorisation procedure is incompatible with the very principle of freedom: “[Requiring authorisation from the authorities undermines the principle that the right to peaceful assembly is a fundamental right].¹² Notification systems requiring those intending to hold a peaceful assembly to inform the authorities in advance and to provide some important details are permissible to the extent necessary to assist the authorities in facilitating peaceful assembly and protecting the rights of others.¹³ However, this requirement must not be misused to discourage peaceful assembly and, as with other interferences with this right, must be justified based on one of the grounds set out in Article 21.¹⁴ The application of a prior notification procedure cannot become an end in itself.¹⁵ Prior notification procedures should be transparent and not unnecessarily burdensome;¹⁶ the conditions they impose on organisers should be proportionate to the impact the meeting is likely to have on the public, and they should be free of charge.”

12 CCPR/C/MAR/CO/6, para. 45; CCPR/C/GMB/CO/2, para. 41; and African Commission on Human and Peoples' Rights, *Guidelines on Freedom of Association and Assembly in Africa*, para. 71.

13 *Kivenmaa v Finland*, para. 9.2. See also African Commission on Human and Peoples' Rights, *Guidelines on Freedom of Association and Assembly in Africa*, para 72.

14 *Kivenmaa v Finland*, para. 9.2. See also *Sekerko v Belarus*, para. 9.4.

15 *Popova v Russian Federation* (CCPR/C/122/D/2217/2012), para. 7.5.

16 *Poliakov v Belarus*, para. 8.3.

Yusuph v Tanzania (judgment) (2022) 6 AfCLR 198

Application 036/2017, *Rajabu Yusuph v United Republic of Tanzania*

Judgment, 24 March 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENS AOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

At the time of filing this Application, the Applicant, who is a citizen of the Respondent State, was serving life imprisonment. He had been convicted and sentenced by the courts of the Respondent State for the rape of a minor. The Applicant unsuccessfully appealed against his conviction and sentence before the domestic courts. He then brought this Application, alleging that the proceedings before the domestic courts amounted to a violation of some of his Charter protected rights. The Court held that the Application was inadmissible on the grounds that it was not filed within a reasonable time after local remedies were exhausted.

Jurisdiction (material jurisdiction, 27-29; appellate jurisdiction, 29; temporal jurisdiction, 32; continuing violations, 32)

Admissibility (exhaustion of local remedies, 50-53; filing within a reasonable time, 61-73)

Declaration: BENS AOULA

Admissibility (filing within a reasonable time, 5, 8)

I. The Parties

1. Rajabu Yusuph (hereinafter referred to as “the Applicant”) is a national of Tanzania who, at the time of filing the Application was at Uyui Central Prison, Tabora Region, serving a sentence of life imprisonment having been convicted of the offence of rape of a six (6) year old minor. He challenges the circumstances of his trial.
2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as “the Respondent State”), which became a Party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as “the Declaration”), through which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 21 November 2019, the

Respondent State deposited with the Chairperson of the African Union Commission an instrument withdrawing its Declaration. The Court held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect, that is, on 22 November 2020.¹

II. Subject of the Application

A. Facts of the matter

3. It emerges from the record before the Court, that the Applicant was arrested and charged before the District Court of Tabora, in Criminal Case No 112/2005, with the offence of rape of a six (6) year old minor. The Applicant was convicted and sentenced to serve life imprisonment on 1 November 2005.
4. The Applicant filed an appeal before the High Court sitting at Tabora, being Criminal Appeal No 31/2006, and on 27 June 2007 this appeal was dismissed.
5. The Applicant filed a further appeal to the Court of Appeal of Tanzania sitting at Tabora, being Criminal Appeal No 457/2005. In its judgment of 28 October 2009, the Court of Appeal dismissed this appeal in its entirety and the Applicant was ordered to pay compensation to the victim amounting to one hundred thousand shillings (TZS 100,000).

B. Alleged violations

6. The Applicant alleges that the Respondent State violated his rights, notably:
 - i. The right to equality before the law and equal protection of the law, protected by Article 3(1) and (2) of the Charter;
 - ii. The right to have his cause heard, protected under Article 7(1) of the Charter;
 - iii. The right to legal representation, protected by Article 10(2) of the Protocol of the African Charter and Section 2 of the Child and Young Offenders Act Cap 13 R.E. [2002].

¹ *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACTHPR, Application No 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.

III. Summary of the Procedure before the Court

7. The Application was filed on 8 November 2017 and was served on the Respondent State on 23 February 2018.
8. The parties filed their pleadings on merits and reparations within the time stipulated by the Court.
9. Pleadings were closed on 23 July 2019 and the parties were duly notified.

IV. Prayers of the Parties

10. The Applicant prays the Court to restore justice where it was overlooked, quash both the conviction and the sentence of life imprisonment imposed upon him and order his release from prison. He further prays the Court to grant any other orders that may be appropriate in these circumstances.
11. In its Response, with regard to the Court's jurisdiction and admissibility of the Application, the Respondent State prays the Court to order the following measures:
 - i. That, the Honorable African Court on Human and Peoples' Rights is not vested with jurisdiction to adjudicate on this Application;
 - ii. That, the Application has not met the admissibility requirements stipulated under Rule 40(5) of the Rules of Court;
 - iii. That, the Application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules of Court;
 - iv. That, the Application be declared inadmissible;
 - v. That, the Application be dismissed.
12. With regard to the merits of the Application, the Respondent State prays the Court to order the following measures:
 - i. That, the Government of United Republic of Tanzania did not violate the Applicant's rights provided by Article 2 of the African Charter on Human and Peoples' Rights;
 - ii. That, the Government of United Republic of Tanzania did not violate the Applicant's rights provided by Article 3(1)(2) of the African Charter on Human and Peoples' Rights;
 - iii. That, the Government of United Republic of Tanzania did not violate the Applicant's rights provided under Article 7(1) of the African Charter on Human and Peoples' Rights;
 - iv. That, the Government of United Republic of Tanzania did not violate the Applicant's rights provided by Article 7(1)(c) of the African Charter on Human and Peoples' Rights;
 - v. That, the Government of United Republic of Tanzania did not violate the Applicant's rights provided by Article 107A(2)(b) of the Constitution of United Republic of Tanzania, 1977;

- vi. That, the Application be dismissed in its entirety for lack of merit;
- vii. That, the Applicant's prayers be denied;
- viii. That, the Applicant be ordered to pay the costs of this Application.

V. Jurisdiction

13. The Court observes that Article 3 of the Protocol provides as follows:
 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
14. The Court further observes that pursuant to Rule 49(1) of the Rules, it "shall conduct a preliminary examination of its jurisdiction [...] in accordance with the Charter, the Protocol and these Rules."²
15. In view of the foregoing, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.
16. In the present Application, the Court notes that the Respondent State has raised two types of objections to its jurisdiction. Firstly, it argues that the Court does not have material jurisdiction and, secondly, that the Court lacks temporal jurisdiction.

A. Objections to material jurisdiction

17. The Respondent State raises three objections in respect of the Court's material jurisdiction.
18. Firstly, the Respondent State asserts that the Court has no jurisdiction to grant the relief of releasing the Applicant. Noting Article 27(1) of the Protocol and in reference to the Court's Jurisprudence in *Alex Thomas v Tanzania*, the Respondent State submits that the prayer sought by the Applicant to be released from custody is beyond the mandate of the Court since the Applicant has not provided specific or compelling circumstances to warrant the Court to grant an order for his release.
19. Secondly, the Respondent State asserts that this Application calls for the Court to sit as a Court of first instance and adjudicate on matters that have never been raised within the national justice system.

2 Rule 39(1), Rules of Court, 2 June 2010.

20. Thirdly, the Respondent State argues that the Court is not vested with jurisdiction to adjudicate on this matter because the present Application calls for the Court to sit as an appellate court and adjudicate on matters of law and evidence already finalised by the Respondent State's highest court, the Court of Appeal of Tanzania.
21. Citing the Court's jurisprudence in *Ernest Francis Mtingwi v Malawi*,³ the Respondent State claims that the Court does not have any appellate jurisdiction to receive and consider appeals in respect of cases already decided upon by domestic or regional courts.
22. For the preceding reasons, the Respondent State prays that the Application should be dismissed.

23. In his Reply, the Applicant states that the Court has jurisdiction to adjudicate over this Application because the rights that he alleges to have been violated are protected by the African Charter and the Protocol thereto.
24. Citing the Court's jurisprudence in *Peter Joseph Chacha*,⁴ the Applicant submits that as long as the rights allegedly violated are protected by the Charter or any other human rights instrument, the Court will have jurisdiction over the matter.
25. The Applicant avers that the rights violated by the Respondent State concern the rights protected under Articles 2, 3(1)(2) and 7(2) of the Charter [sic]. For these reasons, the Applicant submits that the Court has material jurisdiction to adjudicate on this matter.

3 *Ernest Francis Mtingwi v Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190.

4 *Peter Joseph Chacha v United Republic of Tanzania* (admissibility) (28 March 2014) 1 AfCLR 398.

26. The Court recalls that under Article 3(1) of the Protocol, it has jurisdiction to examine any application submitted to it, provided that the rights of which a violation is alleged, are protected by the Charter or any other human rights instrument ratified by the Respondent State.⁵
27. The Court notes that the Respondent State's objection is three-pronged. Firstly, concerning the claim that the Court does not have jurisdiction to grant an order for release, the Court notes Article 27(1) of the Protocol which provides that "[i]f the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation." Therefore, the Court has jurisdiction to grant different types of reparations, including the release from prison. For this reason, the Court dismisses the objection raised by the Respondent State in this regard.
28. Secondly, in relation to the allegation that the Court is being invited to sit as a court of first instance, the Court reaffirms that its jurisdiction, under Article 3 of the Protocol, extends to any application submitted to it, provided that an applicant invokes a violation of rights protected by the Charter or any other human rights instrument ratified by the Respondent State.⁶ In the instant case and in view of the allegations made by the Applicant, which all involve rights protected under the Charter, the Court finds that the said allegations are within the purview of its material jurisdiction.⁷ The Court, therefore, dismisses this objection raised by the Respondent State.
29. Thirdly, as regards the contention that the Court would be exercising appellate jurisdiction by examining certain claims which were already determined by the Respondent State's domestic courts, the Court reiterates its position that it does not exercise appellate jurisdiction with respect to claims already examined by national courts.⁸ At the same time, however, and even though the Court is not an appellate court *vis-à-vis* domestic courts, it retains the power to assess the propriety of domestic

5 *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application No 028/2015, Judgment of 26 June 2020, § 18.

6 *Bernard Balele v United Republic of Tanzania*, ACtHPR, Application No 026/2016, Judgment of 30 September 2021, § 37.

7 *Alex Thomas v Tanzania* (merits) § 130. See also, *Mohamed Abubakari v United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599 § 29; *Christopher Jonas v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101 § 28; and *Ingabire Victoire Umuhoza v Republic of Rwanda* (merits) (24 November 2017) 2 AfCLR 165 § 54.

8 *Ernest Francis Mtingwi v Malawi* (jurisdiction) §§ 14-16.

proceedings against standards set out in international human rights instruments ratified by the State concerned.⁹ In conducting the aforementioned task, the Court does not thereby become an appellate court. The Court, therefore, dismisses the Respondent State's objection and holds that it has material jurisdiction.

B. Objection to temporal jurisdiction

30. The Respondent State also contests the temporal jurisdiction of the Court, because in its view the alleged violations raised by the Applicant are not ongoing. The Respondent State states that the Applicant is serving a lawful sentence for the commission of an offence as provided by statute.
31. The Applicant did not make any submissions on this point.

32. In respect of its temporal jurisdiction, the Court notes that all the violations alleged by the Applicant arose after the Respondent State became a Party to the Charter and the Protocol. Furthermore, the Court observes that the Applicant remains convicted on the basis of what he considers an unfair process. Therefore, it holds that the alleged violations can be considered to be continuing in nature.¹⁰ For these reasons, the Court finds that it has temporal jurisdiction to examine this Application.

C. Other aspects of jurisdiction

33. The Court observes that no objection has been raised with respect to its personal and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules, it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

9 *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477 § 33; *Werema Wangoko Werema and Another v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520 § 29 and *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 130.

10 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197 §§ 71-77.

34. In relation to its personal jurisdiction, the Court recalls, as stated in paragraph 2 of this judgment that, on 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration made under Article 34(6) of the Protocol. The Court further recalls that it has held that the withdrawal of a Declaration does not have any retroactive effect and it also has no bearing on matters pending prior to the filing of the instrument withdrawing the Declaration, or new cases filed before the withdrawal takes effect.¹¹ Since any such withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is deposited, the effective date for the Respondent State's withdrawal was 22 November 2020.¹² This Application having been filed before the Respondent State deposited its notice of withdrawal is thus not affected by it.
35. In light of the above, the Court finds that it has personal jurisdiction to examine the present Application.
36. As for its territorial jurisdiction, the Court notes that the violations alleged by the Applicant happened within the territory of the Respondent State. In the circumstances, the Court holds that it has territorial jurisdiction.
37. In light of the above, the Court holds that it has jurisdiction to determine the present Application.

VI. Admissibility

38. Pursuant to Article 6(2) of the Protocol, "The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter".
39. In line with Rule 50(1) of the Rules,¹³ "the Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules."
40. The Court notes that Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:
Applications filed before the Court shall comply with all of the following conditions:

11 *Andrew Ambrose Cheusi v United Republic of Tanzania*, §§ 35-39.

12 *Ingabire Victoire Umuhoza v United Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562 § 67.

13 Rule 40 of the Rules of Court, 2 June 2010.

- a. Indicate their authors even if the latter request anonymity;
- b. Are compatible with the Constitutive Act of the African Union and with the Charter;
- c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
- d. Are not based exclusively on news disseminated through the mass media;
- e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
- f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
- g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of African Union or the provisions of the Charter.

A. Objections to the admissibility of the Application

41. The Respondent State has raised two objections to the admissibility of the Application. The first objection relates to the requirement of exhaustion of local remedies and the second relates to whether the Application was filed within a reasonable time.

i. Objection based on non-exhaustion of local remedies

42. The Respondent State argues that the Applicant is raising before this Court two allegations which he never raised before Court of Appeal of Tanzania.
43. The Respond State submits that the Applicant “did not raise the allegation that he was convicted and sentenced in a charge which did not refer to a section of the enactment creating the offence charged.” The Respondent State claims that the legal remedy of raising this ground of appeal before the Court of Appeal was available to the Applicant but that he did not pursue it.
44. The Respondent State further claims that the Applicant “did not raise the allegation before the Court of Appeal that he was not afforded legal representation thus violating his right to be heard and to be treated equal before the law”.
45. The Respondent asserts that since the Applicant is claiming he was denied the right to a fair hearing, he could have filed for an Application to review the Court of Appeal’s decision under Rule 66(1)(b) of the Court of Appeal Rules, 2009. This Rule provides

for a review on the basis of a party being “wrongly deprived of an opportunity to be heard”, which the Respondent State considers to be a component of the right to a fair hearing.

46. The Respondent State submits that since the Applicant did not pursue these remedies that were available to him and that there was no delay in accessing them, this Application has not met the admissibility requirement under Rule 40(5) of the Rules¹⁴ and should therefore be dismissed.
47. In his Reply, the Applicant objects to the submissions by the Respondent State. He asserts that he has gone through all remedies available in the Respondent State’s judicial system. He submits that the Respondent State’s Court of Appeal, being the highest court of the land, dismissed his appeal in its entirety on 28 October 2009, thereby bringing to finality the local judicial remedies available to the Applicant.
48. Regarding the Respondent State’s contention that he should have pursued an application for review of the Court of Appeal’s decision, the Applicant argues that the Court had already held in *Alex Thomas* that an application for review “was neither necessary nor mandatory. The final appeal in criminal trials lies, as of right, to the Court of Appeal, which the Applicant has proved that he accessed.”¹⁵
49. The Applicant, therefore, claims that he fully exhausted all available local remedies.

50. The Court notes that pursuant to Article 56(5) of the Charter, whose provisions are restated in Rule 50(2)(e) of the Rules, any application filed before it shall fulfil the requirement of exhaustion of local remedies. The rule of exhaustion of local remedies aims at providing States the opportunity to deal with human rights violations within their jurisdictions before an international human rights body is called upon to determine the State’s responsibility

14 Corresponding to Rule 50(2)(e) of the Rules of 25 September 2020.

15 *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 63.

for the same.¹⁶

51. The Court recalls its position where it held that, in so far as the criminal proceedings against an applicant have been determined by the highest appellate court, the Respondent State will be deemed to have had the opportunity to redress the violations alleged by the Applicant to have arisen from those proceedings.¹⁷
52. In the instant case, the Court notes that the Applicant's appeal before the Court of Appeal, the highest judicial organ of the Respondent State, was determined when that Court rendered its judgment on 28 October 2009. Therefore, the Respondent State had the opportunity to address the violations alleged by the Applicant arising from the Applicant's trial and appeals.
53. Regarding the Respondent State's contention that the Applicant ought to have filed an application for review of the Court of Appeal's judgment, the Court has previously held that such an application for review is an extraordinary remedy which applicants are not required to exhaust.¹⁸ The Court, therefore, finds that the Applicant is deemed to have exhausted local remedies since the Court of Appeal of Tanzania, the highest judicial organ in the Respondent State, had upheld his conviction and sentence, following proceedings which allegedly violated his rights.
54. In light of the foregoing, the Court dismisses the Respondent State's objection based on the non-exhaustion of local remedies.

ii. Objection based on the failure to file the Application within a reasonable time

55. The Respondent State claims that since the Application was not filed within a reasonable time after the local remedies were exhausted, the Court should find that the Application has failed to comply with the provisions of Rule 40(6) of the Rules.¹⁹
56. The Respondent State recalls that the judgment of the Court of Appeal was delivered on 28 October 2009, that the instrument to accept the competence of the Court under Article 5(3) of the Protocol was deposited on 29 March 2010 and that this Application was filed on 8 November 2017. The Respondent State notes that

16 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.

17 *Mohamed Abubakari v United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, § 76.

18 *Mohamed Abubakari v Tanzania* (merits) § 78.

19 Corresponding to Rule 50(2)(f) of the Rules of 25 September 2020.

a period of seven (7) years and eight (8) months elapsed from when the Respondent State accepted the jurisdiction of the Court to when the Applicant filed his Application at the Court.

57. In his Reply, the Applicant, relying on the Court's jurisprudence in *Mtikila*,²⁰ submits that there is no fixed period of time within which to seize the Court and that each case would be decided on its own facts and circumstance. The Applicant avers that this Court, its Protocol, its Rules and its Practice Direction, were all unknown at Uyui Prison, before May 2017, where he was serving his custodial sentence at the time of filing the Application.
58. The Applicant further submits that the first Application to be lodged at the Registry of this Court from Uyui Prison, Tabora was on 13 June 2017 and was registered as Application No 017/2017 *Abdallah Sospeter Mabomba and others v United Republic of Tanzania*. The Applicant claims that proof of this fact can be found at the Registry of the Court that no Application from Uyui Prison in Tabora has been filed before this Court earlier than 13 June 2017.
59. In view of the reason stated above, the Applicant submits that he filed his Application within a reasonable time after exhaustion of local remedies.

60. Pursuant to Article 56(6) of the Charter, as restated in Rule 50(2) (f) of the Rules, in order for an application to be admissible, it must be "submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter".
61. In the present case, the Court notes that the Court of Appeal dismissed the Applicant's appeal on 28 October 2009 and the Applicant filed the Application on 8 November 2017. As the judgment of the Court of Appeal was on 28 October 2009, prior to the deposit of the Declaration provided under Article 34(6) of the Protocol, on 29 March 2010, the Applicant was able to file an application only after the latter date. Therefore, the assessment of reasonable time will be from 29 March 2010.

²⁰ *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania* (merits) (14 June 2013) 1 AfCLR 34.

62. In this regard, the Court observes that between the date of deposit of the Declaration on 29 March 2010 and when the Application was filed on 8 November 2017, a period of seven (7) years, seven (7) months and ten (10) days elapsed.
63. The Court further notes that Article 56(6) of the Charter, as restated in Rule 50(2)(f) of the Rules, does not set a time limit within which it must be seized. However, the Court has held that “the reasonableness of the time limit for referral depends on the particular circumstances of each case and must be determined on a case-by-case basis”.²¹
64. In this regard, the Court has considered as relevant factors, the fact that an applicant is incarcerated,²² their indigence, the time taken to utilise the procedures of the application for review at the Court of Appeal, or the time taken to access the documents on file,²³ the recent establishment of the Court, the need for time to reflect on the advisability of seizing the Court and determine the complaints to be submitted.²⁴
65. Importantly, the Court has confirmed that it is not enough for applicants to simply plead that they were incarcerated, are lay or indigent, for example, to justify their failure to file an Application within a reasonable period of time.²⁵
66. As the Court has previously pointed out, even for lay, incarcerated or indigent litigants there is a duty to demonstrate how their personal situation prevented them from filing their Applications in a more timely manner. It was because of the foregoing that the Court concluded that an Application filed after five (5) years and eleven (11) months was not filed within a reasonable time.²⁶ The Court reached the same conclusion in respect of an Application filed after five (5) years and four (4) months.²⁷ In yet another case,

21 *Beneficiaries of late Norbert Zongo and Others v Burkina Faso* (merits) (28 March 2014) 1 AfCLR 219, § 92; *Kijiji Isiaga v United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 56; *Alex Thomas v Tanzania* (merits), § 73.

22 *Diocles William v United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 426, § 52; *Alex Thomas v Tanzania* (merits), § 74.

23 *Nguza Viking and Johnson Nguza v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 61.

24 *Beneficiaries of late Norbert Zongo and Others v Burkina Faso* (preliminary objections), § 122.

25 *Layford Makene v United Republic of Tanzania*, ACTHPR, Application No 028/2017 Ruling of 2 December 2021 (admissibility), § 48.

26 *Hamad Mohamed Lyambaka v United Republic of Tanzania*, ACTHPR, Application No 010/2016. Ruling of 25 September 2020 (admissibility) § 50.

27 *Godfred Anthony and another v United Republic of Tanzania*, ACTHPR, Application No 015/2015. Ruling of 26 September 2019 (admissibility) § 48.

the Court found that the period of five (5) years and six (6) months was also not a reasonable period of time within the meaning of Article 56(5) of the Charter.²⁸

67. The Court further notes the Applicant's claim that until May 2017, this Court, its Protocol, its Rules and its Practice Direction, were all unknown at Uyui Prison, where he was serving his custodial sentence prior to the filing of the Application.
68. From the Court's docket it emerges that this Application originating from Uyui Prison in Tabora, was filed four (4) months and twenty-six (26) days after the first Application from that prison, Application No 017/2017 *Abdallah Sospeter Mabomba and others v United Republic of Tanzania*.
69. The Court finds, however, that this argument is insufficient to persuade the Court that the Applicant diligently pursued his case and that he was not in a position to know about the Court prior to the filing of Application No 017/2017 *Abdallah Sospeter Mabomba and others v United Republic of Tanzania*.
70. It is clear from the record before the Court that the Applicant had been incarcerated since 2005, when he was a seventeen (17) years old minor. However, when the Applicant submitted his Application before this Court in 2017, he was twenty-nine (29) years old. The Court therefore does not consider this element to be a determining factor that would justify such a long time to submit his Application before this Court.
71. Furthermore, the Court holds that, in consideration of the principle of legal certainty, it is also constrained in its interpretation of reasonable time. The Court can therefore not continue to extend what can be considered as reasonable time without decisive elements that are sufficiently proven.
72. In the instant case, and although the Applicant was, at the material time, incarcerated, he has not provided the Court with compelling arguments and sufficient evidence to demonstrate that his personal situation prevented him from filing the Application in a more timely manner.
73. In view of the foregoing, the Court finds that the filing of the Application seven (7) years, seven (7) months and ten (10) days after exhaustion of local remedies is not a reasonable time within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules. The Court therefore upholds the Respondent State's objection in this regard.

28 *Livinus Daudi Manyuka v United Republic of Tanzania*, ACtHPR, Application No 020/2015. Ruling of 28 November 2019 (admissibility) § 55.

B. Other conditions of admissibility

74. Having found that the Application has not satisfied the requirement in Rule 50(2)(f) of the Rules, the Court need not rule on the Application's compliance with the admissibility requirements set out in Article 56(1), (2), (3), (4), and (7) of the Charter as restated in Rule 50(2)(a), (b), (c), (d) and (g) of the Rules, as these conditions are cumulative.²⁹
75. In view of the foregoing, the Court declares the Application inadmissible.

VII. Costs

76. The Applicant did not make any submissions on costs.
77. The Respondent State prayed that costs be borne by the Applicant.

78. Pursuant to Rule 32 of the Rules of Court "unless otherwise decided by the Court, each party shall bear its own costs".³⁰
79. The Court finds that there is nothing in the instant case warranting it to depart from this provision.
80. Consequently, the Court orders that each party shall bear its own costs.

VIII. Operative part

81. For these reasons,

The Court

Unanimously,

On jurisdiction

- i. *Dismisses* the objections to material jurisdiction;
- ii. *Dismisses* the objection to temporal jurisdiction;
- iii. *Declares* that it has jurisdiction.

29 *Jean Claude Roger Gombert v Côte d'Ivoire* (jurisdiction and admissibility) (22 March 2018) 2 AfCLR 270 § 61; *Dexter Eddie Johnson v Republic of Ghana*, ACtHPR, Application No 016/2017, Ruling of 28 March 2019 (jurisdiction and admissibility), § 57.

30 Rule 30(2) of the Rules of Court, 2 June 2010.

On admissibility

- iv. *Dismisses* the objection based on non-exhaustion of local remedies;

By a majority of Nine (9) for, and One (1) against (Justice Chafika BENSAOULA)

- v. *Finds* that the Application was not filed within a reasonable time within the meaning of Article 56(6) of the Charter and Rule 40(6) of the Rules;
- vi. *Declares* that the Application is inadmissible.

On costs

- vii. *Orders* each party to bear its own costs.

Declaration: BENSAOULA

1. I do not share the conclusions reached by the Court in its judgment referred to above and the provided grounds as to the inadmissibility of the application on the basis of its filing within an unreasonable time.
2. I wished to write this statement because I am convinced that the Court had to declare the application admissible on the basis of the same elements on which it relied to declare it inadmissible.
3. In fact, in its judgment in the case of “rightful claimants” of the late *Norbert Zongo and others v Burkina Faso* rendered on 21 June 2013 ruling on the preliminary objections and with regard to the reasonable time for its referral, the Court expressly declared that “the reasonableness of the time limit for its referral depends on the particular circumstances of each case and must be assessed on a case-by-case basis”.
4. In its judgment on the merits of 24 June 2014 the Court also considered and with regard to prior local remedies that “the assessment of the normal or abnormal nature of the procedure duration relating to local remedies must be carried out at “case by case” according to the specific circumstances of each case”.
5. This principle of “case by case” with regard to the reasonable time, the Court has applied it in many cases and to name but a few:

- The *Sadik Marwakisase v United Republic of Tanzania* judgment of 2 December 2021 when the Court declared the exception raised by the defendant state, as to the reasonable delay, dismissed for the simple reason that the applicant was detained, had no representative before national courts or before this Court (paragraphs 51 and 52) and therefore considered the period of 16 months reasonable.
 - The Christopher Jonas judgment against the United Republic of Tanzania of 28 September 2017 and Amiri Ramadhani against the same State, where the Court considered that the applicants being imprisoned, restricted in their movements, laymen in law, indigent, having no access to information, nor benefiting from the assistance of a lawyer during the trial, illiterate and not having knowledge of the existence of the Court made the delay of 5 years and one month reasonable.
 - And finally in its judgment 013/2016, *Stephen John Rutakikirwa v United Republic of Tanzania* of 24 March 2022 rendered on the same day when the Court reiterated this principle in its paragraph 45 and in its paragraph 48 when it declared the application filed within a reasonable period of 4 years and 4 months because the applicant is imprisoned and restricted in his movements with limited access to information and has not benefited from legal aid!
6. In the judgment which is the subject of the statement, the facts show that the Court reiterated in its paragraphs 70 the fact that the applicant, imprisoned since 2005, was a minor then aged 17 and that he was convicted to life imprisonment on 1 November of the same year ! and then see his conviction confirmed by the High court in 2007 then in 2009 by the Court of appeal.
 7. It is obvious from the same facts, taken up by the Court in its grounds, that the applicant, although a minor, did not benefit from legal aid before the national courts and I would add before this Court as well!
 8. In my opinion, the case-by-case principle in the present case was absolutely to be applied because the essential element which holds the attention is the age of the applicant at the time of the facts of his arrest and his conviction first and then the fact that he did not benefit from legal aid for such serious acts and such a heavy punishment !
 9. Moreover, it appears from the rolls of the Court, that the first case enrolled before it, on 13 June 2017 by a prisoner of the same penitentiary establishment where the applicant is imprisoned and this since the creation of the Court, was 4 months and 26 days before that filed by the applicant.
 10. What seems to me to be irrefutable proof that the applicant was not really aware of the existence of the Court, especially since

respondent state made its statement on 29 March 2010, i.e. 7 months after the decision rendered by the Court of Appeal on 28 October 2009 and that therefore it would have taken time for the applicant to be aware of the existence of the Court and the terms of its referral!

11. And that it also remains undeniable that, for a minor prisoner who, until the decision of the national courts was pronounced, was defenseless, a period of 7 years could not and in no case be considered unreasonable because the primordial and crucial element on which the Court had to apply the principle of the case by case was this new element concerning the age of the applicant!
12. As for the grounds of the Court in paragraphs 70 and 71 of the judgment, that at the time of the filing of the application the applicant was 29 years old! It has been set aside the fact that this applicant reached that age in prison in the life sentence cell and all that time without a lawyer!
13. Which makes me say that expecting this applicant to provide evidence that the elements on which the Court relied in its previous judgments in application of the “case by case” principle are met, remains unthinkable! “Demonstrating that his personal situation prevented him from submitting the application in a more timely manner” as stated in paragraph 72 of the judgment suggests that the applicant has been free to move and not depending on prison rules since the age of 17 and that he is assisted by a lawyer for the trial purpose!
14. With this very significant detail, because of case law reversal is that in the cited above Marwa case against the same defendant (paragraph 52) the Court indeed stated that “.... The applicant was imprisoned, did not benefit from legal assistance during the proceedings before the domestic courts and is defending himself before the present Court. More specifically, the facts of the case occurred between 2007 and 2013, that is to say during the first years of the Court’s activities at a time when the general public and a fortiori people in the situation of the applicant in the present case could not necessarily be expected to have sufficient knowledge of the requirements governing the proceedings before this Court, finally the Respondent State filed its statement in 2010. In these circumstances, the Court considers that the time which elapsed before the applicant lodged his application must be considered reasonable”.
15. Applied, this conclusion in the Marwa judgment, to the judgment object of the statement would have been fair and logical and would have led to the admissibility of the application because responding to the same facts and elements with this essential

detail the age of the applicant at the time of the facts of his indictment and incarceration!

16. I will therefore conclude that for a minor imprisoned at the age of 17, reaching 29 years in prison is not and cannot be a sound ground to declare the application filed within an unreasonable time, especially if in the judgment the years of existence of the Court have been highlighted, so in the present issue the Court had to consider in the same way because the key element remains the minority of the applicant and the non-assistance of a lawyer first and then that it is the same respondent State that is involved and therefore the same date of the statement and a fortiori the same period announced by the Court to prove his knowledge or not of the existence of the Court! paragraph 69)
17. As regards legal certainty referred to in paragraph 71, I do not think that applying it at the expense of human rights is in itself a certainty! In the present case, it is not about acquired rights nor about stability of situations that have generated rights but of a minor judged in the non respect of the elementary rules concerning the juvenile delinquency!
18. I will conclude by saying that the Court in its grounds completely set aside the element of the lack of legal assistance both before the national courts and this Court, which seems to me to be a lack of grounds because a minor detained at the age of 17 convicted to life imprisonment without the assistance of a lawyer, can only be an element in his favor to explain the relatively long delay in filing the application.

Baedan & Anor v Côte d'Ivoire (ruling) (2022) 6 AfCLR 217

Application 2019/2020, *Baedan Dogbo Paul and Baedan M'Bouke Faustin v Republic of Côte d'Ivoire*

Ruling, 1 April 2022. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSOUOLA, ANUKAM, NTSEBEZA and SACKO

The Applicants, who are citizens of the Respondent State, brought this Application alleging that their ancestral land had been compulsorily acquired by the Respondent State without any payment of compensation. The Applicants alleged further that despite an order of the domestic court in their favour, the Respondent State failed to pay compensation in violation of some of their Charter protected rights. At the close of pleadings, the Respondent State claimed that it had not been served with the originating Application in this matter. Applying its Rules, the Court ordered that pleadings be reopened to enable the parties finalise their submissions.

Procedure (reopening of pleadings in the interests of justice, 11-12)

I. The Parties

1. Baedan Dogbo Paul and Baedan M'Bouke Faustin (hereinafter "the Applicants"), are Ivorian nationals. They allege violation of their right of ownership of a parcel of land located in Abidjan and of their right to compensation following the expropriation of the said parcel of land.
2. The Application is filed against the Republic of Côte d'Ivoire (hereinafter "the Respondent State"), which became a party to the African Charter on Human and Peoples' Rights (hereinafter "the Charter") on 31 March 1992 and to the Protocol on the Establishment of an African Court on Human and Peoples' Rights (hereinafter "the Protocol") on 25 January 2004. On 23 July 2013, the Respondent State deposited the Declaration provided for in Article 34(6) of the Protocol (hereinafter referred to as "the Declaration") by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and non-governmental organisations having observer status with the Commission. On 29 April 2020, the Respondent State deposited with the Chairperson of the African Union Commission the instrument of withdrawal of its Declaration. The Court has ruled that this withdrawal has no bearing on pending cases and on new

cases filed before the entry into force of the withdrawal one year after its deposition, that is, on 30 April 2021.

II. Subject of the Application

3. The Applicants aver that in 1980, the Respondent State expropriated a large parcel of ancestral land belonging to the Baedan family in Abidjan Yopougon Kouté and proceeded to build the Yopougon University Hospital in 1980 and then Cité Policière BAE in 1998.
4. The Applicants further aver that in 2003, following compensation proceedings brought by members of the Baedan family before the Yopougon Court of First Instance, the said court, by judgment of 13 January 2003, granted their claim and ordered the Respondent State to pay them an amount of 812,488,000 CFA francs as compensation for the loss of their customary rights. The Applicants state that up to the date of the filing of the instant Application with this Court, the Respondent State has not paid the sum and request the Court to find a violation of their property rights and their right to compensation.

III. Summary of the procedure before the Court

5. The Application was filed with the Registry of the Court on 14 May 2020 and served on the Respondent State on 30 June 2020.
6. On 29 September 2021, the Court requested the Respondent State to submit its Response to the Application within Forty-five (45) days, failing which the Court would enter judgment by default.
7. By correspondence dated 26 October 2021, the Respondent State stated that it never received Application No 2019/2020: *Baedan Dogbo Paul and Baedan M'bouke Faustin v Republic of Côte D'ivoire* and requested that the Application be served on it.
8. On 9 February 2022, pleadings were closed and the Registry of the Court duly notified the parties.
9. On 15 February 2022, the Legal Officer of the Treasury, representing the Respondent State, reaffirmed that he never received the Application in respect of the matter at bar and reiterated his request that the Application be notified to him in order to properly defend the interests of the Respondent State.

IV. Request to be served the Application

10. The Court notes that Rule 46(3) of the Rules of Court provides that "The Court has the discretion to determine whether or not to

reopen pleadings”.

11. The Court also notes that the records show that acknowledgement of receipt was issued only for the notifications of 29 September 2021 and 9 February 2022 delivered by DHL. On the other hand, receipt of the notification of the Application initiating proceedings on 30 June 2020 was not acknowledged and the Respondent State has expressly stated that it did not receive notification of the Application. Based on these findings, the benefit of the doubt regarding the receipt of the Application inures to the Respondent State.
12. The Court notes that under Rule 46(3) of the Rules it may order the reopening of proceedings and allow a party to file its pleadings where the interest of justice so requires. In the instant case, the Court considers that it is appropriate, in the interest of justice and respect for the principle of adversarial proceedings, to adjourn the proceedings and order the reopening of the hearing in order to allow the Respondent State to file its Response.

V. Operative part

13. For these reasons,

The Court

Unanimously,

Orders

- i. That the proceedings in respect of Application 019/2020: *Baedan Dogbo Paul and Baedan M'bouke Faustin v Republic of Côte d'Ivoire* be reopened;
- ii. That the Respondent State make available the complete list of its representatives within Thirty (30) days and file its Response and submissions on reparations within Ninety (90) days from the date of receipt of this Ruling.

John v Tanzania (order) (2022) 6 AfCLR 220

Application 049/2016, *Chrizant John v United Republic of Tanzania*

Order, 13 May 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSOUOLA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant, a citizen of the Respondent State, was incarcerated and awaiting the execution of a death sentence for murder at the time he filed this Application. He alleged that the proceedings before the domestic courts amounted to a violation of some of his Charter protected rights. At the request of the Applicant, the Court had ordered interim measures and granted him legal aid. At the close of pleadings, the parties had not finalised their submissions despite extensions by the Court. Applying its Rules, the Court ordered that pleadings be reopened to enable the parties finalise their submissions.

Procedure (reopening of pleadings in the interests of justice, 10-12)

I. The Parties

1. Chrizant John, hereinafter referred to as “the Applicant”), is a national of United Republic of Tanzania, who, at the time of filing this Application, was incarcerated in Butimba Central Prison in the Mwanza region following his sentencing to death by hanging by the High Court of Tanzania at Bukoba. He alleges a violation of his right to a fair trial in the proceedings before the national courts.
2. The Application is filed against United Republic of Tanzania (hereinafter referred to as “the Respondent State”), which became a Party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as “the Declaration”), through which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission (hereinafter referred to as “AUC”), an instrument withdrawing its Declaration under Article 34(6) of the Protocol. The Court held that this withdrawal had no bearing on pending cases and new cases filed before the withdrawal came

into effect, one (1) year after its deposit, that is, on 22 November 2020.¹

II. Subject of the Application

3. It appears from the record that on 26 June 2015, the Applicant was sentenced to the mandatory death penalty by the High Court sitting in Bukoba for the murder of his mother-in-law, in criminal case No 055 of 2014.
4. Feeling aggrieved, the Applicant appealed to the Bukoba Court of Appeal, which on 24 February 2016 dismissed it in its entirety.

III. Summary of the Procedure before the Court

5. On 1 September 2016, the Registry received the Application initiating the proceedings together with a request for interim measures and a request for legal aid. On 26 September 2016, the Application was served on the Respondent State. On 18 November 2016, the Court issued an order for provisional measures directing the Respondent State to stay the execution of the death sentence against the Applicant, subject to the decision on the main Application.
6. On 12 February 2018, the Court granted legal aid to the Applicant under its legal aid scheme.
7. After several extensions of time at the request of counsel for the Applicant and the Respondent State, the pleadings were closed on 23 July 2019.
8. After the closure of the pleadings both parties submitted written submissions. The Respondent State submitted its response to the Applicant's request for reparations on 28 August 2019, received at the Registry on 5 December 2019. The Applicant submitted its observations on reparations and its rejoinder to the Respondent State's response, reformulated by its counsel, on 9 April 2021.
9. On 27 April 2021, the Registry transmitted the request of the Applicant's counsel to submit further observations to the Respondent State, to which the Respondent State did not respond.

¹ *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) (3 June 2016) 1 AFCLR 562, § 67 ; *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACTHPR, Application No 004/2015, Judgment of 26 June 2020 (merits and reparations) §§ 37-39.

IV. On the reason for reopening of pleadings

10. The Court notes that Rule 46(3) of the Rules provides that “the Court has the discretion to determine whether or not to reopen pleadings”. The Court further notes that pursuant to Rule 90 of the Rules, “Nothing in these Rules shall limit or otherwise affect the inherent power of the Court to adopt such procedure of decisions as may be necessary to meet the ends of justice”.
11. From the proceedings of the present matter as earlier recounted, it merges that both parties have failed to file their pleadings within the time granted. Since the new pleadings involve new arguments and claims on which the Court will be called upon to rule, the interests of justice require that the attention of both parties be drawn to the procedure applicable under Rule 46(3) read in conjunction with Rule 44(2) of the Rules.
12. In view of the foregoing, it is in the interests of justice to reopen the proceedings in order to implement the procedure prescribed by Rule 46(3) of the Rules, namely to allow both parties forty-five (45) days to reply the new submissions made by each of the parties.

V. Operative part

13. For these reasons,
The Court

Unanimously,

Orders that the pleadings in Application n° 049/2016 Chrizant John v United Republic of Tanzania be and hereby reopened.

Ayed v Tunisia (order) (2022) 6 AfCLR 223

Application 008/2019, *Ibrahim Ayed v Republic of Tunisia*

Order, 7 June 2022. Done in Arabic, English and French, the Arabic text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, MENGUE, MUKAMULISA, CHIZUMILA, BENSOUALA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: BEN ACHOUR

The Applicant claimed to have been the victim of a scam by an official of the Respondent State and filed two separate complaints before domestic courts of the Respondent State. While the domestic complaints were pending, he brought this Application alleging that his Charter guaranteed rights had been violated. After several extensions of time and the closure of pleadings, the Respondent State sent communication suggesting that it had earlier sent its submissions to the Court. Applying discretion under its Rules, the Court ordered that the pleadings in the case to be reopened.

Procedure (reopening of pleadings in the interests of justice, 12-14)

I. The Parties

1. Ibrahim Ayed (hereinafter referred to as “the Applicant”) is a Tunisian national. He alleges that in 2014, he was scammed by an official who, after learning that the Applicant had obtained a university degree and was unemployed, promised to use his influence to appoint him as a secondary school teacher.
2. The Application is filed against the Republic of Tunisia (hereinafter “the Respondent State”), which became a Party to the African Charter on Human and Peoples’ Rights (hereinafter “the Charter”) on 21 October 1986 and to the Protocol on 5 October 2007. On 16 April 2017, the Respondent State also deposited the Declaration provided for in Article 34(6) of the Protocol, by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations.

II. Subject of the Application

3. It emerges from the Application that, the Applicant paid an amount of Two Thousand (2000) Tunisian Dinars to Al-fadhil ben Al amin Ali Al Obeidi, a public health nurse, for him to be assigned to the Ministry of Education as a secondary school teacher, after the latter had learned that he, Ibrahim Ayed, had obtained a Master’s degree. According to the agreement between the two, in the

event that the Applicant was not assigned as a teacher, Al Obeidi would be obliged to return the said amount, within two and a half months, which was recorded as a debt to the Applicant.

4. The Applicant avers that the said agreement having caused him harm, he filed two complaints before domestic courts, the first one with the Court of First Instance of Ariana on 14 July 2017 relying on Articles 87 and 291 of the Respondent State's Criminal Code while the second complaint was filed with the Public Prosecutor of the Court of Appeal of Tunis on 8 March 2018. The case was pending at the time the Applicant brought the matter before this Court.

III. Summary of the Procedure before the Court

5. The Application was received by the Registry on 1 March 2019. On 17 May 2019, the Application was served on the Respondent State. On 24 June 2019, the Application was transmitted to the other entities provided for in the Rules.
6. On 6 August 2019, the Respondent State was reminded of the expiry of the time-limit granted to it to designate its representatives and to file its Response to the Application and was granted an additional forty-five (45) days from the date of receipt of the notification to do so.
7. Thereafter, the Respondent State was reminded several times on 18 March 2020, 11 December 2020, 28 January 2021 to file the Response to the Application but it failed to do so.
8. On 29 October 2021, the Respondent State was granted a further forty-five (45) days to respond to the Application, failing which a default judgment will be rendered in the matter. The Respondent State did not respond.
9. Pleadings were closed on 11 March 2022 and Parties were duly informed.
10. On 5 April 2022, the Registry received a letter from the Respondent State indicating that, the Respondent State had filed by its Response on 2 April 2021 and 30 November 2021
11. On 26 May 2022, the Registry of the Court requested the Applicant's observations on the Respondent State's letter and on 30 May 2022, the Applicant indicated that the Court has discretion to determine whether or not to reopen the pleadings in accordance with Rule 46(3) of the Rules.

IV. On the reason for reopening of pleadings

12. The Court observes that Rule 46(3) of the Rules of Court provides

that “[t]he Court has the discretion to determine whether or not to reopen pleadings”. Furthermore, Rule 44(2) provides: “[A]fter the Respondent State has filed its Response; the Applicant may file a Reply thereto within forty-five (45) days”. The Court further notes that under Rule 90 of the Rules, “[n]othing in these Rules shall limit or otherwise affect the inherent power of the Court to adopt such procedure or decisions as may be necessary to meet the ends of justice”.

13. It emerges from the proceedings in the instant case, as summarised above, that the Respondent State’s Response entails crucial submissions on which the Court will be called upon to rule. Therefore, it is in the interest of justice that the attention of both parties be drawn to the procedure applicable under Rule 46(3) as read together with Rule 44(2) of the Rules.
14. In view of the foregoing, it is in the interest of justice to reopen the pleadings and allow the Applicant forty-five (45) days to reply to the Respondent State’s response.

V. Operative part

15. For these reasons,

The Court

Unanimously,

- i. *Orders* the reopening of pleadings in Application No 008/2019 *Ibrahim Ayed v Republic of Tunisia* and deems in the interest of justice, that the Respondent State’s Response is properly filed.
- ii. *Orders* the Applicant to submit the Reply to the Respondent State’s Response within forty-five (45) days of receipt thereof.

Abess v Tunisia (striking out) (2022) 6 AfCLR 226

Application 026/2018, *Mohamed Ali Abess v United Republic of Tunisia*
Order, 23 June 2022. Done in Arabic, English and French, the Arabic text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, MENGUE, MUKAMULISA, CHIZUMILA, BENSOUOLA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: BEN ACHOUR

The Applicant, a former Presidential aspirant in the Respondent State, filed an Application alleging that the rejection of his candidacy and the promulgation of certain laws by the Respondent State were a violation of some of his Charter guaranteed rights. After the Response of the Respondent State was served on him, the Applicant failed to respond to communications from the Court's Registry, despite several reminders. Applying its Rules, the Court ordered the case to be struck out.

Procedure (striking out, 18-22, diligence in prosecuting application 27-29)

I. The Parties

1. Mr. Mohamed Ali Abess (hereinafter referred to as "the Applicant") is a Tunisian national and an advocate at the Tunisian Court of Cassation. He challenges the rejection of his candidacy for the 2014 Tunisian presidential election and accuses the Republic of Tunisia of several violations of his rights and freedoms.
2. The Application is filed against the Republic of Tunisia (hereinafter referred to as "the Respondent State"), which became a party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 5 October 2007. Furthermore, on 16 April 2017, it deposited with the Chairperson of the AU Commission, the Declaration provided for under Article 34(6) of the Protocol by which it accepts the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.

II. Subject matter of the Application

A. Facts of the matter

3. It emerges from the Application that, the Applicant submitted his candidacy to run for the Tunisian presidential elections of

23 November 2014. On 29 September 2014, the Independent High Authority for Elections, *Instance Supérieure Indépendante pour Les Élections* issued a decision rejecting his candidacy. The ISIE based its decision on the ground that his candidacy failed to garner the required number of endorsements, pursuant to the provisions of the Organic Law on Elections and Referendums N° 16 of 26 May 2014.

4. Furthermore, it emerges from the record that the Applicant filed before domestic courts four (4) cases that the judiciary of the Respondent State allegedly failed to settle: i) complaint against the former President of the Republic Mohamed Beji Caid Essebsi in 2013 before the Court of First Instance of Tunis ii) complaint against the preliminary results of the elections of the Supreme Judicial Council in 2016, iii) complaint against the decision of the Speaker of the Assembly of People's Representatives to convene the meeting of the Supreme Judicial Council on 25 April 2017, and iv) complaint against holding of parliamentary by-elections for Tunisians residing in Germany in 2017, all before the Administrative Tribunal of Tunisia.
5. The Applicant also challenges the constitutionality of the two organic laws on the Supreme Judicial Council n° 34/2016 and 19/2017, as well as the organic law on reconciliation in the administrative field n°49/2015 of 2017 and on the non-establishment of the Constitutional Court.
6. He further challenges the continued membership of Judge Rafaâ Ben Achour at this Court.

B. Alleged Violations

7. The Applicant alleges the violation of the following rights:
 - i. right to enjoy rights and freedoms without discrimination under Article 2 of the Charter;
 - ii. right to equality before the law and the right to equal protection of the law under Article 3 of the Charter;
 - iii. right to a fair and impartial judiciary under Article 7 of the Charter;
 - iv. right to freely participate in the conduct of public affairs under Article 13 of the Charter;
 - v. Article 18 of the Protocol and Rule 5 of the Rules by virtue of the presence of Justice Rafaâ Ben Achour as a member of this Court;

- vi. right to equality before Courts and tribunals under Article 14 of the International Covenant on Civil and Political Rights.¹
 - vii. right to equal voting and to stand for election under Article 25 of the International Covenant on Civil and Political Rights.
8. It is also the Applicant's averment that the Respondent State's conduct also violates articles 21, 74, 102, 108, 109 of its own Constitution.

III. Summary of the Procedure before the Court

- 9. The Application was received at the Registry on 12 October 2018. On 19 October 2018, the Applicant was requested to submit copies of judgments rendered by domestic courts within thirty (30) days of receipt of the notification.
- 10. On 18 December 2018, 4 February and 11 March 2019, the Registry sent reminders to the Applicant to comply with the request to submit copies of judgments of domestic courts, within a period of thirty (30) days from receipt of each reminder. The Applicant did not submit the said documents.
- 11. On 10 May 2019, the Registry served the Application on the Respondent State and on 14 June 2019, it was notified to the other entities listed under Rule 42(4) of the Rules.²
- 12. The Respondent State filed the Response to the Application on 22 July 2019 and this was served on the Applicant on 30 August 2019, with a request to file his Reply within thirty (30) days of receipt. The Applicant did not respond to this request.
- 13. On 2 December 2019 and 5 February 2020, the Registry reminded the Applicant of the expiration of the period provided to file his Reply and with each reminder he was provided an additional period of thirty (30) days to file the said Reply. The Applicant did not respond to this request.
- 14. On 10 November 2020, the Registry granted the Applicant an additional period of ten (10) days to file his Reply and to submit supplementary documents. The Applicant did not respond.

1 The Respondent State acceded to the International Covenant on Civil and Political Rights on 18 March 1969.

2 Rule 35(3) of the Rules of Court of 2 June 2010.

IV. Prayers of the Parties

15. The Applicant prays the Court to:
 - i. Remove the Tunisian judge, Justice Rafaâ BEN ACHOUR from the African Court on Human and Peoples' Rights for lack of impartiality.
 - ii. Order the Respondent State, through the legal representative of the *Instance Supérieure Indépendante pour Les Élections* (ISIE), to issue a decision annulling the presidential elections of November and December 2014 and to include the Applicant in the list of candidates for the presidential elections and to organise fresh presidential elections as soon as possible;
 - iii. Order the Respondent State, to pay him Twenty Thousand (20,000) Tunisian dinars as reparation for moral prejudice he suffered for depriving him of his right to run in the presidential election;
 - iv. Order the Respondent State, to pay him the sum of One Million (1,000,000) Tunisian dinars as reparation for the rejection of his candidacy for the 2014 presidential elections;
 - v. Order the Respondent State to pay him One Hundred Thousand (100,000) Tunisian dinars, for litigation fees, attorney's fees, transport and living expenses, and to order the Respondent State to bear the legal costs.
16. The Respondent State on its part prays the Court to find:
 - i. That the Applicant failed to prove any human right that has been violated within the Respondent State for which he has brought proceedings before this Court, which puts his case out of the Court's jurisdiction;
 - ii. That the Application infringes on the national sovereignty of the Respondent State.
 - iii. That the Application is inadmissible and accordingly dismiss it.

V. On the striking out of the Application

17. The Court notes that the relevant Rule on striking out of Applications is Rule 65(1) of the Rules, which provides that:

The Court may at any stage of the proceedings decide to strike out an Application from its cause list where:

 - a. An Applicant notifies the Court of his/her intention not to proceed with the case;
 - b. An Applicant fails to pursue his case within the time limit provided by the Court;
 - c. It, for any other reason, concludes that it is no longer justified to continue with the examination of the Application.

18. The Court observes that parties to an application should pursue their case with diligence.³ Where they fail or indicate, implicitly or explicitly, their lack of interest to do so, Rule 65 allows the Court to remove the application from its cause list. The Court may also decide to strike out an application *suo motu* if in the circumstances, it is no longer justified to continue with the determination of the matter.
19. The Court recalls that the rationale behind Rule 65 is to save the Court's resources from being unnecessarily expended or wasted on matters the consideration of which will not serve the interests of justice.⁴ As such, the provision encourages parties to demonstrate some level of diligence in pursuing their case or else their application risks being strike out from the Court's cause list.⁵
20. Subject to the circumstances of each case, the Court retains the discretion to decide on whether a particular application should be struck out or not.⁶
21. In the instant case, the Applicant filed his Application on 12 August 2018. The Registry, while reviewing his Application, noticed that some documents supporting the Applicant's allegations of violations of human rights were missing. Subsequently, on 19 October 2018, the Registry requested the Applicant to submit the missing documents, notably, copies of judgments of national courts within thirty (30) days of receipt of the notice.
22. The Applicant having failed to do so, the Registry sent reminders to the Applicant on 18 December 2018, 4 February 2019 and 11 March 2019, requesting him to submit the aforesaid copies of judgments of domestic courts, within a period of thirty (30) days from receipt of each reminder.
23. In the meantime, the Registry served the Application on the Respondent State on May 2019, pending the filing of the said documents by the Applicant. The Respondent State filed its Response on 22 July 2019 and this was transmitted to the Applicant on 30 August 2019, with a request to file his Reply within thirty (30) days of receipt. The Applicant did not respond to this request
24. The Registry again reminded the Applicant of the expiration of the period provided to file his Reply on 2 December 2019 and

3 *Abdallah Ally Kulukuni v the United Republic of Tanzania*, Application No 007/2018 Order (strike out) of 25 September 2020, § 18.

4 *Magweiga Mahiri v the United Republic of Tanzania*, Application No 029/2017, Order (strike out) of 24 March 2022, § 22.

5 *Ibid.*

6 *Ibid*, § 23.

5 February 2020, and with each reminder he was provided an additional period of thirty (30) days to file his Reply. The Applicant has never reacted to the various requests.

25. The Court notes, as can be seen from the preceding paragraphs, that despite several requests and extensions of time granted to the Applicant to file the documents supporting his Application and his Reply to the Respondent State's Response, the Applicant has failed to do so.
26. In this regard, the Court notes from the record that there are proofs of delivery of the notices sent to the Applicant. Accordingly, the Applicant's failure to respond to the requests cannot be attributed to the non-receipt of the notices but to his lack of due diligence in pursuing his Application.
27. The Court observes that, as the lawyer he is, the Applicant should have known the importance of pursuing his matter with due diligence by actively participating in the proceedings of the Court, including by adducing evidence to substantiate his allegations and responding to the Court's requests for additional information within the prescribed time. Nevertheless, as noted above, the Applicant repeatedly failed to comply with the Court's requests without providing reasons justifying his inaction.
28. In view of the circumstances, the Court thus concludes that Applicant has failed to pursue his case within the meaning of Rule 65(1)(b) of the Rules and thus, the Court decides to strike out the instant Application from its Cause List.
29. The Court notes that, the striking out of the Application is without prejudice to the Applicant's right to file a new application in accordance with Rule 65(3) of the Rules.

VI. Operative part

30. For these reasons,
The Court
Unanimously,
Strikes out the Application from its Cause List.

African Commission on Human and Peoples' Rights v Kenya (reparations) (2022) 6 AfCLR 232

Application 006/2012, *African Commission on Human and Peoples' Rights v Republic of Kenya*

Judgment (reparations), 23 June 2022. Done in English and French, the English text being authoritative.

Judges: ABOUD, TCHIKAYA, BENACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: KIOKO

In its judgment delivered on 26 May 2017, the Court held that the Respondent State had violated certain human rights of the Ogiek indigenous people represented by the African Commission on Human and Peoples' Rights. In this judgment on reparation, the Court held that the Ogiek people were entitled to material and moral damages as well as measures of recognition, satisfaction and consultation as well as the establishment of a development fund by the Respondent State. Accordingly, the Court made several orders in favour of the Ogiek people.

Reparations (temporal scope of reparations, 26-27; amicable settlement of, 30-32; state responsibility to make reparation, 36-38, 45; burden to prove damage, 40, 60-63; scope of reparations, 41-44; causality, 60, 87; material prejudice, 64-67 70-77; award in equity, 67; reparation currency, 68-69; moral prejudice, 85-93; non-pecuniary reparations, restitution of land, 107-117; measures of recognition, 124-126; measures of satisfaction, 129, 132-133; measures of consultation, 139-144; guarantees of non-repetition, 148-150; development fund, 154-156)

Separate Opinion: TCHIKAYA

Reparations (*restitutio in integrum*, 14; moral prejudice, 35)

I. Background to the Matter

1. In its Application, filed on 12 July 2012, the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Applicant" or "the Commission") alleged that, in October 2009, the Ogiek, an indigenous minority ethnic group in the Republic of Kenya (hereinafter referred to as "the Respondent State"), had received a thirty (30) days eviction notice, issued by the Kenya Forestry Service, to leave the Mau Forest. The Commission filed this Application after receiving, on 14 November 2009, an application from the Centre for Minority Rights Development and Minority Rights Group International, both acting on behalf of the

Ogiek of Mau Forest. In the Application, the Commission argued that the eviction notice failed to consider the importance of the Mau Forest for the survival of the Ogiek leading to violations of Articles 1, 2, 4, 8, 14, 17(2) and (3), 21, and 22 of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter").

2. The Court delivered its judgment on merits on 26 May 2017. In the operative part of its judgment, the Court pronounced itself as follows:

On the Merits

- i. Declares that the Respondent has violated Articles 1, 2, 8, 14, 17(2) and (3), 21 and 22 of the Charter;
- ii. Declares that the Respondent has not violated Article 4 of the Charter;
- iii. Orders the Respondent to take all appropriate measures within a reasonable time frame to remedy all the violations established and to inform the Court of the measures taken within six (6) months from the date of this judgment;
- iv. Reserves its ruling on reparations;
- v. Requests the Applicant to file submissions on Reparations within 60 days from the date of this judgment and thereafter, the Respondent shall file its Response thereto within 60 days of receipt of the Applicant's submissions on Reparations and Costs.

II. Subject of the Application

3. In conformity with Rule 69(3) of the Rules, and in implementation of the operative part of its judgment on merits, the Parties filed their submissions on reparations within the times permitted by the Court.

III. Summary of the Procedure before the Court

4. On 30 May 2017, the Registry transmitted to the Parties, the African Union Commission and the Executive Council of the African Union certified copies of its judgment on merits.
5. On 10 August 2017, the Registry received an application for leave to participate in the proceedings as *amici curiae* from the Human Rights Implementation Centre of the School of Law at the University of Bristol (hereinafter referred to as "the HRIC") and Centre for Human Rights, University of Pretoria (hereinafter referred to as "the CHR"). On 30 November 2017, the Court granted them leave to act as *amici curiae*, after duly notifying the

Parties of their application.

6. On 23 October 2017, the Registry received the Applicant's submissions on reparations. These were transmitted to the Respondent State on 25 October 2017, requesting it to file its Response within thirty (30) days of receipt.
7. On 30 January 2018, the *amici curiae* filed their combined brief and on 31 January 2018, this was transmitted to the Parties for their information.
8. On 13 February 2018, the Respondent State filed its submissions on reparations and these were transmitted to the Applicant on 16 February 2018 giving it thirty (30) days to file a Reply, if any. On 21 March 2018, the Respondent State filed its further submissions on reparations which were transmitted to the Applicant on 29 March 2018 for Reply, within thirty (30) days of receipt thereof.
9. On 9 May 2018, the Registry received the Applicant's Reply and this was transmitted to the Respondent State on 11 May 2018, for its observations, if any, within thirty (30) days of receipt of the Notice.
10. On 13 June 2018, the Registry received the Respondent' State's observations and these were transmitted to the Applicant for information on 14 June 2018.
11. On 20 September 2018, the Registry notified the Parties of the closure of the written proceedings effective on that date.
12. On 16 April 2019, the Registry received two applications, one from Wilson Barngetuny Koimet and 119 others, and the other from Peter Kibiegono Rono and 1300 others for leave to join the proceedings as interested parties. These applications were jointly considered by the Court and dismissed on 4 July 2019.¹
13. On 29 August 2019, the Registry received an application for review of the Court's decision of 4 July 2019. This application was considered by the Court and dismissed on 11 November 2019.²
14. On 10 October 2019, the Registry received an "application to intervene at the reparations stage" filed by Kipsang Kilel and others, being members of the Ogiek Community residing in the Tinet Settlement Scheme. This Application was considered by the Court and dismissed on 28 November 2019.³

1 *African Commission on Human and Peoples' Rights v Kenya*, AfCHPR, Application No 006/2012, Order (intervention) 4 July 2019.

2 *Application for review by Wilson Barngetuny Koimet and 114 others of the Order of 4 July 2019* (order) 11 November 2019.

3 Application No 001/2019, *Application for intervention by Kipsang Killel and others* (order) Intervention 28 November 2019.

15. On 22 November 2019, the Registry informed the Parties and the *amici curiae* of the Court's decision to hold a public hearing which was scheduled for 6 March 2020. The Parties and the *amici curiae* were also sent a list of issues to which their responses were required by 15 January 2021.
16. The Parties and the *amici curiae* all filed their responses to the list of issues within the time permitted by the Court.
17. On 3 March 2020, the Registry informed the Parties and the *amici curiae* of the Court's decision, under Practice Direction 34, to adjourn the hearing scheduled for 6 March 2020 to 5 June 2020 due to the non-availability of the Parties.
18. On the Court's request, two independent expert submissions were filed, one on 2 April 2020 by Dr Elifuraha Laltaika, former expert member of the United Nations Permanent Forum on Indigenous Issues and the other on 30 April 2020 by Victoria Tauli-Corpuz, the then United Nations Special Rapporteur on Rights of Indigenous People. These submissions were duly transmitted to the Parties and the *amici curiae* for their information.
19. On various occasions, in the course of 2020 and 2021, the Court attempted to convene the public hearing but was unable to do so largely due the COVID-19 Pandemic.
20. On 25 June 2021, the Court issued an Order adjourning the public hearing *sine die* and further directed that the reparations phase of the Application would be "disposed of on the basis of the Parties' written pleadings and submissions." This Order was notified to the Parties and the *amici curiae* on 29 June 2021.
21. The Court acknowledges that the Parties filed several submissions in this matter including their responses to the list of issues developed by the Court.

IV. Prayers of the Parties

22. The Applicant prays the Court to order the Respondent to:
 - i. Undertake a process of delimiting, demarcation and titling of Ogiek ancestral land, within which the Ogiek fully participate, within a timeframe of 1 year of notification of the reparations order;
 - ii. Establish and facilitate a dialogue mechanism between the Ogiek (via the Original Complainants), KFS [Kenya Forest Service] (where relevant) and relevant private sector operators in order to reach mutual agreement on whether commercial activities on Ogiek land should cease, or whether they will be allowed to continue but operating via a lease of the land and/or royalty and benefit sharing agreement between the Ogiek communal title holders and the commercial operators, in line with provisions 35 to 37 of the

Community Land Act, 2016, such dialogue to have concluded within a timeframe of 9 months of notification of the reparations order ...;

- iii. Pay the sum of US\$297 104 578 in pecuniary and non-pecuniary damage into a Community Development Fund for the Ogiek within no more than 1 year of the Court's Order on Reparations;
- iv. Take all the necessary administrative, legislative, financial and human resource measures to create a Community Development Fund for the benefit of the members of the Ogiek people within 6 months of notification of the Court's Order on Reparations;
- v. Adopt legislative, administrative and other measures to recognize and ensure the right of the Ogiek to be effectively consulted, in accordance with their traditions and customs and/or with the right to give or withhold their free prior and informed consent, with regards to development, conservation or investment projects on Ogiek ancestral land, and implement adequate safeguards to minimize the damaging effects such projects may have upon the social, economic and cultural survival of the Ogiek;
- vi. Provide for full consultation and participation of the Ogiek, in accordance with their traditions and customs, in the reparations process as a whole, including all steps that the Respondent State and its agencies take in order to comply with the requested Court order to reconstitute Ogiek land, provide the Ogiek with compensation, and provide other guarantees of satisfaction and non-repetition ...;
- vii. Introduce specific legislative, administrative and other measures that are necessary to give effect to the obligations of the Respondent State with respect to the restitution, compensation and other guarantees of satisfaction and non-repetition herein sought, as well as with respect to consultation and participation of the Ogiek, which become apparent as the implementation process takes place, and as set out in this brief, with such processes to be completed within 1 year of the date of the Court's order on reparations, and the Applicant accordingly submits that the Respondent State must take appropriate action to comply with the same;
- viii. Fully recognize the Ogiek as an indigenous people of Kenya, including but not limited to the recognition of the Ogiek language and Ogiek cultural and religious practices; provision of health, social and education services for the Ogiek; and the enacting of positive steps to ensure national and local political representation of the Ogiek; and
- ix. Publicly issue a full apology to the Ogiek for all the violations of their rights as identified by the Judgment, in a newspaper with wide national circulation and on a radio station with widespread coverage, within 3 months of the date of the date of the Court's order on reparations; and
- x. Erect a public monument acknowledging the violation of Ogiek rights, in a place of significant importance to the Ogiek and chosen by them, the design of which also to be agreed by them, within 6 months of the date of the date of the Court's order on reparations.

23. The Respondent State prays the Court to:

- i. Find that it remains committed to the implementation of the Court's judgment as evidenced by its establishment of a multi-agency Task Force to oversee the implementation of the Court's judgment;
- ii. Order that guarantees of non-repetition together with rehabilitation measures are the most far reaching forms of reparations that could be awarded to redress the root and structural causes of identified human rights violations;
- iii. Order that the Court should use its offices to facilitate an amicable settlement with the Ogiek Community on the issue of reparations;
- iv. Hold that restitution, for the Applicants, can be achieved by reverse action of guaranteeing and granting access to the Mau Forest, save where encroachment in the interest of public need or in the general interest of the community in accordance with the provisions of the appropriate law and that the modalities of how this can be undertaken to be advised by the Taskforce;
- v. Find that demarcation and titling is totally unnecessary for purposes of access, occupation and use of the Mau Forest by the Ogiek; and further that the right to occupy and use the Mau Forest would suffice as adequate restitution to the Ogiek and that the individual demarcation and titling would undermine common access and use of the land by other people i.e. nomadic groups that have seasonal access to the Mau Forest;
- vi. Hold that the Respondent State's 2010 Constitution creates a legal super structure that is meant to address the structural and root causes of violations of Article 2 and that by virtue of the existing laws, the same have been substantially remedied and what is left can be attained by administrative interventions and guarantees of non-repetition;
- vii. Find that the Court did not determine that the Ogiek were the owners of the Mau Forest. Additionally, that ownership is not a *sine qua non* for the utilization of land;
- viii. Reject the community survey report submitted by the Applicant as not credible and the claim for US\$ 297,104,578, as compensation, as being premised on speculative presumptions which are neither fair nor proportionate. Further, that no evidence has been led to prove that the survey was actually conducted;
- ix. Find that any compensation due to the Applicants cannot be computed in United States Dollars for a claim involving a country whose currency is not the United States Dollar;
- x. Order that the Respondent State's general liability for violations of the Charter can only be computed from 1992, the year when the Respondent became a party to the Charter. Specifically in relation to the eviction of the Ogiek from Mau Forest, that its liability can only be computed from 26 October 2009, when the notice of eviction from South Western Mau Forest was issued;

- xi. Find that the Gazette Notice appointing the Task Force to give effect to the decision of the Court suffices as a public notice acknowledging violations of the Charter and should be deemed to be just satisfaction;
- xii. Hold that there is no basis for ordering the erection of a monument for the Ogiek commemorating the violation of their rights since the Ogiek have no practice of monument erection and there is no evidence that the same would be of any significance to their community especially as the Respondent State already acknowledged its wrong and is actively taking steps to redress the same;
- xiii. Find that any award of reparation made by the Court must take into account the situation of the Respondent State as a country so as not to cause it undue hardship.
- xiv. Hold that the jurisprudence of the Inter-American Court of Human Rights is not binding on this Court and cannot be the basis for a claim for restitution before the Court;
- xv. Hold that neither Minority Rights Group International nor the Ogiek Peoples' Development Program are representative of the Ogiek and that only the Ogiek Council of Elders is recognised as the body that can speak on behalf of the Ogiek;
- xvi. Find, overall, that the Applicant's claims are unsubstantiated and the Court should carefully assess all claims so as to exclude speculative claims.

V. Respondent State's objections

- 24. Before dealing with the claims for reparations, the Court considers it pertinent to begin by addressing three objections raised by the Respondent State.

A. Liability for activities before 1992

- 25. The Respondent State contends that there is no basis for a claim for compensation for any violations before the year 1992 when it became party to the Charter. It further contends that "any claim for financial compensation can only be computed from 26 October 2009 and only in relation to the notice given to the Ogiek to vacate the South Western Mau Forest."

- 26. The Court recalls that this issue was already resolved in its

merits judgment when it confirmed its temporal jurisdiction in this Application.⁴ Additionally, the Court takes notice of the fact that the violations alleged by the Applicant, which the Court established in its judgment of 26 May 2017, remain unaddressed up to date.

27. In the circumstances, the Court holds that comprehensive reparations need to take into account not only events after 10 February 1992 but also events before that so long as the same can be connected to the harm suffered by the Ogiek in relation to the infringement of their rights as established by the Court. This would ensure that reparations awarded comprehensively address the prejudice suffered by the Ogiek as a result of the Respondent State's conduct. The Court holds, therefore, that there is nothing barring it from considering events that occurred prior to 10 February 1992 in determining the reparations due to the Ogiek.

B. The proposal for an amicable settlement

28. The Respondent State submits that the present Application is a proper case for an amicable settlement in line with Article 9 of the Protocol. According to the Respondent State, "a negotiated settlement is the best solution in the peculiar circumstance of this case".
29. The Applicant opposes the Respondent State's submission. It argues that a ruling on reparations is necessary in order to provide clear guidance on reparations to the Respondent State and to ensure the realisation of the Ogiek's rights and guarantee an effective remedy for violations. The Applicant also points out that previous attempts for an amicable settlement have failed. According to the Applicant, therefore, a genuine and efficient amicable settlement procedure is extremely doubtful but may also seriously undermine the possibility of the Ogiek being offered a fair deal and risks prolonging the human rights violations they have already suffered.

⁴ See, *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9 §§ 64-66.

30. The Court observes that Article 9 of the Protocol provides that “the Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter.” It further observes that Rule 29(2)(a) of the Rules provides that “in the exercise of its contentious jurisdiction, the Court may (a) promote amicable settlement in cases pending before it in accordance with the provisions of the Charter and the Protocol”.⁵ The Court’s powers to facilitate an amicable settlement are further clarified in Rule 64.⁶
31. In the context of the present Application, the Court recalls that at the merits stage of the proceedings, it initiated a process for the possible amicable settlement of this matter. Although both Parties, initially, indicated willingness to participate in the envisaged amicable settlement, this process collapsed when the Parties could not agree on the issues to be covered by the settlement. It was as a result of the preceding that on 7 March 2016, the Court wrote both Parties conveying its decision to proceed with a judicial consideration of the matter especially given the Parties’ failure to agree on an amicable settlement.
32. From the totality of the Parties’ submissions on reparations, it is clear that they hold opposing views on the possibility of an amicable settlement. The Court stresses in this regard that a key prerequisite for an amicable settlement is that the Parties must be willing to engage in the process. Given the failure of the previous attempt at an amicable settlement in this matter, and also recalling that the provisions of the Protocol and Rules, on amicable settlement, are not mandatory, the Court finds that the prerequisites for an amicable settlement are not met. The Court, therefore, dismisses the Respondent State’s prayer.

C. The involvement of the “original complainants” in the proceedings

33. The Respondent State questions the involvement of the Centre for Minority Rights Development (hereinafter referred to as “CEMIRIDE”), Minority Rights Group International (hereinafter

5 Rule 26(1)(c) Rules of Court, 2 June 2010.

6 Rule 64, in so far as is material, provides as follows: 1. Pursuant to Article 9 of the Protocol, the Court may promote amicable settlement of cases pending before it. To that end, it may invite the parties and take appropriate measures to facilitate amicable settlement of the dispute; 2. Parties to a case before the Court, may on their own initiative, solicit the Court’s intervention to settle their dispute amicably at any time before the Court gives its judgment. (Formerly, Rule 56, Rules of Court 2 June 2010).

referred to as “MRGI”) and the Ogiek People’s Development Programme (hereinafter referred to as “OPDP”) in the present proceedings on the basis that these organisations are not representative of the Ogiek. It argues that the present matter could be resolved amicably if “rent seeking western funded organisations” are excluded from the negotiations. The Respondent State further argues that the Rules “do not provide for parties described as original complainants other than the applicant before this Court.” The Respondent State invites the Court to “invoke the provisions of either Rules 45 or 46 of the Rules to ascertain the fact of whether the named non-governmental organisations have the mandate from the Ogiek Council of Elders to speak on their behalf and whether they consulted and obtained by way of a resolution or consent of the said Council of Elders the permission to purport to act for them.”

34. The Applicant submits that “the Ogiek have been and remain clear on who should represent them throughout the 9 year journey that this case has been pending before the Commission and then the Court, namely OPDP.” In the Applicant’s view, this was confirmed to the Respondent State’s Attorney General and others by way of letters dated 11 July 2017 and 8 October 2017. The Ogiek, through the OPDP, it is argued, also clarified representation issues in a letter to the Ministry of Environment and Natural Resources dated 7 December 2017, accompanied by a power of attorney signed by forty (40) Ogiek elders from all locations in the Mau Forest, confirming that OPDP should continue to represent them within discussions on reparations and implementation of the Judgment. The Applicant thus submits that the OPDP, which is among the “original complainants” in this case, truly represents the Ogiek Community.

35. The Court recalls that the question of the representation of the Ogiek in this Application is not arising for the first time. During the merits stage, the Respondent State raised an objection relating to the involvement of the “original complainants” before the Commission in the litigation before this Court.⁷ As against this

⁷ *ACHPR v Kenya* (merits) §§ 84-85.

background, the Court reiterates that the Applicant before it is the Commission rather than the “original complainants” that filed the case, on behalf of the Ogiek, before the Commission. As pointed out in the judgment on merits, since the “original complainants” are not appearing before the Court as Parties⁸ the Court holds that it has proper Parties before it to enable it dispose of the Application.

VI. Reparations

36. The Court recalls that the right to reparations for the breach of human rights obligations is a fundamental principle of international law.⁹ A State that is responsible for an international wrong is required to make full reparation for the damage caused. The Permanent Court of International Justice (hereinafter referred to as “the PCIJ”) ably restated the position in the following words:¹⁰

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.

37. This fundamental principle has been consistently reiterated by the Court in its case law.¹¹ For example, in *Reverend Christopher Mtikila v United Republic of Tanzania* the Court stated as follows:¹²

One of the fundamental principles of contemporary international law on State responsibility, that constitutes a customary norm of international law, is that, any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation.

38. The Protocol aligns itself with this well-established principle of international law by providing, in Article 27(1), that “if the Court finds that there has been violation of a human or peoples’ rights,

8 *ACHPR v Kenya* (merits) § 88.

9 Cf. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 – <https://www.ohchr.org/en/professionalinterest/pages/remedyandrepairation.aspx>.

10 PCIJ: *The Factory at Chorzow* (jurisdiction) Judgment of 26 July 1927 p.21; See also: *Idem* (merits), Judgment of 13 September 1928, Series A, No 7, p. 29.

11 *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo and the Burkinabe Movement on Human and Peoples’ Rights v Burkina Faso* (reparations) (5 June 2015) 1 AfCLR 258 §§ 20-30; and *Lohe Issa Konate v Burkina Faso* (reparations) (3 June 2016) 1 AfCLR 346 §§ 15-18.

12 (14 June 2013) 1 AfCLR 72 §§ 27-29.

it shall make appropriate orders to remedy the violation, including payment of fair compensation or reparation.”

39. The above principles are reiterated, with a focus on indigenous peoples, in the United Nations Declaration on the Rights of Indigenous Peoples (hereinafter referred to as “the UNDRIP”). For example, Article 28 provides as follows:¹³

Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

40. The Court recalls that it is a general principle of international law that the Applicant bears the burden of proof regarding the claim for reparations.¹⁴ Additionally, it is not enough for the Applicant to show that the Respondent State has violated a provision of the Charter, it is also necessary to prove the damage that the State is being required to indemnify.¹⁵ As pointed out in *Zongo and others v Burkina Faso* the existence of a violation of the Charter is not sufficient, *per se*, for reparation to accrue.¹⁶ There must, therefore, be a causal link between the wrongful act that has been established and the alleged prejudice.
41. In terms of the damage that reparations must cover, the Court notes that, according to international law, both material and moral damages have to be repaired.¹⁷ While reparations serve multiple functions, fundamentally their objective is to restore an individual(s) to the position that he/she would have been in had he/she not suffered any harm while at the same time establishing means for deterrence to prevent recurrence of violations.¹⁸

13 It also bears pointing out that the provisions of Article 28 of the UNDRIP find resonance in Articles 8(2), 11(2) and 20(2) of the same Declaration, where the emphasis is on the right to reparations for violation of indigenous peoples' rights.

14 *Mtikila v Tanzania* § 40.

15 *Ibid* § 31.

16 *Zongo and others v Burkina Faso* (reparations) § 24. See also, *Konate v Burkina Faso* (reparations) § 46.

17 *Zongo and others v Burkina Faso* (reparations) § 26.

18 D Shelton *Remedies in international human rights law* (2015) 19-27.

42. In terms of quantification of the reparations, the applicable principle is that of full reparation, commensurate with the prejudice suffered. As stated by the PCIJ in *The Factory at Chorzow*, the State responsible for the violation needs to make effort to “wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”¹⁹
43. The Court observes that whenever it is called upon to adjudicate on reparations, it takes into account not only a fair balance between the form of reparation and the nature of the violation, but also the expressed wishes of the victim.²⁰ Further, the Court supports a wide interpretation of “victim” such that, in an appropriate case, not only first line heirs can claim damages but also other close relatives of the direct victim. In this connection, the Court notes that in *Zongo and others v Burkina Faso*, it cited with approval the definition of a victim proposed in the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.²¹
44. In its understanding of a “victim/s” of human rights violations, the Court remains alive to the fact that the notion of “victim” is not limited to individuals and that, subject to certain conditions, groups and communities may be entitled to reparations meant to address collective harm.²²
45. In the present Application, the Court recalls that the wrongful acts generating the international responsibility of the Respondent State is the violation of Articles 1, 2, 8, 14, 17(2) and (3), 21 and 22 of the Charter. All the reparation claims, therefore, have to be considered and assessed in relation to the violation of the earlier mentioned provisions of the Charter. It is against the above

19 PCIJ: *The Factory at Chorzow (merits)*, Judgment of 13 September 1928, Series A, No 17, p 47.

20 *Ingabire v Rwanda* (reparations) § 22.

21 “Victim” is defined as “... persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization” § 8.

22 Commission on Human Rights, Sub-commission on Prevention of Discrimination and Protection of Minorities, Forty-fifth Session, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, Final report submitted by Mr Theo van Boven, Special Rapporteur, E/CN.4/Sub.2/1993/8, 2 July 1993 §§ 14-15.

outlined principles that the Court will consider the prayers for both pecuniary and non-pecuniary reparations.

A. Pecuniary reparations

46. The Court notes that the Applicant has requested the award of sums of money as compensation for material harm and moral harm.

i. Material prejudice

47. The Applicant prays for compensation to be awarded to the Ogiek as a result of the violations that the Court found. The Applicant submits that for compensation to the Ogiek to be proportional to the circumstances, the compensation should be awarded for all damage suffered as a result of the violations including the payment of pecuniary damages to reflect the violation of their right to development and the loss of their property and natural resources.
48. As to the violations that should inform the compensation, the Applicant avers that the encroachments on the Ogiek's land is the basis for the claim for compensation. Specifically, the Applicant submits that the eviction of the Ogiek from their land and the resulting loss of their non-movable possessions on the land, including dwellings, religious and cultural sites and beehives, the lack of prompt and full compensation to the Ogiek for the loss of their ability to use and benefit from their property over the years and the denial of benefit, use of and interest in their traditional lands since eviction, including the denial of any financial benefit from the lands resources, such as that generated by logging concessions and tea plantations should inform the award of compensation.
49. In a bid to substantiate its claim, the Applicant submits a report from a community survey (Annex E to the Applicant's submissions on reparations) that was supposedly undertaken among the Ogiek. According to the Applicant, for quantification of pecuniary loss, one hundred and fifty-one (151) members of the Ogiek community, each representative of a distinct household, were interviewed through a questionnaire focused on the pecuniary loss suffered as a direct result of the violation of Article 14 and 21 of the Charter. The Applicant submits that the community survey was complemented by a desk-based analysis to quantify the loss to the Ogiek as a result of denial of financial benefits from the resources on the Ogiek ancestral land.

50. In connection to the community survey, the Applicant further submits that the quantification of pecuniary damage, and even non-pecuniary damage, simply represents the “best efforts of the Applicant to provide the evidentiary elements for the Court to have confidence to set a compensation award for the Ogiek ...” The Applicant concedes that calculating the pecuniary, and even non-pecuniary damage, occasioned to the Ogiek over the years is challenging given, among other things, the number of Ogiek involved in the forcible evictions, the passage of time and the dying of some members of the community as well as the peculiar nature of the Ogiek traditional life style which makes it difficult to preserve specific records and proof of lost property. The Applicant thus submits that the Court should “acknowledge the efforts of the Applicant to quantify the compensation it believes is owed to the Ogiek and accept that some aspects of the quantification may require the Court to speculate and base the award on principles of equity in light of the context in which the human rights violations have occurred.”
51. Overall, the Applicant contends that the material loss survey was designed to determine the extent of the loss across the broader Ogiek population. Given the preceding, the Applicant submits that the pecuniary damages due to the Ogiek, as a result of the violations established by the Court, should amount to at least US\$204,604,578 (Two hundred and four million, six hundred and four thousand, five hundred and seventy eight United States Dollars) and accordingly prays for this amount to be awarded.

52. The Respondent State submits that pecuniary damages cannot be awarded on the basis of the “best efforts” of an Applicant which are premised on speculative presumptions but only on legal evidentiary standards based on verifiable empirical data. According to the Respondent State, “pecuniary reparations ought not to be speculative but must be based on cogent proof, the legal and evidential [burden] which squarely falls on the shoulders of the Applicant and to have it otherwise would have no basis in law.”
53. The Respondent State also submits that the Applicant’s claim for pecuniary damages is fanciful, has no basis in law or practice, and if it were to be awarded alongside other forms of reparations it would be manifestly disproportionate and would constitute

unjust enrichment contrary to principles for reparations under international law.

54. Specifically, the Respondent State further submits that the claims on account of loss of farm buildings (US\$ 18,029,915 – Eighteen million twenty nine thousand and nine hundred fifteen United States Dollars) and loss of livestock (US\$ 97,923,370 – Ninety seven million nine hundred twenty three thousand three hundred seventy United States Dollars) are a clear departure from the Applicant's pleadings and submissions at the merits stage about the Ogiek way of life and are without basis.
55. The Respondent State also submits that, for loss of housing, the principle of causality requiring a causal link between the violation found, the harm produced and the reparation sought is missing because the Applicant failed to demonstrate the materials used in building the houses and to show a clear nexus between the same and the losses occasioned.
56. The Respondent State submits that the claim for US\$14,777,233 (Fourteen million seven, hundred seventy and seven thousand, two hundred and thirty three United States Dollars), on account of loss of revenue generated from the Mau forest, is fanciful and not premised on any evidence.
57. Overall, the Respondent State opposes the admission into evidence of the community survey report submitted by the Applicant. According to the Respondent State, the community survey report has no probative value, its methodology is flawed, its analysis is faulty and there is no proof that actual interviews were conducted among the Ogiek to inform the report. Further, the Respondent State also opposes the Applicant's computation of damages in United States Dollars when the claim at issue involves an African country and it is before a court sitting in Africa.
58. The Respondent State further submits that any award for compensation, in case the Court decides to award compensation, should not be such as to cause any unjust enrichment and the Court should be careful not to put the Respondent State into a situation of disproportionate hardship.

59. The Court acknowledges that compensation is an important means for effecting reparations. For example, in the *Mtikila v Tanzania* the Court reiterated the fact that a State that has

violated rights enshrined in the Charter should “take measures to ensure that the victims of human rights abuses are given effective remedies including restitution and compensation”.²³

60. As acknowledged by the Court, however, it is not enough for an Applicant to show that the Respondent State has violated a provision of the Charter, it is also necessary to prove the damage that the State is being required to indemnify.²⁴ The Applicant, therefore, bears the duty of proving the causal nexus between the violations and the damage suffered. Additionally, all material loss must be specifically proved. In insisting on proof of material loss, however, the Court is alive to the fact that victims of human rights violations may face challenges in collating evidence in support of their claims for various reasons. As such, the Court proceeds on a case by case basis paying attention to the consistency and credibility of the Applicant's assertions in the light of the whole Application.²⁵
61. In attempting to prove the pecuniary loss occasioned to the Ogiek, the Applicant relied on a community survey report which was submitted as Annex E to its submissions on reparations. In its further submissions, the Applicant offered clarification about the methods and processes that were used in developing the community survey report especially data collection and analysis. The Court notes, however, that the Respondent State opposes the admission into evidence of this report.
62. In so far as the community survey report is concerned, the Court notes that the Applicant has conceded some limitations in the process of developing and executing the survey which limitations have the potential of affecting the outcomes. For example, the Applicant posits that the “methodological and logistical challenges of ascribing a precise monetary value to the collective harms suffered by the Ogiek community are numerous.”
63. The Court, therefore, while noting the Applicant's effort to deploy a scientific method for determining the compensation due to the Ogiek, holds that the best way forward is to make an equitable award while being mindful of the general challenges of assessing compensation, with mathematical precision, in cases involving violation of indigenous peoples' rights. Resultantly, the Court does not consider itself bound by the community survey report submitted by the Applicant.

23 *Mtikila v Tanzania* (reparations) § 29.

24 *Ibid* §§ 31-32.

25 *Anudo Ochieng Anudo v United Republic of Tanzania* ACtHPR Application No 012/2015 Judgment of 2 December 2021 (reparations) §§ 31-32.

64. Specifically, the Court recalls that the claim for compensation by the Applicant relates to the violation of Articles 14 and 21 of the Charter and specifically in relation to the following: the loss of non-moveable possessions from Ogiek land, both houses(\$59 736 172); and farm buildings (\$18 029 915), the loss of livestock reliant on the land from which the Ogiek were evicted (\$97 923 370); the loss of household income generated from activities on Ogiek land (\$14 137 888); and the loss of revenue generated from activities using the Mau Forest due to the eviction of the Ogiek (\$14 777 233). The detailed breakdown for the amounts claimed in respect of each head of loss are contained in Annex E to the Applicant's submissions on reparations, and the total claim is US\$204,604,578 (Two hundred and four million, six hundred and four thousand, five hundred and seventy eight United States Dollars).
65. Notwithstanding the limitations with the community survey report submitted by the Applicant, it is incontrovertible that the actions of the Respondent State resulted in a violation of the rights of the Ogiek under Articles 14 and 21 of the Charter, among other Charter provisions.²⁶ Given that the Respondent State is responsible for the violation of the rights of the Ogiek, it follows that it bears responsibility for rectifying the consequences of its wrongful acts.
66. The Court, however, acknowledges that the length of time over which the violations occurred, the number of people affected by the violations, the Ogiek way of life and the general difficulties in attaching a monetary value to the loss of resources in the Mau Forest, among other factors, make a precise and mathematically exact quantification of pecuniary loss difficult. It is for the preceding reasons, among others, that the Court must exercise its discretion in equity to determine what amounts to fair compensation to be paid to the Ogiek.
67. In choosing to proceed by way of making an award in equity, the Court does not thereby subject the final award to its absolute and unregulated discretion.²⁷ The Court has paid particular attention to all the submissions, and the supporting documents, filed by the Parties, the *amici curiae* and also the independent experts in order to inform its decision on the equitable award due to the

26 *ACHPR v Kenya* (merits) § 201.

27 Cf. IACtHR, *Case of The Kichwa Indigenous People of Sarayaku v Ecuador* Judgment of 27 June 2012 (merits and reparations) § 314 available at https://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf.

Ogiek. The Court's award, therefore, though premised on the exercise of its equitable discretion is nevertheless informed by the submissions before it and the applicable law.

68. In terms of the currency in which the monetary awards must be made, the Court recalls that the Applicant has pegged all its claims in United States Dollars. The Respondent State, however, opposes this approach and insists that any award, if it is made, should be made in its currency.
69. In relation to this issue, the Court recalls that in *Ingabire Victoire Umuhuza v Republic of Rwanda* it held that where an Applicant is residing in the territory of the Respondent State, the amount of reparation should be calculated in the currency of the said State.²⁸ In the present case, therefore, the Court holds that the currency of any monetary award issued to the Applicant must be in the currency of the Respondent State since the Ogiek, for whose benefit this Application was commenced, are all resident in the territory of the Respondent State and all the violations happened within the territory of the Respondent State.
70. The Court takes particular cognisance of the fact that the claim for compensation relates to the right to property and also the right to freely dispose of wealth and natural resources. The Court is aware that the violations at issue herein have been ongoing for a long time and that they affect a particularly vulnerable section of the Respondent State's population. The award of compensation must, therefore, and in so far as is possible, operate to ameliorate the overall condition of the Ogiek.
71. Given the Parties' contrasting submissions about the relevance of comparative international law, the Court wishes to reiterate that it is not bound by decisions and statutes from other regional human rights systems. Nevertheless, in appropriate cases, it can draw inspiration from pronouncements emerging from other supranational human rights bodies and also distinguish the emerging principles as appropriate.
72. It is against this background that the Court considers the *Case of the Saramaka People v Suriname*,²⁹ also involving an indigenous community, in which the Inter-American Court of Human Rights ordered the respondent to pay, into a development fund for the

28 *Ingabire v Rwanda (reparations)* § 45. See also, *Anudo Ochieng Anudo v United Republic of Tanzania*, ACtHPR, Application 012/2015, Judgment of 2 December 2021 (reparations) § 21 and *Amir Ramadhani v United Republic of Tanzania*, ACtHPR, Application 010/2015, Judgment of 25 June 2021 (reparations) § 14.

29 Judgment of 28 November 2007 (preliminary objections, merits, reparations and costs).

benefit of the applicants, the sum of US\$75, 000 (Seventy five thousand United States Dollars) as compensation for the material prejudice suffered by the applicants.³⁰ In this particular case, the material damage suffered by the applicants consisted primarily of the illegal exploitation of their lands and natural resources.

73. The Court also notes that in the *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, also involving an indigenous community, the Inter-American Court found that the sum of US\$90 000 (Ninety thousand United States Dollars) was adequate compensation in equity for the pecuniary prejudice suffered by the Sarayaku People.³¹ In coming up with this award, the Court took into consideration the fact that the Sarayaku incurred expenses in commencing domestic proceedings to enforce their rights, that their territory and natural resources were damaged, and that their financial situation was affected when their production activities were suspended during certain periods.
74. In so far as distinguishing the earlier referred to cases from the Inter-American System is concerned, and in a non-exhaustive way, the Court takes notice of the fact that the violations at issue in the present Application are not all fours with those established in the the *Case of the Saramaka People* or even the *Case of The Kichwa Indigenous People of Sarayaku*. The Court acknowledges that the violations of the rights of the Ogiek have spanned a long period of time during which the Respondent State has failed/ neglected to implement measures meant to safeguard their rights.
75. The Court is aware that the Ogiek have suffered violations that involve multiple rights under the Charter. This points to a systemic violation of their rights.
76. Given the communal nature of the violations, the the Court finds it inappropriate to order that each member of the Ogiek community be paid compensation individually or that compensation be pegged to a sum due to each member of the Ogiek Community. The Court is reinforced in its preceding finding given not only the communal nature of the violations but also due to the practical challenges of making individual awards for a group numbering approximately 40 000 (forty thousand).
77. Taking all factors into consideration, the Court decides, in the exercise of its equitable jurisdiction, that the Respondent State

30 http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf.

31 IACtHR *Case of the Kichwa Indigenous People of Sarayaku v Ecuador* Judgment of 27 June 2012 (merits and reparations) § 317 available at https://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf.

must compensate the Ogiek with the sum of KES 57 850 000. (Fifty seven million, eight hundred and fifty thousand Kenya Shillings) for the material prejudice suffered.

ii. Moral prejudice

78. The Applicant prays for the payment of compensation for the moral prejudice as a result of violations related to the principle of non-discrimination (Article 2), the right to religion (Article 8), the right to culture (Article 17) and the right to development (Article 22) of the Charter.
79. According to the Applicant, the Ogiek have suffered routine discrimination at the hands of the Respondent State including the non-recognition of their tribal or ethnic identity and their corresponding rights. The Ogiek have not been able to practice their religion including prayers and ceremonies intimately connected to the Mau Forest, to bury their dead in accordance with traditional spiritual rituals, and access sacred sites for initiation and other ceremonies. They have also been denied access to an integrated system of beliefs, values, norms, traditions and artefacts closely linked to the Mau Forest and have had their right to development violated due to the Respondent State's failure to consult with or seek their consent about their shared cultural, economic, and social life within the Mau Forest.
80. The methodology used by the Applicant to quantify the non-pecuniary loss is contained in the compensation analysis report earlier referred to. According to the Applicant, bearing in mind the number of human rights violations found by the Court, the seriousness of the violations, the number of victims at stake and the anxiety, inconvenience and uncertainty caused by the violations, the sum of US\$92 500 000 (ninety two million five hundred thousand United States Dollars) would be adequate to compensate the Ogiek for their moral loss.
81. In coming up with the amount of US\$92 500 000, the Applicant has referred the Court to the following cases –*the case of the Kichwa Indigenous People of Sarayaku v Ecuador* (2012) [1200 victims, compensation awarded US\$1 250 000], the *Case of the Xakmok Kasek Indigenous Community v Paraguay* (2010) [268 victims, compensation awarded US\$700 000], the *Case of the Sawhoyamaya Indigenous Community v Paraguay* (2006) [407 victims, compensation awarded US\$ 1 000 000] and the *Case of the Yakye Axa Indigenous Community v Paraguay* (2005) [319 victims, compensation awarded US\$950 000].

82. The Respondent State disputes the Applicant's claims for moral loss. Specifically, it reiterates its objection to the admissibility of the compensation analysis report filed by the Applicant and avers that all the information contained in the report is incorrect and without any factual basis.
83. In respect of the alleged violation of Article 2 of the Charter, the Respondent State avers that its Constitution of 2010 provides a solid legal super structure which seeks to address the structural and root causes of violations of Article 2 and that the Ogiek's principal grievance lay with the period before the 2010 Constitution was adopted. As for the violation of Article 8 of the Charter, the Respondent State submits that that "the Court in its judgment proposed reparation by means of allowing access to the Mau Forest and government interventions including sensitizing campaigns, collaboration towards maintenance of sites, waiving fees, which the Respondent State has demonstrated willingness to observe and is only structuring the how to."
84. As for the violation of Article 17 of the Charter, the Respondent State submits that it has already addressed the issue of eviction and access to the Mau Forest. In relation to the violation of Article 21 of the Charter, the Respondent submits that the Applicant has misinterpreted the Court's judgment on merits. According to the Respondent State, "the Court did not determine that the Ogiek were the owners of Mau Forest ..." and that the Applicants have misapprehended the findings of the Court and placed emphasis on ownership rather than the right to access, use and occupy the land.

85. The Court notes that, in its judgment on merits, it established that the Respondent State violated the Ogiek's rights under Article 2 of the Charter by failing to recognise the Ogiek as a distinct tribe like other groups;³² Article 8 of the Charter by making it impossible

32 *ACHPR v Kenya* (merits) § 146.

for the Ogiek to continue practising their religious practices;³³ Article 17(2) and (3) of the Charter by evicting the Ogiek from the Mau Forest area thereby restricting them from exercising their cultural activities and practice; and Article 22 of the Charter due to the manner in which the Ogiek have been evicted from the Mau Forest.³⁴

86. The Court confirms that moral prejudice includes both the suffering and distress caused to the direct victims and their families, and the impairment of values that are highly significant to them, as well as other changes of a non-pecuniary nature, in the living conditions of the victims or their family.³⁵
87. In so far as the question of causation for moral prejudice is concerned, the Court recalls that in *Zongo and others v Burkina Faso* it held that the causal link between the wrongful act and the moral prejudice suffered, may result from the violation of a human right, as an automatic consequence, without any need to prove otherwise.³⁶ In terms of quantification of damages for moral harm, the Court, reaffirmed that such a determination should be done equitably taking into account the specific circumstances of each case.³⁷
88. The Court confirms, therefore, that international law requires that the determination of compensation for moral damage should be done equitably taking into account the specific circumstances of each case.³⁸ The nature of the violations and the suffering endured by the victims, the impact of the violations on the victim's way of life and length of time that the victims have had to endure the violations are among the factors that the Court considers in determining moral prejudice.
89. In the circumstances of the present Application, it is not contested that members of the Ogiek Community have suffered from the lack of recognition as an indigenous group; from the evictions from their ancestral land; the denial of enjoyment of the benefits emanating from their ancestral land; the failure to practice their

33 *Ibid* § 169.

34 *Ibid* § 210.

35 Cf. *Case of the "Street Children" (Villagrán Morales et al.) v Guatemala* (reparations and costs) § 84, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_77_ing.pdf; and *Case of Forneron and daughter v Argentina* § 194, available at: https://corteidh.or.cr/docs/casos/articulos/seriec_242_ing.pdf.

36 *Zongo and others v Burkina Faso* (reparations) § 55.

37 D Shelton (n 17 above) 346-348.

38 *Ibid*.

religion and culture as well as the right to fully and meaningfully participate in their economic, social and cultural development.

90. While it is not possible to allocate a precise monetary value equivalent to the moral damage suffered by the Ogiek, nevertheless, the Court can award compensation that provides adequate reparation to the Ogiek. In determining reparations for moral prejudice, as earlier pointed out, the Court takes into consideration the reasonable exercise of judicial discretion and bases its decision on the principles of equity taking into account the specific circumstances of each case.³⁹
91. The Court notes that in the *Case of Sawhoyamaxa Indigenous Community v Paraguay*,⁴⁰ the Inter-American Court of Human Rights awarded the sum of “US\$ 1,000,000.00 (One million United States Dollars) for moral prejudice to be paid into a fund, which would be used to implement educational, housing, agricultural and health projects, as well as to provide drinking water and to build sanitation infrastructure, for the benefit of the members of the Community.”⁴¹
92. The Court also notes that in *the Case of the Kalina and Lokono Peoples v Suriname*⁴² the Inter-American Court of Human Rights ordered that the Respondent should allocate the sum of US\$1 000 000 (One million United States Dollars) to a fund established for the benefit of the applicants to cover for the Applicants’ moral prejudice.⁴³ The case involved the responsibility of the State of Suriname for a series of violations of the rights of members of the Kalina and Lokono indigenous peoples. Specifically, the violations related to the absence of a legal framework recognising the legal personality of the indigenous communities; the failure to recognise collective ownership of the lands, territories and natural resources of the Kalina and Lokono peoples; and the granting of concessions and licences to carry out mining operations on lands belonging to the Kalina and Lokono without consulting them.
93. The Court is mindful that the violations established in the present Application relate to rights that remain central to the very existence of the Ogiek. The Respondent State, therefore, is under a duty to compensate the Ogiek for the moral prejudice

39 *Zongo and others v Burkina Faso (reparations)* § 61 and *Ingabire v Rwanda (reparations)* § 20.

40 Judgment of 29 March 2006 (merits, reparations and costs).

41 *Ibid* § 224.

42 Judgment of 25 November 2015 (merits, reparations and costs).

43 http://www.corteidh.or.cr/docs/casos/articulos/seriec_309_ing.pdf § 298.

they suffered as a result of the violation of their rights. Taking into account the exercise of its reasonable discretion in equity the Court, orders the Respondent to compensate the Ogiek with the sum of KES100 000 000 (One hundred million Kenyan Shillings) for the moral prejudice suffered.

B. Non-pecuniary reparations

94. The Applicant prays the Court to order several non-pecuniary reparations. The Court now considers the Applicant's prayers in respect of each of the non-pecuniary claims as follows:

i. Restitution of Ogiek ancestral lands

95. The Applicant, relying on the Court's finding of a violation of Article 14 of the Charter, submits that a natural consequence thereof is the restitution of the Ogiek ancestral lands. In the Applicant's view, this violation can be remedied by the recovery of the ancestral lands through delimitation, demarcation and titling or otherwise clarification and protection of all such land. The Applicant submits that all processes in this regard should be undertaken within a timeframe of one (1) year of notification of the reparations order with the full participation of the Ogiek.
96. The Applicant also submits that the legal framework in the Respondent State already possesses legislation that can be used to effect restitution of Ogiek ancestral land including the Community Land Act 2016, the Forest Conservation and Management Act, 2016 and the 2010 Constitution of the Respondent State. According to the Applicant, the Respondent State's laws have established a class of lands known as "community lands" (Article 61, Constitution) and one sub-category of community lands is ancestral lands and lands traditionally occupied by hunter gatherer communities (Article 63(2)(d)(ii), Constitution). The Community Land Act 2016 lays out the procedure to be followed by communities seeking to secure formal title over their lands. The Applicant further submits, with the support of an expert report, that these provisions can be used positively to facilitate restitution of Ogiek ancestral land.
97. The Applicant identified the Ogiek ancestral land to be restituted back to the Ogiek through communally held titles, subject to delimitation, delineation and demarcation, as follows:
 - a. The entire Public Forest area, which comprises the Mau Forest Complex, in all its parts, currently defined as public Forest, as well as the Maasai Mau Forest Block. (These lands have been delineated in Annex A to the Applicant's submission on reparations)

- b. Additional areas of Ogiek ancestral land: Kiptagich tea estate and tea factory in South West Mau near Tinet,; the Sojanmi Spring Field flower farm in Njoro area (East Mau) and land owned by a logging company in East Mau (south west of Njoro) measuring about 147 acres.
98. In relation to the ongoing commercial activities on the Ogiek ancestral land, the Applicant submits that the Respondent State should establish and facilitate dialogue mechanisms between the Ogiek (via the original complainants), Kenya Forestry Service (where relevant) and relevant private sector operators in order to reach mutual agreement on whether they will be allowed to continue their activities but operating via a lease of the land and/ or royalty and benefit sharing agreement between the Ogiek communal title holders and the commercial operators, in line with Sections 35 to 37 of the Community Land Act 2016. Such dialogue, it is further submitted, must be concluded within a time frame of nine (9) months of notification of the reparations judgment.
 99. As to the details of the restitution process, the Applicant submits that the Ogiek should be returned all twenty-two (22) forest blocks within the Mau Forest Complex by means of twenty-four (24) communally held titles. Each community, it is submitted, will hold title according to the procedure set out in the Community Land Act 2016 and will manage the forested areas as community forests under the Forest and Conservation Management Act 2016.
 100. The Applicant also prays for the rescission of such titles and concessions found to have been illegally granted with respect to the Ogiek ancestral land; and such land to be returned to the Ogiek with common title within each location. Accordingly, the Applicant submits that the Respondent State should enter into a dialogue with the Ogiek, via the “original complaints”, regarding the land to be returned from non-Ogiek to the Ogiek.
 101. In so far as the restitution of Ogiek ancestral land is concerned, the Applicant filed a Road Map which it submitted should guide the restitution. According to the Applicant’s Road Map, the Court should order a process of restitution that revolves around four elements: first, the appointment of an independent gender balanced panel of experts to oversee the settlement of all claims; second, reclassification of the Mau Forest into three categories depending on the difficulty of resettlement; thirdly, the Court to remain seized of the case until both the merits and reparations are fully implemented and, lastly, the Court to play an active role in overseeing the process of implementation of its judgments.

102. The Respondent State opposes the Applicant's prayer for restitution of Ogiek ancestral land by means of delimitation, demarcation and titling.
103. The Respondent State reiterates its position that the Applicant has misinterpreted the findings of the Court in relation to the ownership of the Ogiek ancestral land. It emphasises that the Court's judgment on merits did not pronounce that the Ogiek were/are the owners of the Mau Forest. In the Respondent State's view, the Applicant has erroneously emphasised ownership rather than the rights of access, use and occupation which the Court granted the Ogiek in its judgment on merits. According to the Respondent, ownership is not a *sine qua non* to the utilisation of land and any process of demarcating forests and titling for indigenous communities will set a dangerous precedent across the world.
104. The Respondent State also submits that guarantees of non-repetition together with rehabilitation measures are the most far-reaching forms of reparation that can be awarded to redress human rights violations since they address the root and structural causes of the violations. These remedies, the Respondent State submits, would best address the human rights violations suffered by the Ogiek including those relating to their ancestral land.
105. In relation to Article 14 of the Charter, the Respondent State submits that the Court's finding was that the violation of Article 14 was occasioned by the denial of access to the Mau Forest. According to the Respondent State, therefore, restitution for this violation can be achieved by the reverse action of guaranteeing and granting access to the Mau Forest for the Ogiek, save where encroachment is necessary in the interest of public need or in the general interest of the community.
106. The Respondent State further submits that demarcation and titling is unnecessary for purposes of access, occupation and use of the Mau Forest because such action is inimical with the character of the Ogiek as hunter and gatherer communities who do not have possession based land tenure systems.

107. The Court observes that, in the context of indigenous peoples' claims to land, demarcation is the formal process of identifying the actual locations and boundaries of indigenous lands or territories and physically marking those boundaries on the ground.⁴⁴ Demarcation is important and necessary because mere abstract or legal recognition of indigenous lands, territories or resources can be practically meaningless unless the physical identity of the land is determined and marked. This serves to remove uncertainty on the part of the concerned indigenous people in respect of the land to which they are entitled to exercise their rights.
108. As has been noted:⁴⁵
- The jurisprudence under international law bestows the right of ownership rather than mere access. if international law were to grant access only, indigenous people would remain vulnerable to further violations/dispossession by the State or third parties. Ownership ensures that indigenous people can engage with the state and third parties as active stakeholders rather than as passive beneficiaries.
109. The Court takes special notice of the fact that the protection of rights to land and natural resources remains fundamental for the survival of indigenous peoples.⁴⁶ As confirmed, the right to property includes not only the right to have access to one's property and not to have one's property invaded or encroached upon but also the right to undisturbed possession, use and control of such property however the owner(s) deem fit.⁴⁷
110. The Court thus finds that, in international law, granting indigenous people privileges such as mere access to land is inadequate to protect their rights to land.⁴⁸ What is required is to legally and

44 Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights *Indigenous peoples and their relationship to land: final working paper* prepared by the Special Rapporteur, Erica-Irene A. Daes – available at <https://digitallibrary.un.org/record/419881?ln=en>.

45 *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of the Endorois Welfare Council) v Kenya* available at: <https://www.achpr.org/sessions/descions?id=193> § 204.

46 Report of the African Commission's Working Group Report on Indigenous Populations/Communities, Adopted by the African Commission on Human and Peoples' Rights at the 28th Session, p. 11.

47 *Social Economic Rights and Accountability Project v Nigeria*; available at: <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2010/109>.

48 See, for example, *Case of the Saramaka People v Suriname* (preliminary objections, merits, reparations and costs), Judgment of 28 November 2007 §§ 110 & 115; *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* (merits, reparations and costs), Judgment of 31 August 2001, Series C No 79, § 153; *Case of the Indigenous Community Yakye Axa v Paraguay* (merits, reparations

securely recognise their collective title to the land in order to guarantee their permanent use and enjoyment of the same.

111. The Court wishes to emphasise though that given the unique situation and way of life of indigenous people, it is important to conceptualise and understand the distinctive dimensions in which their rights to property like land can be manifested. Ownership of land for indigenous people, therefore, is not necessarily the same as other forms of State ownership such as the possession of a fee simple title.⁴⁹ At the same time, however, ownership, even for indigenous people, entails the right to control access to indigenous lands. It thus behoves duty bearers, like the Respondent State, to attune their legal systems to accommodate indigenous peoples' rights to property such as land..
112. The Court acknowledges that "among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centred on an individual but rather on the group and its community".⁵⁰ Indigenous people, therefore, have, by the fact of their existence, the right to live freely in their own territory.⁵¹ The close ties that indigenous peoples have with the land must be recognised and understood as the fundamental basis of their cultures, spiritual life, integrity and economic survival.⁵²
113. The Court recalls that in its judgment on merits it confirmed that the right to property, as guaranteed in Article 14 of the Charter, applies to groups or communities and can be exercised individually or collectively. The Court also held that in determining the applicability

and costs) Judgment of 17 June 2005 Series C No125, §§ 143 & 215; case of the *Moiwana Community v Suriname* (preliminary objections, merits, reparations and costs) Judgment of 15 June 2005. Series C No 124, § 209.

49 A Erueti "The demarcation of indigenous peoples' traditional lands: Comparing domestic principles of demarcation with emerging principles of international law" (2006) 23(3) *Arizona Journal of International and Comparative Law* 543 544.

50 *Mayagna (Sumo) Awa Tingni v Nicaragua* §149.

51 *Ibid.*

52 *Yakye Axa Indigenous Community v Paraguay* §131. See also, UN Committee on Racial Discrimination *General Comment No 23* § 5 – Also relevant here is ILO Convention 169 especially Article 14 which provides as follows: 1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect; 2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession; 3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

of Article 14 of the Charter to indigenous peoples, comparable international law, such as the UNDRIP, was applicable. As the Court further held, rights that can be recognised for indigenous peoples on their ancestral lands are variable.⁵³

114. Given all of the above the Court reiterates its position that the Ogiek have a right to the land that they have occupied and used over the years in the Mau Forest Complex. However, in order to make the protection of the Ogiek's right to land meaningful, there must be more than an abstract or juridical recognition of the right to property.⁵⁴ It is for this reason that physical delineation, demarcation and titling is important.⁵⁵ This delineation, demarcation and titling must be premised on, among others, the Respondent State's Community Land Act, 2016, and the Forest Conservation and Management Act, 2016, without undermining any of the protections accorded to indigenous people by the applicable international law.
115. In the circumstances, the Court holds that the Respondent State should undertake an exercise of delimitation, demarcation and titling in order to protect the Ogiek's right to property, which in this case revolves around their occupation, use and enjoyment of the Mau Forest Complex and its various resources. The Court does not agree with the Respondent State's submission that delimitation, demarcation and titling is inimical to the ways of life of indigenous people. While the Court recognises that the Ogiek way of life, like that of many indigenous people, has not remained stagnant, the evidence before it demonstrates that they have maintained a way of life in and around the Mau Forest that distinguishes them as an indigenous people. Securing their right to property, especially land, creates a conducive context for guaranteeing their continued existence.
116. The Court, therefore, orders the Respondent State to take all necessary measures be they legislative or administrative to identify, in consultation with the Ogiek and/or their representatives, to delimit, demarcate and title Ogiek ancestral land and to grant *de jure* collective title to such land in order to ensure the permanent

53 *ACHPR v Kenya* (merits) 123-127.

54 *Ibid* § 143.

55 In this context, demarcation of lands is the formal process of identifying the actual locations and boundaries of indigenous lands or territories and physically marking those boundaries on the ground – Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights *Indigenous peoples and their relationship to land: final working paper* prepared by the Special Rapporteur, Erica-Irene A. Daes

use, occupation and enjoyment, by the Ogiek, with legal certainty. Where the Respondent State is unable to reconstitute such land for objective and reasonable grounds, it must enter into negotiations with the Ogiek through their representatives, for purposes of either offering adequate compensation or identifying alternative lands of equal extension and quality to be given for Ogiek use and/or occupation. This process must be undertaken and concluded within two (2) years from the date of notification of this judgment.

117. The Court further orders that, where concessions and/or leases have been granted over Ogiek ancestral land to non-Ogiek and other private individuals or corporations, the Respondent State must commence dialogue and consultations between the Ogiek and/or their representatives and the other concerned parties for purposes of reaching an agreement on whether or not they can be allowed to continue their operations by way of lease and/or royalty and benefit sharing with the Ogiek in line with the Community Land Act. In cases where land was allocated to non-Ogiek and where it proves impossible to reach a compromise, the Respondent State must either compensate the concerned third parties and return the land to the Ogiek or agree on appropriate compensation for the Ogiek.

ii. Recognition of the Ogiek as an indigenous people

118. The Applicant prays for the full recognition of the Ogiek as an indigenous people, including but not limited to the recognition of the Ogiek language and Ogiek cultural and religious practices; provision of health, social and education services for the Ogiek; and the enacting of positive steps to ensure national and local political representation of the Ogiek.
119. The Applicant further prays for the Respondent State to immediately engage in dialogue with the Ogiek's representatives, in accordance with their traditions and customs, to grant full recognition of the Ogiek, such processes to be completed within one (1) year of the date of the Court's order on reparations.

120. The Respondent State submits that it has constituted a Task Force to formulate further administrative interventions to redress the violations suffered by the Ogiek including their non-recognition

as an indigenous people.

- 121.** The Respondent State further submits that its Constitution of 2010 provides a solid legal superstructure which seeks to address the structural and root cause of the violations suffered by the Ogiek and that the same have been substantially remedied and what is left can be attained by administrative interventions and guarantees of non-repetition.

- 122.** The Court recalls that in its judgment on the merits it found that the Respondent State violated Article 2 of the Charter by failing to recognize the Ogiek's status as a distinct tribe like other similar groups and thereby denying them the rights available to other tribes.⁵⁶
- 123.** The Court notes that the Respondent State, on 23 October 2017, established a multi-agency Task Force with an initial period for operation of six (6) months, to implement its decision on merits. The Court also notes that on 25 October 2018 the Respondent State again appointed a Task Force for the implementation of the Court's judgment, albeit with a different composition from the one set up on 23 October 2017. The Court observes that while the Respondent State has stated that the Task Force appointed in October 2018 conducted extensive consultations with the Ogiek and other communities likely to be affected by its judgment, the Applicants have seriously questioned the composition of the Task Force as well as the methods it employed.
- 124.** Notwithstanding the Parties' lack of agreement on the utility of the Task Force, the Court notes, from the Respondent State's report to the Court of 25 January 2022, that the Task Force submitted its report to the appointing authority in October 2019. The Court, however, has not been able to access any publicly available record(s) of the findings and recommendations of the Task Force. The Court thus finds that whatever interventions may emerge from the Task Force, the processes afoot this far have not contributed meaningfully to the implementation of its judgment on the merits.

⁵⁶ *ACHPR v Kenya* (merits) § 146.

125. Separately, but again from the report filed by the Respondent State on 25 January 2022, the Court notes that the Respondent State, at least from 2019, has recognised the Ogiek as a sub-group of the Kalenjin, for purposes of its Population and Housing Census.
126. In its judgment on the merits, the Court already recognised the Ogiek as an indigenous population that is part of the Kenyan people having a particular status and deserving special protection deriving from their vulnerability.⁵⁷ Following from this recognition, the Court, therefore, orders that the Respondent State must take all necessary legislative, administrative and other measures to guarantee the full recognition of the Ogiek as an indigenous people of Kenya in an effective manner, including but not limited to according full recognition and protection to the Ogiek language and Ogiek cultural and religious practices within twelve (12) months of notification this judgment.

iii. Public apology

127. The Applicant submits that the Respondent State should be ordered to publicly issue a full apology to the Ogiek for all the violations of their rights as identified by the Court, in a newspaper with wide national circulation and on a radio station with widespread coverage, within three (3) months of the date of the Court's order on reparations.

128. The Respondent State submits that the Gazette Notice appointing the Task Force to give effect to the decision of the Court suffices as a public notice acknowledging violations of the Charter and would constitute just satisfaction for the violations suffered by the Ogiek.

57 *ACHPR v Kenya* (merits), § 112.

129. The Court, recalling its jurisprudence, holds that a judgment can constitute a sufficient form of reparation and also a sufficient measure of satisfaction.⁵⁸ In the instant case, the Court believes that its judgments, both on the merits and reparations, are a sufficient measure of satisfaction and that, therefore, it is not necessary for the Respondent State to issue a public apology.

iv. Erection of public monument

130. The Applicant submits that the Respondent State should be ordered to erect a public monument acknowledging the violation of Ogiek rights, in a place of significant importance to the Ogiek within six (6) months of the date of the Court's order on reparations.

131. The Respondent State submits that there is no justification for the erection of a monument as a form of reparations and that the Ogiek have no practice of monument erection and there is no evidence that the same would be of any significance to their community. It further submits that there is no evidence that the erection of a monument would be of any significance to the Ogiek Community especially given that it has "already acknowledged its wrongs and is actively taking steps to redress the same."

132. Commemoration of victims of human rights violations by way of erecting a memorial or even by way of other acts of public acknowledgment of the violations, is an accepted form of reparations in international law.⁵⁹ In the main, this serves as a

⁵⁸ *Mtikila v Tanzania* (reparations) § 45; *Armand Guehi v Tanzania* (merits and reparations) (7 December 2018) 477 § 194 and Application No 005/2015 *Thobias Mang'ara Mango and another v Tanzania*, ACtHPR, Application No005/2015, Judgment of 2 December 2021 (merits and reparations) § 106.

⁵⁹ Cf. *Gonzales and others (Cotton Field) v Mexico* § 471 (16 November 2009).

way of dignifying the victims and also to create a reminder of the violations that occurred and thus, hopefully, spur undertakings not to repeat the violations. The erection of a monument to victims of human rights violations, therefore, is a symbolic gesture which simultaneously acknowledges the violations while deterring further violations.

- 133.** As the Court has established, however, a judgment itself can constitute sufficient reparation.⁶⁰ In the present Application, having considered all the circumstances of the case, especially the other orders on reparations that the Court has made, the Court holds that it is not necessary for the Respondent State to erect a monument for the commemoration of the violation of the rights of the Ogiek. Resultantly, the Court dismisses the Applicant's prayer.

v. The right to effective consultation and dialogue

- 134.** The Applicant submits that the Court had, in its judgment on merits, found that the Respondent State repeatedly failed to consult with the Ogiek resulting in a violation of Article 22 of the Charter.
- 135.** The Applicant prays the Court to make an order directing the Respondent State to adopt legislative, administrative and other measures to recognise and ensure the right of the Ogiek to be effectively consulted, in accordance with their traditions and customs and/or with the right to give or withhold their free, prior and informed consent, with regard to development, conservation or investment projects on Ogiek ancestral land, and implement adequate safeguards to minimize the damaging effects such projects may have upon the social, economic and cultural survival of the Ogiek, with such processes to be completed within one (1) year of the date of the Court's order on reparation.
- 136.** The Applicant further prays the Court for an order requiring the Respondent State to fully consult and facilitate the participation, in accordance with their traditions and customs, of the Ogiek in the reparation process as a whole, including all steps that the Respondent State and its agencies take in order to comply with the Court's order.

60 *Mtikila v Tanzania (reparations)* § 37.

- 137.** The Respondent State submits that it intends to engage directly with the Ogiek through the Ogiek Council of Elders which it views as the generally accepted body mandated to speak on behalf of the Ogiek community. In the same vein, the Respondent State reiterates its willingness and commitment to offer a comprehensive and long-lasting solution to the predicament of the Ogiek of the Mau Forest in line with the Court's judgment on the merits.
- 138.** The Respondent State, however, has also categorically submitted that "it is opposed to engagement with self-serving third parties ...who have been a stumbling block to all attempts to meaningful engagement with the Ogiek Community to resolve this long standing issue."

- 139.** The Court recalls that in its judgment on merits it found that the Ogiek had been continuously evicted from the Mau Forest without being effectively consulted.⁶¹ As the Court further held, the evictions have adversely impacted on the Ogiek's economic, social, and cultural development. The Court also found that the Ogiek have not been actively involved in developing and determining health, housing and other economic and social programmes affecting them.
- 140.** The Court observes that the Respondent State has not, generally, opposed the establishment of mechanisms and processes which could facilitate engagement with the Ogiek especially in relation to remedying the various violations of their human rights. So far as the Court has been able to discern, from the Respondent State's submissions, its major objection relates to engagement with the complainants that filed this Application before the Commission. In this regard, the Court wishes to reiterate its earlier finding that the complainants that filed this case before the Commission are not Parties to the present case, the only Applicant before it is the Commission.
- 141.** The Court also observes that in its various submissions before it, the Respondent State has expressed its willingness to engage the Ogiek to solve the land problem in the Mau Forest. However, apart from the establishment of the Task Force, the Respondent State

61 *ACHPR v Kenya* (merits) § 210.

has not been forthcoming with information about the concrete steps that it has been taking towards the implementation of the judgment on merits. This seems to contradict the Respondent State's own submissions in relation to its commitment to engagement towards the resolution of the differences that it has with the Ogiek.

142. As against the above background, the Court reiterates its position, as reflected in the judgment on merits, that it is a basic requirement of international human rights law that indigenous peoples, like the Ogiek, be consulted in all decisions and actions that affect their lives. In the present case, therefore, the Respondent State has an obligation to consult the Ogiek in an active and informed manner, in accordance with their customs and traditions, within the framework of continuing communication between the parties.⁶² Such consultations must be undertaken in good faith and using culturally-appropriate procedures. Where development programmes are at stake, the consultation must begin during the early stages of the development plans, and not only when it is necessary to obtain Ogiek's approval. In such a case, it is also incumbent on the Respondent State to ensure that the Ogiek are aware of the potential benefits and risks so they can decide whether to accept the proposed development or not. This would be in line with the notion of Free Prior and Informed Consent which is also reflected in Article 32(2) of the UNDRIP.
143. The Court observes that it is not strange for indigenous peoples to self-organise along lines of national, regional and sometimes even international networks covering non-governmental organisations and other civil society organisations. In the case of the Ogiek, it is clear that they have several bodies that represent their interests. It is thus incumbent on the Respondent State, in line with the obligation to consult in good faith, to create space for engagement with all actors that represent the interests of the Ogiek. This engagement, for the avoidance of doubt, must follow culturally appropriate procedures and processes. In case challenges arise in identifying organisations/bodies to represent the Ogiek, in consultations and engagement with the Respondent, the Respondent State must facilitate the creation of civic space, and time, where the Ogiek must be allowed to resolve all representation-related challenges.

62 IACtHR Case of *The Kichwa Indigenous People of Sarayaku v Ecuador* Judgment of 27 June 2012 (merits and reparations) § 177.

- 144.** The Court, therefore, grants the Applicant's prayer and orders that the Respondent State must take all necessary legislative, administrative or other measures to recognise, respect and protect the right of the Ogiek to be effectively consulted, in accordance with their tradition/customs, and/or with the right to give or withhold their free, prior and informed consent, with regards to development, conservation or investment projects on Ogiek ancestral land and to implement measures that would minimise the damaging effects of such projects on the survival of the Ogiek.
- 145.** Given that the Court has established that the violation of the Ogiek's rights was partly due to the Respondent State's failure to consult the Ogiek, the Court further orders that the Respondent State to ensure the full consultation and participation of the Ogiek, in accordance with their traditions/customs, in the reparation process as a whole including specifically all the steps taken in order to comply with this judgment.

vi. Guarantees of non-repetition

- 146.** The Applicant prays that the Court make an order that the Respondent State guarantees non-repetition of the violation of the rights of the Ogiek People.

- 147.** The Respondent State does not contest the Applicant's prayer and has submitted that guarantees of non-repetition together with rehabilitation measures are the best means for addressing human rights violation especially where the objective is to address the root and structural causes of the violations.

- 148.** Guarantees of non-repetition are aimed at ensuring that further violations do not occur. As a form of reparations, they serve to prevent future violations, to cease on-going violations and to

assure victims of past violations of the harm they suffered and of action to prevent the repetition thereof. The overall aim of guarantees of non-repetition is to “break the structural causes of societal violence, which are often conducive to an environment in which [human rights violations] take place and are not publicly condemned or adequately punished.”⁶³

149. The Court recalls that it is trite that a State that is a party to an international human rights instrument thereby undertakes to honour the terms of the instrument including through the modification of its domestic laws to align them with the obligations that it has assumed. In this Application, the Court observes that the Parties are not in dispute on the need for guarantees of non-repetition.
150. In the present case, the Court orders the Respondent State to adopt legislative, administrative and/or any other measures to avoid a recurrence of the violations established by the Court including, inter alia, by the restitution of the Ogiek ancestral lands, the recognition of the Ogiek as an indigenous people, and the establishment of mechanisms/frameworks for consultation and dialogue with the Ogiek on all matters affecting them.

C. Development fund for the Ogiek

151. The Applicant has requested the Court to order the Respondent State to take “all necessary measures administrative, legislative, financial and human resource measure to create a Community Development Fund for the benefit of the members of the Ogiek people within 6 months of notification of the Court’s Order on Reparation.”
152. According to the Applicant, a community development fund provides “the governance framework for the allocation of funds to projects of a collective interest to the indigenous community such as agriculture, education, food security, health housing, water and sanitation projects, resource management and other projects that the indigenous community consider of benefit ...”

63 African Commission on Human and Peoples’ Rights *General Comment No 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment* (Article 5) § 45 – available at: https://www.achpr.org/public/Document/file/English/achpr_general_comment_No_4_english.pdf.

153. The Respondent State's submissions did not address this issue.

154. The Court recalls that it has ordered the Respondent State to pay compensation to the Ogiek for violation of their rights. The Court is aware that the members of the Ogiek in the Mau Forest area number approximately forty thousand (40, 000). Given that the violations leading up to this judgment have been experienced by many members of the Ogiek Community and over a substantial expanse of time, the Court considers it very important that any benefit, as a result of this litigation, should be extended to as many members of the Ogiek Community as possible. In the circumstances, the establishment of a fund is one mechanism to ensure that all Ogiek benefit from the outcome of this litigation.

155. The Court thus orders the Respondent State to establish a community development fund for the Ogiek which should be a repository of all the funds ordered as reparations in this case. The community development fund shall be used to support projects for the benefit of the Ogiek in the areas of health, education, food security, natural resource management and any other causes beneficial to the well-being of the Ogiek as determined from time to time by the committee managing the fund in consultation with the Ogiek. The Respondent State must, therefore, take the necessary administrative, legislative and any other measures to establish this Fund within twelve (12) months of the notification of this judgment.

156. In terms of administration of the community development fund, the Court orders that the Respondent State should coordinate the process of constituting a committee that will oversee the management of the fund. This Committee must have adequate representation from the Ogiek with such representatives being chosen by the Ogiek themselves.

VII. Costs

157. None of the Parties made any submissions in respect of costs.

158. The Court, however, recalls that in terms of Rule 32 of the Rules “unless otherwise decided by the Court, each party shall bear its own costs.”⁶⁴

159. In the present case, the Court sees no reason to depart from the above general principle and accordingly orders each party to bear its own costs.

VIII. Operative part

160. For these reasons,

The Court

Unanimously,

On the Respondent State's objections

i. *Dismisses* all the Respondent State's objections;

On pecuniary reparations

ii. *Orders* the Respondent State to pay the sum of KES 57 850 000. (Fifty seven million, eight hundred and fifty thousand Kenya Shillings), free from any government tax, as compensation for the material prejudice suffered by the Ogiek;

iii. *Orders* the Respondent State to pay the sum of KES 100 000 000 (One hundred million Kenya Shillings), free from any government tax, as compensation for the moral prejudice suffered by the Ogiek;

On non-pecuniary reparations

iv. *Orders* the Respondent State to take all necessary measures, legislative, administrative or otherwise to identify, in consultation with the Ogiek and/or their representatives, and delimit, demarcate and title Ogiek ancestral land and to grant collective title to such land in order to ensure, with legal certainty, the Ogiek's use and enjoyment of the same.;

v. *Orders* the Respondent State, where concessions and/or leases have been granted over Ogiek ancestral land, to commence dialogue and consultations between the Ogiek and their representatives and the other concerned parties for purposes of reaching an agreement on whether or not they can be allowed to continue their operations by way of lease and/or royalty and benefit

64 Rule 30 of the Rules of Court 2 June 2010.

sharing with the Ogiek in line with all applicable laws. Where it proves impossible to reach a compromise, the Respondent State is ordered to compensate the concerned third parties and return such land to the Ogiek;

- vi. *Orders* that the Respondent State must take all appropriate measures, within one (1) year, to guarantee full recognition of the Ogiek as an indigenous people of Kenya in an effective manner, including but not limited to according full recognition to the Ogiek language and Ogiek cultural and religious practices;
- vii. *Dismisses* the Applicant's prayer for a public apology;
- viii. *Dismisses* the Applicant's prayer for the erection of a monument to commemorate the human rights violations suffered by the Ogiek;
- ix. *Orders* the Respondent State to take all necessary legislative, administrative or other measures to recognise, respect and protect the right of the Ogiek to be effectively consulted, in accordance with their tradition/customs in respect of all development, conservation or investment projects on Ogiek ancestral land;
- x. *Orders* the Respondent State to ensure the full consultation and participation of the Ogiek, in accordance with their traditions/customs, in the reparation process as ordered in this judgment;
- xi. *Orders* the Respondent State to adopt legislative, administrative and/or any other measures to give full effect to the terms of this judgment as a means of guaranteeing the non-repetition of the violations identified;
- xii. *Orders* the Respondent State to take the necessary administrative, legislative and any other measures within twelve (12) months of the notification of this judgment to establish a community development fund for the Ogiek which should be a repository of all the funds ordered as compensation in this case;
- xiii. *Orders* the Respondent State, within twelve (12) months of notification of this judgment, to take legislative, administrative or any other measures to establish and operationalise the Committee for the management of the development fund ordered in this Judgment;

On implementation and reporting

- xiv. *Orders* that the Respondent State must, within six (6) months of notification of this judgment, publish the official English summaries, developed by the Registry of the Court, of this judgment together with that of the judgment of 26 May 2017. These summaries must be published, once in the official Government Gazette and once in a newspaper with widespread national circulation. The Respondent State must also, within the six (6) months period earlier referred to, publish the full judgments on merits and on

reparations together with the summaries provided by the Registry of the Court on an official government website where they should remain available for a period of at least one (1) year;

- xv. *Orders* the Respondent State to submit, within twelve (12) months from the date of notification of this Judgment, a report on the status of implementation of all the Orders herein;
- xvi. *Holds*, that it shall conduct a hearing on the status of implementation of the orders made in this judgment on a date to be appointed by the Court twelve (12) months from the date of this judgment.

On Costs

- xvii. *Decides* that each party shall bear its own costs.

Separate Opinion: TCHIKAYA

- 1. I fully endorse the decision on reparations that the Court has just rendered in *the Ogiek Case*, on 23 June 2022, to which I have voted in favour. My concurrence is so complete that in this separate opinion I must elaborate on some of the issues that I found so correct in the Court's decision.

- 2. After ten years, the Court has just concluded⁶⁵ the longest case in its first sixteen years. It concerns the fundamental rights of a minority: the Ogiek. One of the communities in the Mau Forest in southeastern Kenya, the Ogiek have been struggling with various measures taken by the Respondent State. The Court, in a unanimous decision on reparations, which I fully supported, recognized the rights claimed by the Ogiek community, namely:

65 ACHPR, *African Commission on Human and Peoples' Rights v Kenya*, 23 June 2023.

- a. The Respondent State¹ violated the right of the Ogiek to have a “distinct tribal status recognized to other similar groups and, as a result, having arbitrarily expelled them from the Mau Forest (...) it deprived them of their community development”² ;
 - b. In § 127 of its 2017 decision on the merits, there was already the Court’s assertion that “Without excluding the right to property in the classical sense, this provision places greater emphasis on the rights of possession, occupation, use and exploitation of land”.³ The possession, occupation, use and exploitation of the land are restored to the Ogiek;
 - c. The decision on reparations of 2022,⁴ as a result of the violations, confirms and diversifies the rights due to the Ogiek.
3. According to the case file, the case began on 14 November 2009, when the African Commission on Human and Peoples’ Rights received a communication from the Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRGI), submitted on behalf of the Ogiek community. At issue was an eviction notice issued by the Kenya Forest Service in October 2009, which required the Ogiek and other people living in the Mau Forest to leave within thirty (30) days. The African Commission had taken various interim measures (including 23 November 2009), including suspending the eviction notice, but these measures were not implemented.
 4. On 12 July 2012, the Commission (which had become an Applicant under the Protocol)⁵ filed an application with the Arusha Court. The processing of the case was long and went through various stages, as well as numerous exchanges of procedural documents. Thus, on 28 December 2012, the Applicant requested the Court to order further interim measures aimed, in particular,

1 The Court has previously recognized as a victim of a violation within the meaning of Section V of the UN Principles and Guidelines, which understands “victims” as “...persons who have individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or serious impairment of their fundamental rights, as a result of acts or omissions that constitute gross violations of international human rights law or serious violations of international humanitarian law.”, General Assembly, Resolution 40/34, 29 November 1985, § 8.

2 *ACHPR, African Commission on Human and Peoples’ Rights v Kenya*, 26 May 2017, § 146.

3 It is stated in § 128 that “in the present case, the Respondent State does not dispute that the Ogiek Community has occupied land in the Mau Forest since time immemorial”.

4 *ACHPR, African Commission on Human and Peoples’ Rights v Kenya*, 23 June 2022.

5 Article 5(1) (a) of the Protocol, which grants the Commission standing to bring the case before the Court.

at the directive issued on 9 November 2012 by the Ministry of Lands, relating to land of less than five (5) acres in the area of the Mau Forest complex. As in the merits phase,⁶ between the years 2020 and 2021, the Court attempted in the remedies phase to hold a public hearing which could not be held due to the Covid-19 pandemic.

5. The issue before the African Court was not a simple one. The 2022 decision on reparations was not just an exercise in style. It had at least two imperatives: (a) to best reflect the 2017 decision on the merits in which it had found violations of the Ogiek's rights; and;⁷ (b) to determine the precise content of the reparations to be approved. In addition to the claim for the return of ancestral lands, the Court had to decide on at least five other reparations issues to fully cover the dispute.
6. The Court has unambiguously recognized the Ogiek's rights as well-founded under the African Charter, it is up to the Respondent State to translate this into practice in the sense that it has indicated in its claim:

“the Respondent State has always committed itself to implementing the Court's judgment by, among other things, setting up an Inter-Ministerial Working Group to oversee the implementation of the said judgment”.⁸
7. The following sections of this paper will address, first, issues related to the assessment of material damages and the specific issue of restitution of ancestral lands (I.), second, other forms of reparations (II.) and, third, the procedures and modalities of the reparations awarded (III).

I. The *Ogiek* case, material loss and land restitution

8. The Court first ruled on the reparations for the material damage suffered by the Ogieks. It was careful not to innovate. Ratione jure, it remained rooted in the prevailing approach to reparation in international law.

6 The amicable settlement had not been successful, the Court, by letter of 7 March 2016, informed the parties of the continuation of the judicial proceedings.

7 In accordance with Article 27(1) of the Protocol, which states: “Where it considers that there has been a violation of a human or peoples’ right, the Court shall order all appropriate measures to remedy the situation, including the payment of just compensation or the granting of reparation.”.

8 Judgment of 23 June 2017, § 23.

II. Assessment of the material damage

9. On the assessment of the material damage suffered by the Ogieks, as the beginning of the dispute, the Court will follow the rules regularly applied. In the Chorzów Plant case, the Permanent Court of International Justice stated that compensation replaces restitution in kind, if the latter is not possible. The amount must correspond to the value of restitution in kind (...) the value that would have existed, if the illegal act had not been committed.⁹ In paragraph 60 of the judgment, the Court explains its method marked by difficulties due to the nature of the case:
 “The Court takes into account the circumstances of each case based on the consistency and credibility of the Applicant’s statements in light of the entire application”.¹⁰
10. Ultimately, the Court has chosen the path of equity. An award will be made in equity, so that it does not depend solely on the Court’s discretion. The Court has paid particular attention to: (a) the submissions and supporting documents filed by the Parties; (b) the amici curiae; (c) the independent experts, before making its decision on compensation; and (d) the claim for reparations, which relates to the right of ownership and free disposal of one’s natural wealth and resources.¹¹
11. In order to emphasize the collective nature of the reparation, the Court specified in its reasons that:
 “it is not appropriate to order that each member of the Ogiek Community be compensated individually or that such compensation be dependent on a sum due to each member of that community. (...) in view not only of the communal nature of the violations, but also of the practical difficulties involved in awarding individual compensation to a group of approximately forty thousand (40,000) people”.
12. This situation has led the Court to consider, in all fairness, that the Respondent State shall pay the Ogiek an amount of fifty-seven million eight hundred and fifty thousand (57,850,000) Kenyan shillings as compensation for the material damage suffered.

9 PCIJ, *Case Concerning the Chorzów Factory (Claim for Compensation)* (merits), Series, 13 September 1928, p. 47.

10 AFCHPR, *Anudo Ochieng Anudo v United Republic of Tanzania*, Judgment of 2 December 2021 (reparations), §§ 31-32.

11 AFCHPR, *op. cit.*, 23 June 2022, § 67.

III. The issue of restitution of ancestral lands to the Ogiek

13. Based on its jurisprudence and in accordance with applicable law, the Court formulates reparations from paragraph 36 of its judgment. The Court has always applied a fundamental principle, the obligation to remedy all violations found.¹² In the well-known 2013 case, *Reverend Christopher Mtikila v United Republic of Tanzania*.¹³

“the Court expressed its adherence to the principle of the law of international responsibility that the obligation to make reparation constitutes”...
14. The Court’s position can be supported. Where there is confiscation in violation of human rights, restitutio in integrum implies, in principle, the return of the property. In the case of unlawful expropriation, as was found in the present case:

“the best form of reparation would in principle consist in the retrocession of the land by the State”.¹⁴
15. One of the defenses of the Respondent State was that the land occupied by the Ogiek was “State property”.¹⁵ The exercise by the State of its functions, including the organization of various possessions, does not affect its authority over its territory. Thus, whatever the value of this argument may have been, the Court considers, in paragraph 111 of the judgment, the following:

12 AfCHPR, *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema dit Ablasse, Ernest Zongo and Blaise Ilboudo and the burkinabé human and Peoples’s Rights Movement v Burkina Faso* (reparations), 5 June 2015, §§ 20 to 30; and *Lohe Issa Konaté v Burkina Faso* (reparations) 3 June 2016. Principle consistent with European human rights law. The European Court recalls through Article 53 of the Convention that States “have undertaken to abide by the decisions of the Court in disputes to which they are parties; moreover, Article 54 provides that the judgment of the Court shall be transmitted to the Comité of Ministers, which shall supervise its execution. It follows that a judgment finding a violation entails for the respondent State a legal obligation under the Convention to put an end to the violation and to erase its consequences in such a way as to restore as far as possible the situation prior to the violation.” ECHR, *Case of Papamichalopoulos and Others v Greece* (Art. 50), 31 October 1995, Series A No 330-B, § 34..

13 CAFDHP, 14 June 2013, 1 RJCA 74 §§ 27-29.

14 ILC, *Malawi African Association et al. v Mauritania*, Communications 54/91 (27th Regular Session, May 2000).

15 Case law and doctrine agree that the domain of the State can only be controlled by the rules of international law. In particular, as in this case there are violations of certain rules of human rights in favor of a national community. The International Court observed in 1960 that the right of passage claimed by Portugal against India was a question of international law which could only be resolved on the basis of international law (...). The question was therefore not within the exclusive jurisdiction of India, since it involved rules of international law, even if their interpretation was disputed. See ICJ, *Case concerning the Right of Passage over Indian Territory*, 12 April 1960, Reports 1960, p. 6.

“it is important to conceptualize and understand the equally particular dimensions in which their rights to ownership of the land may manifest themselves. Title to indigenous peoples’ lands is therefore not necessarily similar to other forms of title granted by the Respondent State, such as freehold title”.¹⁶

16. Article 16 paragraph 4 of the Indigenous and Tribal Peoples Convention, 1989 (No 169),¹⁷ which deals with the removal of peoples from the lands they occupy, provides that, if return is not possible:

“These peoples shall be provided, as far as possible, with lands of at least equal quality and legal status to those of the lands previously occupied by them and enabling them to meet their present needs and ensure their future development. Where the peoples concerned express a preference for compensation in cash or in kind, they shall be so compensated, subject to appropriate safeguards».

17. In the case of the *Caloto Massacre*,¹⁸ members of an indigenous community were massacred with the complicity of the police. At issue, in addition to various reparations, was the full implementation of agreements regarding the allocation of land through agreed procedures and within a reasonable timeframe, in collaboration with the indigenous communities. This issue of land in relation to the communal nature of the dispute had long been the focus of attention in this litigation. It was the focus of the reparations.
18. This link, always present with land, organizes all the reasoning in the reparations¹⁹ that will be granted by the African Court in this case as well. It will be necessary to take into account the nature of the subject, in this case community and indigenous, victim of the violations, moreover, a national minority.²⁰ *The United Nations*

16 Erueti (E.), The Demarcation of Indigenous Peoples’ Traditional Lands: A Comparison of Domestic Demarcation Principles with International Law Principles in Development, *Arizona Journal of International and Comparative Law*, 2006, 23, 543 p.

17 Convention 169 of the International Labour Organization, or the Indigenous and Tribal Peoples Convention, applies together with Convention 107 “concerning Indigenous and Tribal Populations”

18 Report No 36/00, Case 11.101, *Massacre of Caloto v Colombia*, 13 April 2000, § 75, 3; A. Cajas-Sarria M., The Massacre of Caloto: A Case Study on the Rights and the Indigenous Mobilization in the Inter-American System of Human Rights, *Boletín Mexicano de Derecho Comparado* No 130, pp. 73-106, 2011.

19 The Court readily cites the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005 (UN Resolution 60/147).

20 On the complexity of the notion, see Tchikaya (B.), Le droit international et le concept de minorité, Quelques observations à partir du cas de l’Afrique, *Miskolc Journal of International Law*, Vol. 5, 2008, Issue 2, pp. 1-15.

*Declaration on the Rights of Indigenous Peoples*²¹ states at the outset that:

“indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different and to be respected as such” (Preamble),

19. And in Article 1, it states:

“Indigenous peoples have the right, collectively or individually, to the full enjoyment of all human rights.”

20. We know that sovereign power is territorialized. The State is competent to deal with facts, conflicting or not, occurring on its territory and within its borders. It remains, in a way, the depositary of territorial titles. In this respect, it may assign, if necessary and in accordance with the international law of public domain, areas of the territory to peoples or individuals who are nationals of its territory. Moreover, once it was established that the right of ownership within the meaning of Article 14 of the Charter could be individual or collective, it could apply to groups or communities.²²

21. Paragraphs 94 and others. of the judgment are central to the Court’s consideration of non-pecuniary remedies. In effect, the Court considers that:

“based on the finding of a violation of section 14 of the Charter, that one of the natural consequences of this recognition is the restitution of the ancestral lands of the Ogiek (...) this violation can be remedied by restitution of the ancestral lands through the delimitation and demarcation of the lands and the granting of title deeds or by any other means aimed at clarifying the status of all such lands and ensuring their protection (...).²³

22. Without departing from its 2017 decision, the Court pronounces on the right to land as follows:

“the right to property includes not only the right to have access to one’s property and not to have one’s property invaded or encroached upon, but also the right to possess, use and control that property without being disturbed, in the manner deemed appropriate by the owners”.²⁴

23. The Court’s judgment is further clarified by paragraph 112. The Court recognizes that :

“among aboriginal peoples, there is a communal tradition regarding a form of collective ownership of land, such that ownership of land is not centered on an individual, but rather on the group and its community.

21 Resolution adopted by the UN GA, 13 September 2007 (A/61/L.67 and Add.1) 61/295.

22 2017 Judgment, § 23.

23 Judgment on Reparations, *op. cit.* at § 96.

24 ECOWAS Tribunal, *SERAP v Nigeria*, 30 November 2010.

Indigenous peoples therefore have, by their very existence, the right to live freely on their own land".²⁵

24. This decision does not betray the evolution of the law of nations on this issue. It is certainly based on two concepts whose framing is not stable in international law: that of people, whose affirmation has been broadened by the African Charter on Human and Peoples' Rights, and that of property, whose regime must always be recalled and specified. It is a question, in this case, of a collective application of property.²⁶ It is the above-mentioned formula of the Court contained in the decision at paragraph 112: the ownership of land is not centered on an individual, but rather on the group and its community.²⁷
25. A similarity can be made with many cases, including the one in which the Inter-American Court ordered the same measures, in 2021, against the State of Nicaragua, which had granted a foreign company a concession to take timber from the ancestral lands of the *community Mayagna Awas Tingni*.²⁸ The Inter-American Court of Human Rights had considered that Nicaragua, had violated the right to property of the members of the community, and this based on the indigenous conception of land ownership. In many ways, this approach of the Inter-American Court, favorable to the fundamental rights of the communities was considered innovative.
26. Since the obligation to retrocede carries with it the obligation to delimit, the offending State should, as the Court decided:
 "Take all the necessary measures (...) to identify, in consultation with the Ogiek and/or their representatives, and to delimit, demarcate the ancestral lands of the Ogiek and issue to them a collective land title on these lands in order to guarantee the use and enjoyment through judicial certainty".
27. Other forms of redress will come to the attention of the Court in favor of the Ogieks.

IV. The *Ogiek* case: Other forms of reparation

28. As with land restitution, other forms of reparation are also informed by *the Basic Principles and Guidelines on the Right*

25 Judgment on Reparations, *op. cit.* at § 112.

26 v. IACtHR, *Saramaka People v Suriname*, 28 November 2007; *Indigenous Community Yakye Axa v Paraguay*, 17 June 2005; *Afaire Moiwana Community v Suriname*, 15 June 2005.

27 Judgment on Reparations, *op. cit.* at §§ 137 et seq.

28 Case of *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, 31 August 2001.

to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by the United Nations General Assembly. This is an important work, the result of 15 years of work,²⁹ which sets out some useful approaches in the often-lengthy procedures for reparation.

29. In reality, there are different forms of reparations. The State, in accordance with international law, may choose either one or the other. Article 34 of the Draft Articles on State Responsibility states that reparation “shall take the form of restitution, compensation and satisfaction, separately or jointly.” The ILC (International Law Commission) had noted that, in some cases, reparation will take place by joining the different forms.³⁰
30. In the present case, the Court pronounces various reparations in the sense of the damage suffered by the Ogieks. This will be the case for the moral damage found.

A. Non-material damage

31. With regard to compensation for non-material damage, which is undeniably complex,³¹ the Court has remained consistent with its case law. Its position is based on various breaches of the Convention, as summarized in paragraph 85 of the judgment.³²
32. It follows from the judgment that non-material damage includes:
“the suffering and distress caused to the direct victims and their families, as well as the damage to values that are very important to

29 *The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGA Resolution, 1989/13 of 31 August 1989.

30 ILC Commentary on Article 34 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, Official Records of the 56th Session of UNGA, A/56/10.

31 This complexity is evidenced in the law of nations by a classic case, *The Widows of the Lusitania*. A jurisprudential reversal was necessary, see SA, *Widows of the Lusitania, United States v Germany*, Joint American-German Claims Commission, 1 November 1923. This is also stated in a remarkable study, Jean-François Flauss (J.-François) and Abdelgawad (E. Lambert), *L'indemnisation du dommage par la Cour européenne des droits de l'homme et ses effets en droit français*, Institut international des droits de l'homme, Prisme (CNRS), 2009: “Compensation for non-material damage is in fact likely to lead to compensation for loss of earnings, which is a classic component of injury to property. It also happens that compensation for moral prejudice is similar to a thinly disguised form of compensation for a loss of opportunity.

32 The Court noted that in its judgment on the merits, it found that the respondent State had violated the right of the Ogiek, protected by Article 2 of the Charter, by not recognizing them as a full tribe, as is the case with other groups; It also violated article 8 of the Charter, for preventing the Ogiek from continuing to practice

them, as well as other changes of a non-pecuniary nature in the living conditions of the victims or their families”.³³

33. The damages suffered by the Ogieks and the human rights violations at issue for which the Respondent State was found responsible. In 2017, the Court considered that in order to determine the extent of the rights recognized to indigenous communities on their ancestral lands, as is the case here (...) that Article 14 of the African Charter³⁴ must be interpreted in light of the principles applicable, in particular, within the framework of the United Nations.³⁵
34. In *the Lusitania case*, there are these very evocative lines recorded in an Opinion. It states that:
“it is manifestly impossible to evaluate mathematically, or with a certain degree of accuracy, or by the use of a precise formula the damage suffered (...). This does not, however, justify that the author of a damage should be exempt from repairing the wrong he has done, nor that the victim should not receive reparation calculated according to rules which come as close to accuracy as the human mind can imagine. To deny such reparation would be to disregard the fundamental principle that there is a remedy for any infringement of a right”.³⁶
35. The difficulty with moral prejudice was one that the Court seems to have understood well. In this case, it was important not to confuse the individual prejudices that were cumulative with the collective prejudice. This latter prejudice was diffuse and could not be assessed by adding up all the individual prejudices. The difficulty was understood by the Court and the operative part expresses it by speaking of:
“(...) Violations found in the present Application concern rights that are central to the very existence of the Ogiek”.³⁷
36. Thus, a lump-sum compensation was awarded for non-material

their religion, articles 17(2) and (3) of the Charter, for expelling them from the Mau Forest area, thus preventing them from exercising their cultural activities and practices, and article 22 of the Charter, because of the manner in which the Ogiek were expelled from the Mau Forest, v. § 85 of the Judgment.

33 CAfDHP, *op. cit.* 2023, § 86.

34 Article 14 reads: “The right of ownership is guaranteed. It may not be infringed except by public necessity or in the general interest of the community, in accordance with the provisions of appropriate laws.”

35 CAfDHP, *op. cit.* 2017, § 125.

36 *Opinion in the Lusitania case*, 1 November 1923, *supra*, *Reports of Awards*, Volume VII, p. 32, § 36.

37 *Idem.*, § 93.

damage.³⁸

B. The status of the indigenous population, their culture and language

37. It follows from the judgment on the merits handed down by the Court in 2017 that the Ogiek should be recognized as an indigenous population. The Respondent State violated Article 2 of the Charter for not recognizing them as a full tribe similar to other groups. The Court specified that this recognition should be accompanied by measures to “fully protect their language and their cultural and religious practices within twelve (12) months of service of the judgment.
38. The Court’s rulings in this case are consistent with history. The United Nations General Assembly has proclaimed the period 2022-2032 as the International Decade of the World’s Indigenous Languages, and has invited UNESCO to be the coordinating agency for a program within the United Nations³⁹ system to this effect.
39. This request has been granted since the Court’s decision of 26 May 2017. It was renewed in the decision of 23 June 2023, thus will be taken:
“Appropriate measures, within one (1) year, to effectively ensure full recognition of the Ogiek as an indigenous people of Kenya, including (...) their language and cultural and religious practices”.
40. In order to achieve this, the Court found that direct dialogue with the community concerned is necessary.

C. Direct dialogue with the Ogiek Council of Elders

41. In its judgment, the Court did not support the idea of a public apology for the Ogiek, nor the idea of a monument as a form of

38 *Ibidem*, § 160, Operative part: iii) Orders the Respondent State to pay the sum of one hundred million (100,000,000) Kenyan shillings, free of all governmental taxes, as compensation for the non-pecuniary damage suffered by the Ogieks.

39 See also AGONU Resolution, 18 December 2019 (A/74/396)] 74/135, Rights of Indigenous Peoples; see International Covenant on Civil and Political Rights, 16 December 1966 (Article 27); International Covenant on Economic, Social and Cultural Rights, v preambles: “Human beings cannot be free unless conditions are created whereby they may enjoy civil and political as well as economic, social and cultural rights”; UNGA Resolution, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, No 47/135, 18 December 1992.

reparation.⁴⁰ However, it does consider the idea of engaging in direct dialogue with the Ogiek as efficient. This dialogue could take place through the Ogiek Council of Elders, a body that is generally agreed upon by the Ogiek.⁴¹ The commitment to a comprehensive and sustainable solution to the problem of the Ogiek of the Mau Forest has been noted.

42. In order to end a conflict, the parties have always sought concerted, even consensual and negotiated solutions, especially in human rights conflicts involving collective rights. This also applies to the implementation of guaranteed rights. On another scale, the International Court of Justice was not mistaken when it referred the parties, Hungary and Slovakia, involved in the management of the Danube River to negotiations.⁴²

D. Guarantees of non-repetition

43. The Court considers that it is consistent with its decision that the legislative and administrative measures to be taken by the Respondent State will prevent the repetition of the violations found. The Court goes on to emphasize that the restitution of land and all other measures are sufficient to guarantee non-repetition.⁴³
44. The abundant jurisprudence on this aspect shows this. It sufficiently establishes that normally the non-repetition of harmful measures is implicit and inherent in the reparation decisions taken.⁴⁴ There is a considerable body of decisions indicating the various means that the Respondent-State may use – including

40 In § 133 of the decision, the Court made it clear that “a judgment alone may constitute sufficient reparation. And, “considering all the circumstances of the case, including the other measures it has ordered on reparations (...) it is not necessary for the respondent State to erect a monument in memory of the violations of the rights of the Ogiek (...).

41 AfCHPR, Judgment of 23 June 2022, see §§ 134 et seq.

42 ICJ, *Gabcikovo-Nagymaros Project, Slovakia v Hungary*, ICJ, Judgment, 25 September 1997; it is useful to read in point B. of the operative part of this judgment that: “Hungary and Slovakia must negotiate in good faith, taking into account the existing situation, and must take all necessary measures to ensure the attainment of the objectives of the Treaty of 16 September 1977, in accordance with the procedures to be agreed upon”.

43 AfCHPR, *Judgment of 23 June 2022*, see § 150.

44 See in particular: Case of *Velásquez Rodríguez v Honduras (compensation)*, Judgment of 21 July 1989, Series C No 7, §§ 34, 35 (duty to prevent further enforced disappearances); Case of *Castillo Páez v Peru*, Judgment of 3 November 1997 (duty to prevent further enforced disappearances); Case of *Trujillo Oroza v Bolivia (reparation)*, Judgment of 27 February 2002, Series C No 92, § 110; Inter-American Commission on Human Rights Report No 63/99, Case 11.427, *Victor Rosario Congo* (Ecuador), 13 April 1999, § 103.

the adoption of legislation – to ensure the proper implementation of the reparations decided upon.⁴⁵

45. It is recognized, in fact, that guarantees of non-repetition are one of the forms of reparation (remedy) to which the Ogiek, as victims, are entitled. Non-repetition is closely linked to the obligation to cease violations. Guarantees have a preventive function and can be seen as a positive reinforcement of the implementation of reparations.⁴⁶ The Court considered that all the measures included in the judgment are sufficient to guarantee non-repetition.⁴⁷
46. In the approach followed by the Court, various elements related to the modalities and procedures for implementing the selected reparations can be noted. It is undoubtedly in the interest of obtaining a follow-up to the judgment pronounced.

V. Procedural aspects of implementing reparations

47. Overall, particular attention should be paid to what the Court installs in its operative part as an opening as follows:
“where concessions or leases have been granted on Ogiek ancestral lands, the Respondent State shall engage in dialogue and consultations among the Ogiek (...) with a view to agreeing whether or not to allow the continuation of the activities of the beneficiaries of the said concessions in the form of leases and or sharing of royalties and benefits, with the Ogiek (...) In the event that a compromise cannot be reached, the Respondent State shall compensate the third parties concerned and return the land to the Ogiek.”
48. Mechanisms and working methods were considered, in addition to the community development fund for the Ogiek.

A. Mechanisms and modalities for working on reparations

49. A dedicated organization is needed to oversee the repair enterprise. A 2013⁴⁸ study initiated by the African Commission on

45 African Commission on Human and Peoples' Rights, Case of *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Communication 155/96 (30th Ordinary Session, October 2001), §§ 57, 61.

46 International Law Commission, Commentary on Article 30 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Official Records of the UNGA, 56th Session, Supplement No 10 and Corrigendum (A/56/10). See also, Tigroudja (H.), E. Lambert-Abdelgawad & K. Martin-Chenut, eds, *Remedying Serious and Massive Violations of Human Rights: La Cour interaméricaine, Pionnière ou modèle?*, Société de législation comparée,

47 CAFDHP, *Idem*, v. § 150.

48 ACHPR, The scope of the right to reparation: Who is entitled to reparation, Studies, 2013, p. 39.

Human and Peoples' Rights said to this effect that:

"the group identified as such may be entitled to collective reparations (...) In cases involving, for example, large-scale violations, alongside the allocation of collective reparations to a specific group, it will therefore be important to establish a mechanism that allows individual victims to come forward and present their claim for reparations."

50. Undoubtedly, one of the first internal actions will be to set up an *ad hoc* body in order to better meet all the obligations. This is what the *UN Declaration on the Rights of Indigenous Peoples* calls for. The Declaration was not contradicted by the *Memorandum* of the UN Rapporteur on Indigenous Peoples:⁴⁹ An essential approach to redress is to consider the collective nature of the harm.
51. From this *ad hoc* body, an effective mechanism for delimitation, demarcation and titling could come. This could be done by strengthening, among other things, the body or working group established following the Court's judgment of 23 October 2017.
52. In this case, therefore, there is a kind of obligation to consult the Ogiek in an "active and informed manner", respecting their customs and traditions.⁵⁰ These consultations must be conducted in good faith. These procedures must be fair and equitable as specified in Article 40 of the *UN Declaration on Indigenous Peoples*. In its judgment, the Court found that "... the processes implemented to date have not contributed significantly to the execution of its judgment on the merits."⁵¹

B. The Community Development Fund

53. In the Applicant's view, the overall implementation and realization of reparations would require the creation of a development fund. She puts it this way:

"A community development fund provides "the governance framework dedicated to allocating funds to projects of collective interest to the aboriginal community, such as agriculture, education, food security, health, housing, water and sanitation projects, resource management, and other projects that the aboriginal community considers beneficial..."

49 UN Special Rapporteur on the Rights of Indigenous Peoples Expert testimony at the request of the African Court on Human and Peoples' Rights on reparations in *African Commission on Human and Peoples' Rights v Kenya*, Application 006/2012 29 April 2020.

50 IACtHR Case of *Kichwa Indigenous Peoples of Sarayaku v Ecuador*, 27 June 2012, § 177.

51 Judgment, *op. cit.* 23 June 2022, § 125.

54. Thus, the Respondent State will be ordered to establish:
 “a community development fund for the benefit of the Ogiek, which should be the repository of all funds ordered as reparations in this judgment.”
55. The development fund should allow for Ogiek projects in the areas of health, education, food security, natural resource management...The administrative, legislative and other measures necessary for the establishment of this fund within twelve months of the judgment being duly notified. This decision marks an initiative of the Court following the request of the Ogiek.
56. The importance of this measure is similar to that taken in favour of the Ogoni by the Banjul Commission.⁵² The Commission had, inter alia, urged Nigeria to inform it of the establishment of a Niger Delta Development Commission (NDDC) set up by law to deal with environmental and other social problems in the Niger Delta area and other oil producing areas of Nigeria; and (the establishment of) the Legal Commission of Inquiry set up to investigate issues of human rights violations.
57. The example of collective reparations owed by Guatemala in compensation for the *Sanchez Plan massacres* are suggestive.⁵³ In the *Plan de Sanchez Massacre case*, the Inter-American Court of Human Rights ordered the State to carry out a Five-Year Development Plan that included the establishment of structures for education, health services, water irrigation and production.⁵⁴ This example showed, once again, that the search for reparation after a profound damage could be complex. Another example of collective reparation is the opening of a school and a dispensary in the 1993 case of *Aloeboetoe v Suriname*, of 1993, judged by

52 The Ogoni Case concerns mass violations. The communication also stated that the oil consortium exploited the Ogoni reserves (...) discharging toxic waste into the air and waterways of the region, in violation of applicable international environmental rules. The consortium has not been able to maintain its infrastructure, which has caused many foreseeable accidents near the villages. The resulting contamination of water, soil and air had serious short and long-term health consequences...; ACHPR, *Social and Economic Rights Action Center (SERAC) Economic and Social Rights (CESR) v Nigeria*, Communication and Center for 155/96 (30th Ordinary Session, October 2001), § 68.

53 One of the worst massacres, that of Plan de Sánchez, took place in a Guatemalan village on 18 July 1982. More than 250 people (mainly women and children, and almost exclusively members of the Achi Maya ethnic group) were mistreated and murdered. In 2004, the Inter-American Court issued two verdicts. It established Guatemala's responsibility and ordered a package of monetary, non-monetary compensation... The Inter-American Court of Human Rights issued a ruling on the Masacre Plan de Sanchez.

54 IACtHR, Case concerning the Plan de Sanchez Massacre (reparation), Judgment of 19 November 2004, §§ 109-111.

the same Court.⁵⁵

58. This decision of the Court thus enshrines a consistent jurisprudence. Paragraph 160 testifies to this:

“The establishment and operation of a Development Fund Management Committee”.⁵⁶

59. Generally speaking, on restitution, which is one of the major points, it is appropriate to follow the requirements of the *Basic Principles and Guidelines*⁵⁷ on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law (...), cited above, point IX of which emphasizes:

“ (...). Restitution includes, as appropriate, the restoration of liberty, the enjoyment of human rights, identity, family life and citizenship, the return to the place of residence and the restitution of employment and property.

VI. Conclusion

60. The various measures in the Court's judgment relating to reparation, to which I reiterate my support, are consistent with the current state of international law. They promote the traditional territorial powers of the State and their exercise. These powers do not affect the sovereign, exclusive and independent exercise of territorial jurisdiction by the Respondent State. International jurisprudence confirms that territorial sovereignty has absolute effects, both positively and negatively, because the State must deny itself any activity that is not in conformity with international law.⁵⁸
61. The Arusha Court and the Banjul Commission are, in a way, working together in this decision. In addition to the fact that the

55 IACtHR, Case of *Aloeboetoe et al. v Suriname* (reparation), Judgment of 10 September 1993, § 96.

56 AfCHPR, Judgment of 23 June 2022, see § 160, xiii.

57 AGONU, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, supra § 17.

58 In his award of 1928 (Island of Palmas, RSA vol. II, p. 281), Max Huber evokes the link between the activities that the State could exercise on its as a direct expression of the principle of independence. Territorial sovereignty implies the exclusive right to carry out State activities. The defendant State is in the business of carrying out actions for the purpose of welfare and equilibrium in its territory; see SA, *Isle of Palmas, United States v The Netherlands*, Max Huber, CPA. Netherlands, Max Huber, CPA, 4 April 1928, RSA, vol. II, p. 839; I.C.J., *Corfu Channel, United Kingdom v Albania*, ICJ, Preliminary Objections. Albania, ICJ, Preliminary Objections, 25 March 1948, Rec. 1948, p. 15; merits, 9 April 1949, Rec. 1949, p. 4; Determination of the Amount of Reparations, 15 December 1949, Rec. 1949, p. 244.

Banjul Commission, as the Applicant in this case, had previously rendered a decision in the Communication *Endorois Welfare Council v Kenya*⁵⁹ in which it emphasized that the rights of the *Endorois* had been violated when they were denied access to their traditional lands. These lands had been turned into a hunting reserve. The Kenyan state was obliged to recognize the communal land rights of the *Endorois* indigenous peoples. It had to compensate them and return the land or offer them other land of equal size and quality, in agreement with the indigenous community.

62. The concept of a people or community group is being further developed as a result of these two judgments by the Court in 2017 and 2023. For the African human rights system, the legal category of people, holder of rights, is resolutely reinforced. These two decisions will constitute a solid step in the Court's jurisprudence. They contribute incisively to the end of an era. The one where "the individual was the human rights". The time when, with good reason, Ms. D. Lochack declared that "the individual is the human right". Lochack declared that "human rights can only be thought of from the moment when we postulate that man is a subject of law, endowed with the capacity to have rights and to avail himself of them in the face of power".⁶⁰ How far we have come since the famous Advisory Opinion of 1928 (Case of the *Jurisdiction of the Tribunals of Danzig*)⁶¹ to put the group, the community and the people back at the center of internationalist elaborations of law? The African Court has just put one more touch to it.

59 *Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Communication, No 276/2003, 2009. See also IACtHR, *Saramaka People v Suriname* (preliminary objections, merits, reparations and costs), Judgment of 28 November 2007; *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Judgment of 31 August 2001; *Yakye Axa Indigenous Community v Paraguay*, Judgment of 17 June 2005.

60 Lochak (D.), *Mutation des droits de l'homme et mutation du droit*, RIE, 1984. 13, p. 55; see the analyses of Colliard (Cl.-Albert) according to which the law of public liberties supposes an "individual conception of the world" and that in the absence of such a conception "there are no real public liberties, in *Les libertés publiques*, Dalloz, 1982, 904 p.

61 CPJI, Advisory Opinion, *Jurisdiction of the Courts of Danzig*, 3 March 1928, Series B, No 15, p. 17, one can read "a well-established principle of international law, an international agreement cannot, as such, directly create rights and obligations for individuals.

Belgheith v Tunisia (provisional measures) (2022) 6 AfCLR 291

Application 002/2022, *Ibrahim Ben Mohamed Ben Ibrahim Belgheith v United Republic of Tunisia*

Order, 23 June 2022. Done in Arabic, English and French, the Arabic text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, MENGUE, MUKAMULISA, CHIZUMILA, BENSOUULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: BEN ACHOUR

The Applicant, a citizen of the Respondent State, brought this Application, alleging that certain acts of the Respondent State including the establishment of a provisional supreme judicial council instead of an election supreme judicial council, were a violation of some rights guaranteed in the Charter. The Applicant filed a request for provisional measures along with his main Application. The Court considered the provisional measures sought and held that the measures were the same as those sought in the main Application. The Court therefore held that it would dispose of the entire application on the merits.

Provisional measures (similarity of request with application on the merits, 15-16)

I. The Parties

1. Ibrahim Ben Mohamed Ben Ibrahim Belgheith (hereinafter referred to as “the Applicant”) is a Tunisian national and a lawyer. He alleges violation of his rights under Articles 1, 7, 13(1), 20(1) and 26 of the Charter following the promulgation of Decree-Law No 11/2022 of 12 February 2022 establishing the Provisional Supreme Judicial Council, in place of the Supreme Judicial Council provided for by Law No 2016-34 of 28 April 2016.
2. The Application is filed against the Republic of Tunisia (hereinafter referred to as “the Respondent State”), which became a party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and to the Protocol on 10 February 2006. The Respondent State also deposited, on 16 April 2017, the Declaration provided for under Article 34(6) of the Protocol (hereinafter referred to as “the Declaration”), by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations.

II. Subject of the Application

3. The Applicant alleges the Decree-Law No 11 of 2022 to establish a new Provisional Supreme Judicial Council in lieu of the elected Supreme Judiciary Council which was regulated by Law No 34 of 2016 of 28 April 2016 violates the right of the people to self-determination, the right to participate in the conduct of public affairs beside the violation of the principles of the rule of law.

III. Summary of the Procedure before the Court

4. The Application, together with the request for provisional measures, were received on 4 April 2022. On 25 April 2022, the Registry acknowledged receipt of the Application and notified the Applicant of its registration.
5. On 23 May 2022, the Application and the request for provisional measures were served on the Respondent State with a request for it to respond to the request for provisional measures within fifteen (15) days, send the names of its representatives within thirty (30) days and to respond to the Application on the merits within ninety (90) days.

IV. Prayers of the Parties

6. The Applicant prays the Court to:
 - i. Declare that it has jurisdiction.
 - ii. Declare the Application admissible.
7. On the merits, the Applicant prays the Court to:
 - i. Find a violation of the right of the people to self-determination within the meaning of Article 20(1) of the Charter and Article 1(1) of the International Covenant on Economic and Social Rights, the International Covenant on Civil and political Rights¹ and Article 21(3) of the Universal Declaration of Human Rights
 - ii. Find a violation of the right to participate in the conduct of the affairs of the country within the meaning of Article 13(1) of the Charter, Article 21(1) of the Universal Declaration of Human Rights and Article 21(5) of the International Covenant on Civil and political Rights.
 - iii. Find a violation of the right to bring a case before the courts enshrined in Articles 1, 7 and 26 of the Charter and Article 14(1) of the International Covenant on Civil and Political Rights, the principle of separation of powers and independence of the judiciary.

1 The Respondent State became a Party to the Covenant on 18 March 1969.

- iv. Order the Respondent State to take all necessary measures to comply with the provisions of the Constitution and the law, including the Organic Law on the Supreme Judicial Council, and to refrain from amending it by a law of lower level or without complying with constitutional and legal obligations.
- 8. With regard to reparation for material prejudice, the Applicant considers that even if they exist, are real and of a continuous nature, but are not personal and direct, the Applicant lacks standing to seek compensation for persons or even the State for that matter. Accordingly, the Applicant does not request reparation for material prejudice for himself. He also does not request reparation for the moral and psychological damages he has suffered personally as a victim of such violations.
- 9. As regards guarantees of non-repetition, the Applicant prays the Court to order the Respondent State to:
 - i. Adopt the necessary legislative and regulatory instruments to ensure the supremacy of the Constitution, including the speedy establishment of the Constitutional Court and the removal of all legislative, regulatory, political and practical impediments hindering it;
 - ii. Adopt the necessary legislative and regulatory instruments to ensure that the President of the Republic does not make further attempts to infringe the independence of the judiciary or to undermine its organization in violation of the Constitution and the law.
 - iii. Respect the independence of the Supreme Judicial Council and facilitate the election of its members under the supervision of the Independent High Electoral Commission, as required by law.
 - iv. Adopt the necessary legislative and regulatory instruments to further inculcate the culture of the rule of law and institutions, the separation of powers and the independence of the judiciary in the population, particularly among young people.
 - v. Provide procedural avenues and effective solutions to remedy violations of the Constitution, pending the establishment of the Constitutional Court.
- 10. The Respondent State did not respond.

V. Provisional measures requested

- 11. As regards provisional measures, the Applicant requests the Court to:
 - Repeal Decree-Law No 11/2022, return to constitutional legitimacy, respect the Constitution as guarantor of human rights that have been violated, restore the powers and activities of the Supreme Judicial Council and its elected legal composition, and to guarantee the election of the Council in accordance with the law and the Constitution.

12. The Applicant considers that the promulgation of the Decree-Law No 11/2022 occasioned serious violations of the right of the people to self-determination, the right to participate in the conduct of the affairs of the country, the rights provided for both in the Charter and in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the principles of the rule of law, separation of powers and independence of the judiciary. It also led to the violation of the Constitution of the Respondent State, which was violated as an expression of the will of the people and as the supreme law in the hierarchy of laws, and to the repeal of Organic Law No 34 of 2016 pertaining to the Supreme Judicial Council by the said Decree-Law.
13. The Applicant further avers that the Decree-Law No 11/2022 approves flagrant intrusions by giving powers to the executive branch, represented by the President of the Republic, who now combines all powers and eliminates all checks on his actions, which poses a serious threat to the Applicant as a citizen and lawyer, the judiciary and people of the Respondent State, as well as the suspension of the democratic process and the Constitution. He further submits that the Constitutional guarantees protected by the instruments whose existence, and the respect of which, the Court commits to ensure, were thus abolished, so that provisional measures are required in accordance with Article 27 of the Protocol.
14. The Respondent State did not respond to the request for provisional measures.

15. The Court notes, from the foregoing, that the provisional measures requested are the same as those contained in the main Application and that adjudicating on these may prejudice the merits of the case.
16. Accordingly, for the purposes of proper administration of justice, the Court decides that it will rule on the request for provisional measures together with the merits of the case.

VI. Operative part

17. For these reasons,

The Court

Unanimously,

Decides that it will rule on the request for provisional measures at the same time as the merits of the case.

Kodeih & Anor v Benin (ruling) (2022) 6 AfCLR 296

Application 008/2020, *Ghaby Kodeih and Nabih Kodeih v Republic of Benin*

Ruling, 23 June 2022. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

The Applicants, who are citizens of the Respondent State, brought this Application alleging that their trial and conviction by administrative and judicial authorities in the Respondent State were a violation of their human rights. Upholding the objection by the Respondent State, the Court held that the Applicants had not exhausted local remedies before bringing their Application. Accordingly, the Court declared the Application inadmissible.

Jurisdiction (material jurisdiction, 28-30, withdrawal of Declaration 33)

Admissibility (exhaustion of local remedies, 50-57)

I. The Parties

1. Mr Ghaby Kodeih and Mr Nabih Kodeih (hereinafter referred to as “the Applicants”) are nationals of the Republic of Benin. They allege the violation of their rights as a result of judicial and administrative proceedings brought against them.
2. The Application is filed against the Republic of Benin (hereinafter referred to as “the Respondent State”), which became a party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986, and to the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (hereinafter referred to as “the Protocol”) on 22 August 2014. On 8 February 2016, the Respondent State deposited the Declaration provided for in Article 34(6) of the said Protocol (hereinafter referred to as “the Declaration”) by virtue of which it accepted the jurisdiction of the Court to receive applications directly from individuals and Non-Governmental Organizations. On 25 March 2020, the Respondent State deposited with the African Union Commission, an instrument of withdrawal of the said Declaration. The Court has ruled that this withdrawal has no bearing on pending cases and new cases filed before the entry into force of the withdrawal, one year after its deposit, that is, on

26 March 2021.¹

II. Subject of the Application

A. Facts of the matter

3. It emerges from the Application that the Cotonou City Council issued the Applicants with a building permit² to build a four-storey hotel named “RAMADA” on a parcel of land registered under No 6063 in the Cotonou Land Register, located in the Djoméhountin neighbourhood.
4. The Applicants aver that the hotel project, initially for four (4) floors, was modified to reach eight (8) floors and to this end, *Laboratoire d'Essais et de Recherches en Génie Civil* (LERGC), a public limited company, carried out soil and structure studies, the results of which are recorded in a report dated 12 April 2017.³
5. The Applicants aver that on 31 January 2017,⁴ the Cotonou City Council suspended work on the hotel project for lack of a building permit covering the eight (8) floors. On 18 May 2017, the Applicants applied to the said City Council for another building permit in respect of the eight (8) floors. The Applicants submit that on 31 May 2017, the National Commission in charge of examining building permit applications assessed their application and requested additional documents, which were subsequently submitted.
6. The Applicants further aver that owing to the fact that the building was exposed to corrosion and deterioration, they sent several letters to the Ministry of the Living Environment and Development seeking its approval to resume work. However, there was no response to these letters.
7. They note that they were in this situation when the Cotonou City Council carried out compliance checks on 5 June 2019 and concluded that there were several irregularities on the building under construction, notably, that it had eight (8) floors instead

1 *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No 003/2020, Judgment, 5 May 2020 (provisional measures), §§ 4-5 and Corrigendum of 29 July 2020.

2 Building Permit No 2015/No 0094/MCOT/SG/DSEF/DAD/SAC of 6 July 2015.

3 Report n°001/04/17/LERGC/RE/A of 12 April 2017: geotechnical study as part of the construction of an R+8 type building with basement on plot Land title 6063 located in Djomehountin, Cotonou.

4 Minutes of suspension of works notification of 31 January 2017.

of the four (4) authorised and the substantial modification of the access ramp to the car park, the staircases as well as the openings of the building.

8. The Applicants aver that they were summoned by the Public Prosecutor, on 12 June 2019 to appear before the Cotonou Court of First Instance for the offence of failure to comply with the terms of the building permit and to attend the hearing of an Application for the demolition of the building under construction. The Applicants contend that they were summoned, without having been given prior notice to take compliance measures pursuant to Article 49 of Decree No 2014-205 of 13 March 2014 governing the issuance of building permits in the Republic of Benin, and while their building permit had not been cancelled.
9. They further aver that on 27 September 2019, by Judgment No044/3rd CD (hereinafter referred to as “the judgment of 27 September 2019”), the court found them guilty of the above-mentioned offence and sentenced them to a fine of West African CFA Franc Five Hundred Thousand (FCFA 500,000). The court also issued an order for the demolition of the building.
10. On 1 October 2019, the Applicants appealed against the judgment of 27 September 2019 before the Cotonou Court of Appeal, which upheld the judgment on 24 March 2020.

B. Alleged violations

11. The Applicants allege a violation of the following rights:
 - i. the right to a fair trial, protected by Article 7(2) of the Charter;
 - ii. the right to property, protected by Article 14 of the Charter;

III. Summary of the Procedure before the Court

12. On 17 February 2020, the Applicants filed the Application and a request for provisional measures. These were served on the Respondent State on 25 February 2020 for its response to the request for provisional measures within eight (8) days and the Application on the merit, sixty (60) days, from the receipt of the notification.
13. On 28 February 2020, the Court issued a Ruling for provisional measures, the operative part of which reads as follows:
 - i. stay the execution of judgement No 04413è CD rendered on 27 September 2019 by the First Class Court of First Instance of Cotonou which ordered the demolition of the building pending consideration of the merits of the case by this Court.

- ii. report to the Court within fifteen (15) days as from the date of receipt of this Order, on measures taken to implement the Order.
- 14. The Parties filed their pleadings on the merits and reparations within the stipulated time limits.
- 15. Pleadings were closed on 28 March 2022 and the Parties were duly notified.

IV. Prayers of the Parties

- 16. The Applicants pray the Court to:
 - i. Declare that it has jurisdiction;
 - ii. Declare the Application admissible;
 - iii. Declare that the Republic of Benin violated Articles 7(2) and 14 of the African Charter on Human and Peoples' Rights;
 - iv. Order the annulment of Judgment No44/3/CD of 27 September 2019 rendered by the Court of First Instance of Cotonou;
 - v. Serve notice to the Applicants to produce evidence of the harm he suffered, certified by experts;
 - vi. Order the State of Benin to pay to them the sum of 20 000 000 000 FCFA as damages;
 - vii. Order the Republic of Benin to report to the Court on the implementation of the decision to be taken within such time as the Court may determine;
 - viii. Order the Republic of Benin to pay the costs.
- 17. The Respondent State prays the Court to:
 - i. Find that there is no violation of the human rights alleged to have been violated;
 - ii. Find that the Applicants seek the annulment of Judgment No Judgment No44/3/CD of 27 September 2019 rendered by the Court of First Instance of Cotonou.
 - iii. Find that the Court itself has already ruled that it is not an appellate court of decisions rendered by domestic courts;
 - iv. Find that the Court lacks jurisdiction;
 - v. Consequently, declare that it lacks jurisdiction.
 - vi. Find that at the time of hearing the Application, local remedies had not been exhausted before the parties brought the case before the African Court;
 - vii. Find that local remedies are available, effective and offer a chance of success;
 - viii. Consequently, declare Mr. Ghaby Kodeih and Mr Naby Kodeih's Application inadmissible.
 - ix. Find that there has never been a violation of the right to a fair trial.

- x. Find that the offence of non-compliance with the terms of a building permit is constituted in relation to the Applicants.
- xi. Find that the demolition of the building ordered by the judge is a sanction provided for by Decree 2014-2015 of 13 March 2014 governing building permits in the Republic of Benin.
- xii. Find that the Respondent State has not violated Article 7(2) of the African Charter on Human and Peoples' Rights.
- xiii. Find that the Respondent State has not violated the property rights of the Applicants and therefore has not violated the provisions of Article 14 of the African Charter on Human and Peoples' Rights.
- xiv. Find that the Applicants adduce no evidence of the harm allegedly suffered owing to the actions of the Respondent State;
- xv. Find that the Respondent State did not commit any fault that resulted in any harm requiring any compensation;
- xvi. Declare that there is no ground for compensation;
- xvii. Consequently, purely and simply dismiss the Application by Mr Ghaby Kodeih and Mr Naby Kodeih.

V. Jurisdiction

18. Article 3 of the Protocol provides:

- 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
- 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

19. Furthermore, according to Rule 49(1) of the Rules of Court, "The Court shall conduct preliminary examination of its jurisdiction [...] in accordance with the Charter, the Protocol and these Rules".⁵

20. Based on the above-mentioned provisions, the Court must, for every application, examine its jurisdiction and rule, where appropriate, on any objections to its jurisdiction.

21. The Court notes that the Respondent State raises an objection to the Court's material jurisdiction.

A. Objection to material jurisdiction

22. The Respondent State notes that the Applicants seek the annulment of the judgment of 27 September 2019. The Respondent State contends that this request amounts to asking the Court to challenge the decisions of its domestic courts.

5 Rule 39(1) of the Rules of Court of 2 June 2010.

23. It contends that the Court would effectively be exercising appellate jurisdiction, whereas according to its jurisprudence, in particular the judgment – in *Alex Thomas v United Republic of Tanzania*, it is not an appellate court with regard to domestic courts. Accordingly, the Respondent State requests the Court to find that it lacks jurisdiction.
24. The Applicants contend that when a court decision is in itself a violation of human rights, the Court, which has a mandate to protect the human rights of citizens, has no choice but to intervene and denounce the violation.
25. They submit that it is not a question of reviewing the legality of a decision rendered by a domestic court but of finding a clear violation of human rights contained in a judicial act. They further contend that while the Court cannot assess the proper application of domestic law by national judges, it retains jurisdiction to identify human rights violations even when they emanate from a decision of domestic courts.
26. The Applicants consider that, in the instant case, the Court has jurisdiction to assess whether the judgment of 27 September 2019 was consistent with the requirements of the Charter and any other international human rights instrument.

27. The Court considers that, under Article 3(1) of the Protocol, it has jurisdiction to hear all cases brought before it insofar as they relate to alleged violations of the Charter, the Protocol and any other human rights instrument ratified by the Respondent State.⁶
28. The Court recalls, in accordance with its jurisprudence “that it is not an appellate body with respect to the decisions of national courts”. However, “this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or with any other human rights instrument ratified by the

6 *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015), 1 AfCLR 465 § 45; *Kennedy Owino Onyachi and another v United Republic of Tanzania* (merits) (28 September 2017), 2 AfCLR 65 § 34-36; *Jibu Amir aka Mussa and another v United Republic of Tanzania* (merits and reparations) (28 November 2019), 3 AfCLR 629, § 18; *Masoud Rajabu v United Republic of Tanzania*, ACtHPR, Application No 008/2016, Judgment of 25 June 2021 (merits and reparations) § 21.

State concerned.⁷

29. The Court observes that in the instant case, the Applicants allege a violation of the right to a fair trial and the right to property protected by Articles 7(2) and 14 of the Charter, respectively, the interpretation and application of which fall within its material jurisdiction.
30. Accordingly, the Court is not called upon to sit as an appellate court but rather to act within its material jurisdiction. It follows that the objection raised by the Respondent State cannot be upheld.
31. Accordingly, the Court finds that it has material jurisdiction to hear the instant case.

B. Other aspects of jurisdiction

32. The Court observes that no objection has been raised with respect to its personal, temporal and territorial jurisdiction. Nonetheless, in accordance with Rule 49(1) of the Rules, it must satisfy itself that all aspects of its jurisdiction have been fulfilled before proceeding with the Application.
33. As regards its personal jurisdiction, the Court notes that, the Respondent State is a party to the Charter and the Protocol, and it deposited the Declaration. The Court recalls, as it has stated in paragraph 2 of this Ruling that, the Respondent State deposited the instrument of withdrawal of the Declaration on 25 March 2020. In this regard, the Court recalls its jurisprudence according to which the withdrawal by the Respondent State of its Declaration has no retroactive effect and has no bearing on cases pending at the time of the withdrawal or new cases filed before the withdrawal takes effect, twelve (12) months after its deposit, that is, on 26 March 2021. Accordingly, the withdrawal has no bearing on the instant Application, as the Application was filed before the withdrawal of the Declaration took effect.⁸
34. With regard to temporal jurisdiction, the Court finds that it has been established, because the alleged violations occurred, after the Respondent State became a party to the Charter, the Protocol and had deposited the Declaration.

⁷ *Kenedy Ivan v United Republic of Tanzania* (merits) (March 2019), 3 AfCLR 48 § 26; *Armand Guéhi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477 § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018), 2 AfCLR 287 § 35.

⁸ See paragraph 2 of this Ruling.

35. As regards its territorial jurisdiction, the Court finds that it has jurisdiction insofar as the facts of the case and the alleged violations took place in the Respondent State's territory.
36. Accordingly, the Court finds that it has jurisdiction to consider the Application.

VI. Admissibility

37. Article 6(2) of the Protocol provides that "the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter".
38. According to Rule 50(1) of the Rules of Court,⁹ "The Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules".
39. Rule 50(2) of the Rules of Court, which restates in substance the provisions of Article 56 of the Charter, provides:
Applications filed before the Court shall comply with all of the following conditions:
 - a. Indicate their authors even if the latter request anonymity,
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter,
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union,
 - d. Are not based exclusively on news disseminated through the mass media,
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
 - f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date the Commission is seized with the matter, and
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the Charter.
40. The Court notes that the Respondent State raises an objection to the admissibility of the Application based on non-exhaustion of local remedies.

9 Article 40 of the Rules of 2 June 2010.

A. Objection based on non-exhaustion of local remedies

41. The Respondent State contends that the requirement of exhaustion of local remedies under Article 56(5) of the Charter and Rule 40 of the Rules of Court¹⁰ implies that a case concerning the violation of human rights must be heard at all levels of domestic courts before being brought before the Court.
42. It notes, in the instant case, that although the Applicants appealed the High Court judgment of 27 September 2019 before the Cotonou Court of Appeal, pursuant to Article 509 of the Criminal Procedure Code, Law No 2012-15 of 18 March 2013, they filed their Application before this Court without awaiting the outcome of the appeal proceedings. They state that the Cotonou Court of Appeal ruled on its appeal by Decision No066/1CC/20 of 24 March 2020.
43. The Respondent State finds that in the instant case the Application was submitted before the exhaustion of local remedies and must therefore be declared inadmissible.

44. The Applicants argue that the requirement to exhaust local remedies implies, *inter alia*, that the available judicial remedies are effective.
45. They submit that in the instant case, the local remedies are ineffective due to the fact that domestic courts lack independence because of the massive intrusion of the executive power in the High Judicial Council (hereinafter “HJM”) as a result of the new Article 1 of Organic Law No 2018-02 relating to the HJM, which calls into question the principle of separation of powers and the independence of the judiciary.
46. They also cite the lack of independence and impartiality on the part of Mr. Justin Gbenameto, President of the First Correctional Chamber of the Cotonou Court of Appeal.
47. According to them, Mr. Justin Gbenameto “is under the control of the executive power” because he was reinstated as a magistrate

10 *Idem*.

by the Constitutional Court.¹¹ This is in spite of a decision rendered by the High Judicial Council¹² for his removal and the subsequent decision rejecting the appeal to his removal as inadmissible.¹³

48. The Applicants contend that there was no need to seek effective justice before the Correctional Chamber of the Cotonou Court of Appeal which heard their appeal, nor before the Supreme Court. They submit that the objection based on admissibility of the Application should therefore be dismissed.

49. The Court notes that, pursuant to Article 56(5) of the Charter and Rule 50(2) of the Rules, for an application to be admissible, local remedies must have been exhausted if they are available, unless it is clear that the procedure has been unduly prolonged.
50. The Court notes that the remedies to be exhausted are those of a judicial nature. These must be available to the Applicant without hindrance and be effective, in the sense that they are “capable of satisfying the complainant or of remedying the situation in question”.¹⁴
51. The Court states, moreover, that compliance with the requirement under Article 56(5) of the Charter and Rule 50(2) of the Rules presupposes not only that the Applicant initiates local remedies, but also that he awaits the outcome.¹⁵ In the same vein, the Court also stated that in order to determine whether the requirement to exhaust local remedies has been met, the proceedings to which the Applicant was a party must have been finalised at the time of filing the Application with the Court.¹⁶

11 Decision DCC 19-270 of 22 August 2019 of the Constitutional Court.

12 Decision No 001/CSM of 14 January 2014 of the High Judicial Council.

13 Decision DCC 14-123 of 3 July 2014 of the Constitutional Court.

14 *Beneficiaries of the late Norbert Zongo, Aboulaye Nikiema a.k.a. Ablassé, Ernest Zongo and Blaise Ilboudo and Mouvement Burkinabè des droits de l’homme et des peuples v Burkina Faso*, Judgment (5 December 2014) (merits) 1 AfCLR 219, § 68; *Ibid. Konaté v Burkina Faso* (merits) §108.

15 *Yacouba Traoré v Republic of Mali*, ACTHPR, Application No 010/2018, Judgment of 25 September 2020 (jurisdiction and admissibility) §§ 46 and 47.

16 *Komi Koutché v Republic of Benin*, ACTHPR, Application 020/2019, Judgment of 25 June 2021, §61; *Sébastien Marie Aikoué Ajavon v Republic of Benin*, ACTHPR, Application 027/2020, Judgment of 2 December 2021, §74.

52. The Court notes, in the instant case that, it is not disputed that on 1 October 2019, the Applicants, pursuant to Article 509 of the Code of Criminal Procedure,¹⁷ appealed the judgment of 27 September 2019 before the Cotonou Court of Appeal and that the Applicants filed the instant Application on 17 February 2020, while the appeal proceedings were pending. The Court also notes that the Cotonou Court of Appeal rendered its decision on 24 March 2020,¹⁸ one (1) month and one (1) week after the filing of the instant Application.
53. It notes that to justify bringing a case before the Court without awaiting the decision of the Court of Appeal, the Applicants advance two (2) arguments, namely, the lack of independence of the judiciary as well as the lack of independence and impartiality of the president of the First Correctional Chamber of the Cotonou Appeal Court.
54. With regard to the first argument, the Court notes that, insofar as the requirement to exhaust local remedies is assessed at the time of bringing a case before it, an Applicant cannot rely on circumstances subsequent to the filing of the application in order to be exempted from compliance with this requirement.¹⁹ It follows that in the instant case, the argument relating to the lack of independence and impartiality of the HJC, which the Court ruled on in its judgment of 4 December 2020, *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*, relates to a circumstance subsequent to the filing of the instant Application. Consequently, the Court rejects this argument.
55. As regards the second argument, the Court has held that “ the impartiality of a judge is presumed, and that compelling evidence is needed to rebut this presumption”.²⁰
56. The Court notes, in the instant case, that the Applicants did not provide any evidence of the partiality and lack of independence of the President of the Correctional Chamber, which is a collegiate

17 Article 509 of Law No 2012-15 of 30 March 2012 on the Code of Criminal Procedure provides that “judgments handed down by the Court of First Instance ruling on criminal matters may be appealed. The appeal shall be brought before the Court of Appeal”.

18 Decision No 66/1CC/20 of 24 March 2020 of the First Correctional Chamber of the Cotonou Court of Appeal.

19 *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*, ACtHPR, Application No027/2020, Judgment of 2 December 2021 § 79.

20 *Sébastien Germain Ajavon v Republic of Benin*, ACtHPR, Application No 062/2019, Judgment of 4 December 2020 (merits and reparations), § 293; *Alfred Agbesi Woyome v Republic of Ghana* (28 June 2019) (merits and reparations), 3 AfCLR 235 § 128.

body of the Cotonou Court of Appeal before which they appealed the judgment of 27 September 2019. Consequently, the Court rejects the Applicants' arguments.

57. In view of the foregoing, the Court finds that the Applicants should have awaited the outcome of their appeal before filing the instant Application, unless the appeal procedure was unduly prolonged. The Court notes that the Applicants filed the Application four (4) months and seventeen (17) days after filing their appeal but before the said appeal was determined. The Court finds that the Applicants filed their Application prematurely.
58. Accordingly, the Court finds that the objection based on non-exhaustion of remedies is well-founded and that the Application does not satisfy the requirement of Rule 50(2)(e) of the Rules.

B. Other aspects of admissibility

59. Having found that the Application does not satisfy Rule 50(2)(e) of the Rules, and since the admissibility requirements are cumulative,²¹ the Court does not need to rule on the admissibility requirements set out in Article 56(1), (2), (3), (4), (6), and (7) of the Charter and Rule 50(2)(a), (b), (c), (d), (f) and (g) of the Rules.²²
60. In view of the foregoing, the Court declares the Application inadmissible.

VII. Costs

61. Each Party prays that the other be ordered to pay the costs.

21 *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (jurisdiction and admissibility) (21 March 2018), 2 AfCLR 237 § 63; *Rutabingwa Chrysanthé v Republic of Rwanda* (jurisdiction and admissibility) (11 May 2018), 2 AfCLR 361 § 48; *Collectif des anciens travailleurs ALS v Republic of Mali*, ACTHPR, Application No 042/2015, Judgment of 28 March 2019 (jurisdiction and admissibility) § 39.

22 *Ibid.*

- 62. According to Article 32(2) of the Rules,²³ “Unless otherwise decided by the Court, each party shall bear its own costs, if any”.
- 63. The Court notes that nothing in the circumstances of the instant case warrants a departure from this provision.
- 64. Accordingly, the Court decides that each party should bear its own costs.

VIII. Operative part

65. For these reasons,
The Court
Unanimously,
Jurisdiction

- i. *Dismisses* the objection to material jurisdiction;
- ii. *Declares* that it has jurisdiction;

Admissibility:

- iii. *Upholds* the objection based on non-exhaustion of local remedies;
- iv. *Declares* the Application inadmissible;

Costs:

- v. *Orders* that each party shall bear its own costs.

23 Article 30(2) of the Rules of 2 June 2010.

Makungu v Tanzania (reparations) (2022) 6 AfCLR 309

Application 006/2016, *Mgosi Mwita Makungu v United Republic of Tanzania*

Judgment, 23 June 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

In its judgment of 7 December 2018, the Court held that the Respondent State had violated the Applicant's right to a fair trial by failing to provide him with certified true copies of the records of proceedings and judgment in a domestic criminal matter in which he was convicted. The Court ordered that the Applicant be released from prison and reserved its judgment on the other forms of reparations sought by the Applicant. In this judgment, the Court dismissed the Applicant's claim for moral damages for indirect victims but ordered reparations for material damages and made orders for measures of satisfaction.

Procedure (conditions for default judgment, 14-17)

Reparations (basis of, 21; onus to provide evidence for, 22; scope of, 78; measures of, 23; material prejudice, 29-30, 32-37; moral prejudice, 44-53; indirect victims, 56-63; measures of satisfaction, 66-70; report on implementation, 72-73)

I. Brief background of the Matter

1. In his Application filed on 29 January 2016, Mgosi Mwita Makungu ("the Applicant") alleged that the United Republic of Tanzania ("the Respondent State") had violated his right to non-discrimination, right to equal protection before the law and right to fair trial under Articles 2, 3 and 7 of the African Charter on Human and Peoples' Rights ("the Charter"). The claims arose from the Respondent State's alleged failure to provide the Applicant with certified true copies of the record of proceedings and judgments of the local courts which rendered his conviction for robbery with violence and armed robbery and a cumulative sentence of thirty (30) years' imprisonment.
2. On 7 December 2018, the Court rendered its judgment, of which paragraphs (vi)-(xi) reads as follows:
 - vi. *Finds* that the Respondent State violated Article 7(1) (a) of the Charter as regards the failure to provide the Applicant with the certified true copies of the records of proceedings and judgments in Criminal Case No 244 of 1995 and Criminal Case No 278 of 1995 heard at the District Court of Bunda, to facilitate the Applicant file

the appeals therefrom and therefore orders the Respondent State to provide them to the Applicant;

- vii. *Orders* the Respondent State to release the Applicant from prison within thirty (30) days of this Judgment;
- viii. *Reserves* its decision on the Applicant's prayer on the other forms of reparation;
- ix. *Allows* the Applicant, in accordance with Rule 63 of its Rules, to file his written submissions on the other forms of reparation within sixty (60) days from the date of notification of this Judgment; and the Respondent State to file its Response thereto within thirty (30) days from the date of receipt of the Applicant's written submissions;
- x. *Orders* the Respondent State to submit to the Court a report on the measures taken in respect of paragraphs (vi) and (vii) above within sixty (60) days of notification of this Judgment; and
- xi. *Reserves* its decision on costs.

II. Subject of the Application

- 3. On 16 August 2019, the Applicant filed his written submissions, praying the Court to award him reparations based on its findings in the judgment on the merits as mentioned above.

III. Summary of the Procedure before the Court

- 4. On 10 December 2018, the Registry transmitted to the Parties, a certified true copy of the judgment on merits.
- 5. On 15 February 2019, the Court granted the Applicant, *suo motu*, a thirty (30) day extension of time to file his written submissions on reparations as time had elapsed since the notification of the judgment to the Parties.
- 6. On 16 August 2019, the Applicant filed his submissions on reparations after being granted two (2) further sixty (60) day extensions of time to file the said submissions. On the same date, the Applicant requested the Court for an extension of time to file evidence to support the claims in respect of the alleged indirect victims. On 4 October 2019, the Applicant was notified that the Court had granted his request for extension of time to file additional evidence. The Applicant did not file the evidence.
- 7. The Applicant's submissions on reparations were served on the Respondent State on 27 January 2020. The Respondent State did not file a Response to these submissions. The time for doing so first elapsed on 28 February 2020. On 1 December 2020, the Respondent State was sent a reminder about the pending Response.

8. On 1 April 2022, the Parties were notified that, pursuant to Rule 63(1) of the Rules, the Respondent State was required to file a Response to the submissions on reparations within forty-five (45) days from the date of receipt of the notice, failing which, the Court would enter a judgment in default.
9. Although the Respondent State received all these notifications, it did not respond to any of them.
10. Pleadings were closed on 20 May 2022 and the Parties were duly notified.

IV. Prayers of the Parties

11. The Applicant prays the Court to grant the following reparations:
 - i. TZS 30,000,000 (Thirty Million Tanzanian Shillings) to the Applicant for moral prejudice;
 - ii. TZS 20,000,000 (Twenty Million Tanzanian Shillings) payable to each of his two wives, Mrs Ghati Mgosi and Mrs Nyangi Bageni for moral prejudice;
 - iii. TZS 10,000,000 (Ten Million Tanzanian Shillings) to his mother, Nyakibari Momanyi for moral prejudice;
 - iv. TZS 10,000,000 (Ten Million Tanzanian Shillings) to his brother for moral prejudice;
 - v. TZS 5,000,000 (Five Million Tanzanian Shillings) to each of his children for moral prejudice;
 - vi. An order that the above-mentioned amounts are paid tax free within three (3) months of notification of judgment on reparations;
 - vii. An amount to be determined by this Honourable Court which it considers just to Mgosi Mwita Makungu for the material prejudice suffered;
 - viii. An Order that the Respondent reports to this Honourable Court within six (6) months of the date of notification of the Reparations Judgment and every six (6) months thereafter, until such a time all orders have been complied with;
 - ix. An Order that the Respondent publishes the judgment on Reparations within three (3) months of notification in both English and Swahili for a period of not less than one year, on the official website of the Judiciary and Ministry of Constitutional Affairs.
12. The Respondent State did not respond to the Applicant's submissions.

V. On the default of the Respondent State

13. Rule 63(1) provides that:
Whenever a party does not appear before the Court, or fails to defend its case within the period prescribed by the Court, the Court may, on the Application of the other party, or on its own motion, enter a decision in default after it has satisfied itself that the defaulting party has been duly served with the Application and all other documents pertinent to the proceedings.
14. The Court notes that Rule 63(1) of the Rules sets out three conditions for a judgment in default and these are: i) the notification to the defaulting party; ii) the default of one of the Parties; and iii) application by the other Party or the Court acting on its own motion.
15. With regard to notification, the Court recalls that the Applicant's written submissions on reparations were filed on 16 August 2019. The Court further notes that from 27 January 2020, being the date of service of the Applicant's submissions on the Respondent State, to 20 May 2022, when pleadings were closed, the Registry notified the Respondent State of all the pleadings filed by the Applicant. The Court concludes that the Respondent State was duly notified.
16. On the default of one of the Parties, the Court notes that, in the notice of service of the Application, it requested the Respondent State to file its Response thereto within thirty (30) days of receipt. The Respondent State failed to file its submissions within the time provided even after further notifications on 3 December 2020 and on 1 April 2022. The Court, therefore, finds that the Respondent State has failed to defend its case within the prescribed time.
17. Finally, with respect to the third condition, the Court notes that the Rules, empower it to issue a decision in default either *suo motu* or on the request of the other Party. In the present case, the Applicant having not requested for a default decision, the Court will proceed to issue the decision *suo motu* for proper administration of justice.¹
18. The required conditions having thus been fulfilled, the Court enters this judgment by default.

1 *African Commission on Human and Peoples' Rights v Libya* (merits) (2016) 1 AfCLR 153 §§ 38-42; *Fidele Mulindahabi v Rwanda*, ACtHPR, Application No 010/2017, Ruling of 26 June 2020 (jurisdiction and admissibility) § 30. *Yusuph Said v United Republic of Tanzania*, ACtHPR, Application No 011/2019, Ruling of 21 September 2021 (jurisdiction and admissibility) §§ 17; *Robert Richard v United Republic of Tanzania*, ACtHPR, Application No 035/2016 Judgment of 2 December 2021 (merits and reparations) §§ 17-18.

VI. Reparations

19. In his submissions the Applicant prays the Court to grant him reparations for material and moral prejudice due to the violation of his rights by the Respondent State.
20. Article 27(1) of the Protocol stipulates that:
If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.
21. As it has consistently held, the Court considers that, for reparations to be granted, the Respondent State should first be internationally responsible for the wrongful act. Second, causation should be established between the wrongful act and the alleged prejudice. Furthermore, and where it is granted, reparation should cover the full damage suffered.²
22. The Court reiterates that the onus is on the Applicant to provide evidence to justify his prayers, particularly for material damages.³ With regard to moral damages, the Court has held that it is presumed that there is prejudice caused when violations are established.⁴
23. The Court also restates that measures that a State could take to remedy a violation of human rights include restitution, compensation and rehabilitation of the victim, as well as measures to ensure non-repetition of the violations, taking into account the circumstances of each case.⁵
24. In the instant case, the Court established that the Respondent State violated the Applicant's right to a fair trial under Article 7(1)(a) of the Charter by failing to provide him with certified true

2 *The Beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v Burkina Faso* (reparations) (5 June 2015) 1 AfCLR 258 §§ 20 to 31; *Lohé Issa Konaté v Burkina Faso* (reparations) (3 June 2016) 1 AfCLR 346 §§ 52 to 59; and *Reverend Christopher R. Mtikila v United Republic of Tanzania* (reparations) (13 June 2014) 1 AfCLR 72 §§ 27 to 29 and 40.

3 *Kennedy Gihana and others v Rwanda* (merits and reparations) (28 November 2019) 3 AfCLR 655 § 139; See also *Reverend Christopher R. Mtikila v Tanzania* (reparations) § 40; *Lohé Issa Konaté v Burkina Faso* (reparations) § 15(d); and *Kalebi Elisamehe v Tanzania* (merits and reparations) § 97.

4 *Ally Rajabu and Others v United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 539, § 136; *Armand Guehi v Tanzania* (merits and reparations) (7 December 2018), 2 AfCLR 477, § 55; *Lucien Ikili Rashidi v United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 13, § 119; *Norbert Zongo and Others v Burkina Faso* (reparations), § 55; and *Kalebi Elisamehe v Tanzania* (merits and reparations), § 97.

5 *Ingabire Victoire Umuhoza v Republic of Rwanda* (reparations) (7 December 2018) 2 AfCLR 202 § 20. See also *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application 028/2015, Judgment of 26 June 2020 (merits and reparations) § 96.

copies of the record of proceedings and judgments in Criminal Case No 244 of 1995 and Criminal Case No 278 of 1995 heard at the District Court of Bunda for over twenty-two (22) years. By these judgments, he was convicted of the offence of armed robbery and robbery with violence, respectively, and sentenced to fifteen (15) years imprisonment for each conviction.

25. It is against these findings and principles that the Court will consider the Applicant's prayers for reparations.

A. Pecuniary reparations

26. The Applicant seeks reparations for material and moral prejudice that he suffered and for moral prejudice suffered by the alleged indirect victims.

i. Material prejudice

27. The Applicant claims that, because of his imprisonment, his "farming business" collapsed. Further, the Applicant claims that he lost his house and plot of land at Bugarika area and a plot of land at Tarime area after his family was forced to sell them to secure a source of income. The Applicant swore an affidavit on 3 July 2019, which he filed before the Court on 16 August 2019, by which he restated these claims.⁶
28. The Applicant implores the Court that "due to lack of documentary evidence, which as a result of imprisonment of over 24 years was misplaced" to "consider making an award for the loss of income, which is just and commensurate in the present circumstances."

6 The affidavit reads:

18. THAT, I was a successful farmer before I got arrested and imprisoned;
19. THAT, I did not get the opportunity to handover my business and make the necessary arrangements regarding my personal and family affairs before my arrest;
20. THAT, as a result of my imprisonment and prolonged absence, my farming business collapsed;
21. THAT, I lost my house and plot of land both located at Bugarika area, within Mwanza City and another plot of land at Tarime area after my family was forced to sell them as a source of income.

29. The Court notes that, for reparations for material prejudice to be granted, there must be a causal link between the violation established by the Court and the prejudice caused, and there should be a specification of the nature of the prejudice and proof thereof.⁷
30. In the instant Application, the Court established that the Applicant's right to fair trial under Article 7(1)(a) of the Charter was violated as he was unable to appeal his conviction and sentence for twenty-two (22) years, seven (7) months and twenty-two (22) days, or two hundred and seventy-two (272) months as at the date of this Court's judgment on merits rendered on 7 December 2018. The Applicant's inability to appeal his conviction and sentence resulted in his continued imprisonment and serving over two thirds of his sentence without exercising his right of appeal. This situation directly led to his inability to earn an income.
31. The Court notes that, the Applicant has prayed for flexibility due to difficulty of obtaining documentation to support his claim that he managed a farming business and earned an income from it. His prayer is based on the fact a long time that has elapsed since his incarceration.
32. The Court notes that the Applicant has neither provided information on the nature of the farming business that he managed nor specified the monthly income he earned. The Court also notes that documents required as evidence of the Applicant's actual or estimated income would essentially be of a private or confidential nature. Such documents would therefore be available or accessible only to the Applicant and not to third parties. The Applicant's situation, being incarcerated, means that there would be a real difficulty to access the said documents which are of a private or confidential nature. In view of this, the Court deems it fit to adopt a flexible approach.
33. The flexible approach necessitates the use of an acceptable basis for the assessment of the lost earnings. Since the Applicant asserts that he earned his income from the farming sector without any specifications, the Court deems that the use of the minimum applicable monthly wage during that period is an acceptable standard for assessment of the quantum of damages. The Court notes that the applicable minimum monthly wage for the period was Tanzanian Shillings Seventeen Thousand, Five Hundred

7 *Kijiji Isiaga v United Republic of Tanzania*, ACTHPR, Application No 032/2015, Judgment of 25 June 2021 (reparations) § 20.

(TZS 17,500).⁸

34. The period to be used for computation is from 16 April 1996 when the Applicant first notified the Respondent State of his intention to appeal his convictions and sentences, until 7 December 2018 when this Court established in the judgment on merits that, the Respondent State had violated his rights. This is a period of twenty-two (22) years, seven (7) months and twenty-two (22) days), that is 22.67 years or two hundred and seventy-two (272) months. The Court notes that, the Applicant would not have worked throughout the year as there would be a period of rest. On average there would be one day of rest per week which translates to fifty-two (52) days of rest or one and seven tenth (1.7) months a year for the rest period. This can be rounded off to two (2) months per year to be multiplied by 22.67 years, that is, 22.67 years x 2 months/per year amounting to 45.3 months. The total of 45.3 months will be deducted from the two hundred-and-seventy-two-months period that is, $272 - 45.3 = 226.7$ months.
35. The Court also notes that, it is necessary to factor in adjustments in cost of living that occurred during the intervening period, and for this purpose an annual inflation rate of 3.8 % (or $3.8\%/12 = 0.32\%$ per month)⁹ will be applied. The Court deems it appropriate to apply the rate of inflation for adjustments in costs of living because it is of general application as opposed to, for instance, interest rate, which varies depending on amounts and durations involved.
36. Therefore, the computation for the income lost will be based on the period of 226.7 months multiplied by 17,500 TZS compounded with a monthly inflation rate of 0.32 %, that is, $226.7 \times 17,500 \text{ TZS} \times 0.32\% = 5,807,421 \text{ TZS}$. The Court therefore awards the Applicant, in equity, the amount of Tanzanian Shillings Five Million Eight Hundred and Seven Thousand and Four Hundred and Twenty One only (TZS 5,807,421) as damages for material prejudice suffered for loss of income.
37. Regarding the alleged sale of the house at Bugarika and the plot of land at Tarime, these sales are not directly linked to the Applicant's continued incarceration as they could have been sold for reasons

8 See Schedule Part A of Government Notice Number 85 published on 30 April 1996 'Regulation of Wages and Terms of Employment Order 1996', issued under Section 10(3C) of the Regulation of Wages and Terms of Employment Ordinance, Cap 300.

9 See the annual inflation rate as indicated by the Bank of Tanzania as at April 2022 available on <https://www.bot.go.tz/#>; The inflation rate is usually constant for long periods of time as would be applicable for the period under consideration.

other than his imprisonment. Furthermore, the Court notes that, in addition to his affidavit, the Applicant's relatives would have been able to provide evidence such as certifications by local authorities in which the said lands and house are situated, providing their specifications and value and attesting to his ownership of the properties and relating to their sale.

38. The Court therefore dismisses this prayer relating to material prejudice allegedly suffered due to the sale of the Applicant's house and plots of land.

ii. Moral prejudice

39. The Applicant prays the Court to grant him reparations for the moral prejudice he suffered and for the moral prejudice allegedly suffered by his wives, children, mother and brother.

a. Moral prejudice suffered by the Applicant

40. The Applicant claims that he is a direct victim of the violation of Article 7(1)(a) of the Charter as acknowledged in the judgment on merits dated 7 December 2018. Specifically, the Applicant claims that he suffered emotional and physical anguish during his unfair trial, and imprisonment lasting over twenty-four (24) years, his life plan was disrupted, he lost his social status, and he has had limited contact with this family while in prison.
41. Further, the Applicant tenders before the Court medical documents to demonstrate that his health deteriorated due to his imprisonment. The Applicant claims that he "was diagnosed with tuberculosis, eye problems, ulcers, spinal cord pains, acute confusion resulting in loss of memory (retrograde amnesia/delirium)."
42. The Applicant requests the Court to award him reparations for moral prejudice based on the principle of equity while considering the time he has spent in jail, that is, more than twenty-four (24) years. He cites the decision of the Court in the *Lohe Issa Konaté* case where the Applicant and his family were awarded twenty thousand dollars (USD 20,000) in moral damages endured as a result of the Applicant's imprisonment for a one-year period.
43. In light of the above, the Applicant prays the Court to grant him a sum of Thirty Million Tanzanian Shillings (TZS 30, 000,000) for moral prejudice as a direct victim.

44. The Court recalls its established case-law where it has held that moral prejudice is presumed in cases of human rights violations, and the quantum of damages in this respect is assessed based on equity, taking into account the circumstances of the case.¹⁰ The Court has, thus, adopted the practice of granting a lump sum in such instances.¹¹
45. As indicated in paragraph 2 of this judgment, the Court notes that the Respondent State violated the Applicant's right to appeal his convictions and sentences for armed robbery and robbery with violence issued vide the judgments in Criminal Case No244 of 1995 of 18 June 1996 and Criminal Case No278 of 1995 of 15 April 1996, respectively, both by the District Court of Bunda.
46. The Court further notes that, the Applicant indicated his intention to appeal the convictions and sentencing in both cases, by filing notices of appeal on 16 April 1996 with respect to Criminal Case No278 of 1995 and on 22 June 1996 with respect to Criminal Case No 244 of 1995, within the time prescribed by law.
47. It is pertinent that, the Applicant was unable to exercise his right to appeal during the period running from 16 April 1996, to 7 December 2018, when the judgment on merits was rendered, this being (22) years, seven (7) months and twenty-two (22) days.
48. Furthermore, the time for the Respondent State to report on measures taken to facilitate the Applicant to exercise his right of appeal as ordered, elapsed on 17 February 2019. The Respondent State also ought to have released the Applicant no later than 8 January 2019. By his letter dated 26 July 2019, the Applicant informed the Court that the Respondent State is yet to implement the Judgment on merits. The Respondent State did not submit any observations regarding the Applicant's letter, after it was notified of the same, therefore it is deemed to have accepted the Applicant's contentions.
49. The Applicant's inability to exercise his right to appeal and in view of the long prison term he faced undoubtedly caused him distress

10 *Norbert Zongo and Others v Burkina Faso* (reparations), § 55; *Ingabire Victoire Umuhoza v Rwanda* (reparations), § 59; *Christopher Jonas v Tanzania* (reparations), § 23.

11 *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 119; *Minani Evarist v United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 402, § 84-85; *Armand Guehi v Tanzania* (merits and reparations) § 177; *Christopher Jonas v United Republic of Tanzania* (reparations), § 24.

and psychological anguish on account of which he suffered great moral prejudice. This suffering is aggravated by the Respondent State's failure to implement this Court's judgment on merits and report on the measures taken in that regard. Accordingly, the Applicant is entitled to moral damages.

50. The Court notes that the *Konaté* standard referred to by the Applicant is distinguishable from his case due to the difference in the nature of the offences that were implicated. The Court will therefore not fully apply that standard in assessing the quantum of reparation for moral prejudice to be awarded to the Applicant.
51. In view of the moral prejudice suffered by the Applicant due to his inability to exercise his right to appeal his conviction and sentence for a prolonged period, resulting in him serving more than two-thirds of his thirty (30) year prison sentence without exercising this right, the Court awards the Applicant the sum of Thirty Million Tanzanian Shillings (TZS 30,000,000) as fair compensation for the moral prejudice suffered.
52. The Court further notes that, based on the medical documents that the Applicant submitted on 11 June 2015, the Applicant was diagnosed with presbyopia. This condition relates to a gradual-age-related loss of the eyes' ability to focus actively on nearby objects. In view of the nature of this condition, which occurs due to advancement in age, there ought to have been evidence provided indicating that the Applicant's condition was as a direct consequence of the violation established yet the Applicant failed to provide such evidence. Therefore, the claim based on this ground is dismissed.
53. As regards the claim of tuberculosis, ulcers, spinal cord pains and delirium, the Court notes that the medical documents provided are incomplete and unclear to support these allegations. Furthermore, like the claim relating to the diagnosis of presbyopia, the Court requires evidence proving that these ailments were a direct consequence of the violations established. Without the said evidence, this claim is also dismissed.

b. Moral prejudice suffered by the alleged indirect victims

54. The Applicant prays the Court to consider the indirect victims, who have also suffered moral prejudice due to the violations against him, as follows:
 - i. An amount of Twenty Million Tanzanian Shillings (TZS 20,000,000) payable to each of his two wives, Mrs Ghati Sandarya Mgosi and Mrs Nyangi Bageni

- ii. Five Million Tanzanian Shillings (TZS 5,000,000) to each of his children: Matinde Mgosi; Joel Mgosi; Geoffrey Mgosi; Josephat Mgosi (now late); Julius Mgosi; and Momanyi Mgosi
 - iii. Ten Million Tanzanian Shillings (TZS 10,000,000) payable to his brother, Charles Samuel
 - iv. Ten Million Tanzanian Shillings (TZS 10,000,000) payable to his mother, Nyakibari Momanyi
- 55.** The Applicant claims that his imprisonment disrupted the day-to-day lives of his family members as well as induced social stigma and emotional anguish on them. He claims that his two (2) wives have suffered emotional and financial distress without his support since he was the breadwinner of the family. His children have missed out on the opportunity of being raised by their biological father owing to the Applicant's imprisonment. In addition, the Applicant claims that one of his sons died after his family failed to raise the money to pay for medical costs.

- 56.** The Court notes that with regard to indirect victims, as a general rule, moral prejudice is presumed with respect to spouses, parents and children and reparation is granted only when there is evidence of the relation between spouses or the filiation with an applicant. For other categories of indirect victims, proof of filiation and moral prejudice suffered is required.¹²
- 57.** In the present case, the Applicant's affidavit dated 3 July 2019 and filed before the Court on 16 August 2019 has been tendered as proof of filiation with the alleged indirect victims as follows:
- 2. THAT, I have two wives namely Ghati Sandarya Mgosi and Nyangi Bageni
 - 3. THAT, some of my children were very young at the time of my incarceration, in particular
 - a. Matinde Mgosi (female), was 8 years at the time of my imprisonment
 - b. Joel Mgosi (male), was 6 years old at the time of my imprisonment
 - c. Geoffrey Mgosi (male), was 6 years old at the time of my imprisonment

¹² *Norbert Zongo and Others v Burkina Faso* (reparations), § 54; and *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 135; *Léon Mugesera v Rwanda*, ACtHPR, Application No 012/2017, Judgment of 27 November 2020 (merits and reparations), § 148.

- d. Josephat Mgosi (male but now late) was 6 years old at the time of my imprisonment
- e. Julius Mgosi (male), was 3 years old at the time of my imprisonment
- f. Momanyi Mgosi (male), was 8 months in the womb of Nganyi Bageni
- 4. THAT, I am the son of Nyakibari Momanyi
- 5. THAT, I have a younger brother named Charles Samuel
- 58.** The Applicant's affidavit further elaborates on the effect of the violation he suffered on the members of his family. The Applicant claims that his family as a whole "has suffered emotional anguish and the social stigma of having the Applicant arrested, tried, convicted and imprisoned." Furthermore, the Applicant claims:
 - 26. THAT, my two wives, Ghati Sandarya and Nyangi Bageni have suffered significant emotional and financial distress following my conviction and incarceration. They have been taking care of my six children without their life partner and breadwinner of the family.
 - 28. THAT, due to my imprisonment my children have missed on the opportunity and experience of being raised by their biological father...
 - 29. THAT, my father died of high blood pressure when I was arrested and my son died after my family failed to cover his medical cost.
- 59.** The Court notes that even after granting the Applicant his request for extension of time to file additional evidence in support of the claims for reparations for the alleged indirect victims, the Applicant did not do so within the prescribed time. Therefore, the Applicant's affidavit is the only evidence tendered to establish the Applicant's filiation with the alleged indirect victims. This is not enough for purposes of establishing that there was a spousal relationship or filiation between the Applicant and the alleged indirect victims.
- 60.** The Court reiterates its jurisprudence that indirect victims must prove their relation to the Applicant to be entitled to damages. Hence, spouses should adduce their marriage certificate or any other equivalent proof, children should adduce their birth certificate or any other equivalent evidence to show proof of their filiation, and fathers and mothers should adduce only an attestation of paternity or maternity or any other equivalent proof.¹³
- 61.** In view of the lack of supporting documentation proving the Applicant's filiation to the persons he presents as his spouses, children and parents, their claims for reparations for moral prejudice cannot be sustained.

13 *Norbert Zongo and Others v Burkina Faso* (reparations), § 54.

62. With regard to the claims of moral prejudice suffered by his younger brother, in addition to the lack of supporting evidence on his filiation to the Applicant, no evidence was provided to demonstrate that his living and social conditions were adversely affected as a result of the violations against the Applicant.
63. Consequently, the Court dismisses this prayer for reparations to the alleged indirect victims.

B. Non-pecuniary reparations

64. The Applicant seeks non-pecuniary reparations in the form of publication of this judgment and periodic reporting by the Respondent State on its implementation.

i. Measures of satisfaction

65. The Applicant prays the Court to order “that the Respondent publishes the Judgment on Reparations within three (3) months of notification in both English and Swahili for a period of not less than one year, on the official website of the Judiciary and Ministry of Constitutional Affairs.”

66. The Court recalls that, as per its case-law, its judgment can constitute sufficient reparation for any given violation especially when it comes to moral prejudice. Therefore, orders such as publication of a decision are made on a case-by-case basis as the circumstances warrant.¹⁴ Such circumstances would include cases of grave or systemic violations that affect the domestic system of the Respondent State, where the Respondent State has not implemented a previous order of this Court in relation to the same case, or where there is need to enhance public

14 *Reverend Christopher R. Mtikila v Tanzania* (reparations), § 45; *Ally Rajabu and Others v Tanzania* (merits and reparations), §§ 151-153; *Andrew Ambrose Cheusi v Tanzania* (merits and reparations) §§ 173-174; and *Amir Ramadhani v United Republic of Tanzania*, ACtHPR, Application No 010/2015, Judgment of 25 June 2021 (reparations) § 49.

awareness of the findings in the case.¹⁵

67. The Court notes that in the judgment on the merits of this Application, the Respondent State was ordered to release the Applicant within thirty (30) days of notification of the judgment and to provide the Applicant with the certified true copies of the records of proceedings and judgments in the two criminal cases, and report within sixty (60) days of such notification on measures taken to comply with these orders. The Respondent State has not filed any such report despite several reminders and despite the Applicant's request for compliance with these orders, particularly to release him from prison.
68. The Court recalls its jurisprudence, in the *Zongo*,¹⁶ *Mtikila*¹⁷ and *Anudo*¹⁸ cases, in which it noted that the publication of judgments of international human rights courts as a measure of satisfaction was common practice.
69. The Court notes that, in view of the nature of the violation and the Respondent State's non-compliance with the judgment on merits, there is a need to emphasise on, and raise awareness on the Respondent State's obligations and the reparations required. In view of these circumstances, the Court deems it necessary for this judgment on reparations to be published.
70. The Court further notes that Kiswahili is the Respondent State's national and official language. The publication of this judgment on reparations in Kiswahili will ensure that it is publicised to as wide an audience as possible. The prayer for this judgment on reparations to be published in English and Kiswahili is therefore granted.

ii. Report on implementation

71. The Applicant prays the Court that "the Respondent reports to this Honourable Court within 6 months of the date of notification of the Reparations Judgment and every six (6) months thereafter, until such a time all orders have been complied with".

15 *Armand Guehi v Tanzania* (merits and reparations), § 191. See also *Reverend Christopher R. Mtikila v Tanzania* (reparations), § 45; *Norbert Zongo and Others v Burkina Faso* (reparations), §§ 103-106; and *Amir Ramadhani v Tanzania* (reparations) § 49.

16 *Norbert Zongo and Others v Burkina Faso* (reparations), § 98.

17 *Reverend Christopher R. Mtikila v Tanzania* (reparations), § 45.

18 *Anudo Ochieng Anudo v United Republic of Tanzania*, ACTHPR, Application No 012/2015, Judgment of 2 December 2021 (reparations) § 95.

72. The Court restates its previous decisions that orders on reporting on the implementation of its decisions have become inherent in its processes as prescribed under Article 30 of the Protocol.¹⁹
73. In view of this, therefore, the Court deems it necessary to order the Respondent State to periodically report on the implementation of this judgment in accordance with Article 30 of the Protocol.

VII. Costs

74. Rule 32(2) of the Rules²⁰ stipulates that, “Unless otherwise decided by the Court, each party shall bear its own costs, if any”.
75. In the instant Application, the Applicant did not make submissions on costs.
76. Therefore, considering the circumstances of this case, the Court decides that each party should bear its own costs.

VIII. Operative part

77. For these reasons,
The Court

Unanimously,

On pecuniary reparations

- i. *Dismisses* the Applicant’s prayer for moral prejudice suffered by the alleged indirect victims
- ii. *Grants* the Applicant’s prayer for material prejudice and awards him the sum of Five Million Eight Hundred and Seven Thousand and Four Hundred and Twenty-One Tanzanian Shillings (TZS 5,807,421)
- iii. *Grants* the Applicant’s prayer with regard to moral prejudice and awards him the sum of Thirty Million Tanzanian Shillings (TZS 30,000,000).
- iv. *Orders* the Respondent State to pay the amounts indicated under sub-paragraphs (ii) and (iii) tax free as fair compensation, within six (6) months from the date of notification of judgment, failure of

19 See *Wilfred Onyango Nganyi and 9 Others v Tanzania*(reparations), § 83; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania*, ACtHPR, Application No 006/2015, Judgment of 8 May 2020 (reparations) § 62; *Kalebi Elisamehe v Tanzania* (merits and reparations), § 117(xvi).

20 Rule 30(2) of the Rules of Court, 2 June 2010.

which, it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Bank of Tanzania throughout the period of delayed payment until the accrued amount is fully paid.

On non-pecuniary reparations

- v. *Orders* the Respondent State to publish this Judgment in English and Kiswahili, on the website of the Judiciary and the Ministry for Constitutional and Legal Affairs, and to ensure that it remains accessible for at least one (1) year after the date of the publication.

On implementation and reporting

- vi. *Orders* the Respondent State to submit to it within six (6) months from the date of notification of this Judgment, a report on the status of implementation of the orders set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On costs

- vii. *Orders* each Party to bear its own costs.

Munthali v Malawi (judgment) (2022) 6 AfCLR 326

Application 022/2017, *Harold Mbalanda Munthali v Republic of Malawi*

Judgment, 23 June 2022. Done in English and French, the English text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: CHIZUMILA

The Applicant, acting on behalf of himself and the estate of his deceased father, brought this Application for the alleged confiscation of property that belonged to the deceased. The Applicant alleged that property of the deceased was confiscated in 1976 under the Respondent State's Forfeiture Act, without any payment of compensation. He further alleged that the Respondent State frustrated the deceased's effort to recover his property and get compensation for the confiscated property during his lifetime. The Applicant therefore claimed that the conduct of the Respondent State constituted a violation of Charter guaranteed rights. The Court held that the Respondent State had violated the right to equal protection under the law, the right to be heard and the right to a remedy. Accordingly, the Court granted reparations for material and moral prejudice.

Jurisdiction (material jurisdiction, 27-28; temporal jurisdiction, 29-35)

Admissibility (exhaustion of local remedies, 48-52, 54-55; filing within a reasonable time, 61-63)

Procedure (no requirement to expressly state violated right, 76)

Equal protection (duty of authorities, 81; non-discriminatory protection, 82-83)

Fair trial (right to be heard, 89; state duty to enforce court order, 90-91; ouster of court's jurisdiction, 95-97; right to a remedy, 101-106)

Reparation (scope of, 109; measures of, 110; material prejudice, 111, 123; limitation on quantum, 127; quantum of damage, 128-131; moral prejudice, 135-138)

I. The Parties

1. Mr Harold Mbalanda Munthali (hereinafter referred to as "the Applicant") is a Malawian national. He is a son of late Mr Mbalanda Mweziwapala Munthali (hereinafter referred to as "the deceased") and brings this claim on his own behalf and on behalf of the estate of the deceased in his capacity as the administrator for the alleged unlawful confiscation of the deceased's properties.
2. The Application is filed against the Republic of Malawi (hereinafter referred to as "the Respondent State"), which became party to

the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 23 February 1990 and to the Protocol on 9 October 2008. It also deposited, on 9 October 2008, the Declaration under Article 34(6) of the Protocol through which it accepts the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations (NGOs).

II. Subject of the Application

A. Facts of the matter

3. The Applicant submits that, on 26 January 1976, supposedly under the Forfeiture Act, the Government of the Respondent State confiscated all personal and real property of the deceased and vested it in the Government through the office of the Administrator General.¹ The forfeiture, the Applicant alleges, did not require the Government to pay any compensation to the victim and the deceased did not receive any compensation.
4. Following the adoption of a new Constitution in 1994 and as part of dismantling the one-party State that prevailed at the time of the forfeiture, the Respondent State established a National Compensation Tribunal (hereinafter referred to as "the Tribunal") with a life span of ten (10) years. The Tribunal was exclusively vested with the resolution of claims with respect to alleged criminal and civil liability of the Government for acts that occurred before 1994. According to the Applicant, no action could be instituted before ordinary courts in relation to such acts except by the Tribunal itself.
5. The Applicant further submits that sometime in or around 1995, the deceased filed a complaint to the Government through the Chief Legal Aid Advocate who took up the matter with the Attorney General, and on 6 August 2002 referred the deceased to the Tribunal. Having investigated the matter, the Administrator of the Tribunal, on 21 and 24 June 2003, addressed to the competent authorities of the Respondent State various correspondences notifying them of the Tribunal's intention to hand over the properties to the deceased. However, the said authorities objected to the

1 Forfeiture Act, Malawi, 25 January 1966, An Act to empower the Minister to declare certain persons subject to forfeiture: to provide for the forfeiture and disposition of the property of such persons: to provide that such persons shall be disabled to sue for or alienate property and to enforce judgments: to provide for indemnity of any person disposing or otherwise dealing with such property: and for matters incidental thereto and connected therewith.

hand over and the Tribunal was not able to complete the matter until it concluded its operation upon the expiry of its life span.

6. Frustrated by the processes before the Tribunal, the deceased lodged an action before the High Court of Malawi, which, on 21 October 2005, delivered a judgment in default declaring that the confiscation constituted a violation of the deceased's right to property; that he was entitled to compensation; and ordering that the said properties be returned to him. In implementation of the said order, the Sheriff of the Respondent State recovered some of the deceased's properties.
7. However, when the matter was set down for assessment of damages, the High Court, on 29 January 2008, issued an Order dismissing the claim for compensation on the grounds that it was time barred under the Limitation Act and fell within the purview of the Tribunal. According to the Applicant, the deceased did not appeal to the Supreme Court of Appeal of Malawi and did not receive any compensation until he died on 2 November 2010.
8. On 7 August 2012 and severally thereafter, the Applicant wrote to the Attorney General of the Respondent State over the claim of the deceased's estate, seeking an effective remedy. On 23 May 2016, the Attorney General responded that the Government could not compensate the deceased's estate outside the framework of the Tribunal.

B. Alleged violations

9. The Applicant alleges that the conduct of the Respondent State constitutes a violation of the rights to equal protection before the law, and to have one's cause heard protected under Articles 3(1), and 7(1) of the Charter; and Articles 14(1) and 16 of the International Covenant on Civil and Political Rights (hereinafter "the ICCPR"). The Applicant further alleges the violation of the right to property guaranteed under Article 14 of the Charter.

III. Summary of the Procedure before the Court

10. The Registry received the Application on 28 July 2017, and served it on the Respondent State on 3 November 2017.
11. The Parties filed their pleadings on the merits and reparations within the time prescribed by the Court and these were duly exchanged.
12. On 3 April 2020, the Registry requested the Applicant to submit additional evidence both on the merits and reparations within a period of ten (10) days from the date of receipt. At the expiry of the

- time allocated, the Applicant did not file any additional evidence.
13. Pleadings were closed on 21 April 2020, and the Parties were duly notified.
 14. On 5 May 2021, the Registry informed the Parties that the Court has decided to conduct a public hearing slated on 7 June 2021.
 15. On 7 June 2021, the Court held a public hearing at which both Parties were duly represented.
 16. On 8 June 2021, the Registry informed the Parties that the Court had decided to initiate an amicable settlement procedure as provided for under Rules 64(1) of its Rules. As requested, both Parties agreed to the procedure and the Applicant filed its submissions in this respect on 23 September 2021. Despite several reminders, the Respondent State did not file any submission and, on 3 February 2022, informed the Court that it no longer wishes to be part of the amicable settlement process.
 17. On 4 March 2022, the Registry informed the Parties that, taking notice of the Respondent State's withdrawal from the amicable settlement process, the Court had decided to resume the contentious proceedings and deliver its ruling in the matter.

IV. Prayers of the Parties

18. The Applicant prays the Court to make the following orders:
 - i. Declare that the Respondent State's conduct in effecting a forfeiture of the deceased's property was unlawful and contrary to international law.
 - ii. Declare that by failing to resolve the deceased's claim, the Respondent State violated the Applicant's right to equal protection before the law; the right to have the deceased's cause heard and the right to property.
 - iii. Direct that the Applicant be paid the sum of US\$ 1,104,539.87 representing the loss suffered by the deceased as a result of the forfeiture of his property.
 - iv. Direct the Respondent State to compensate the Applicant and his family for the hardship suffered as a result of the conduct of the Respondent State.
 - v. Make an order for costs.
19. The Respondent State prays the Court to:
 - i. Dismiss the Application as inadmissible.
 - ii. Order that the Applicant should bear the costs.

V. Jurisdiction

- 20.** The Court notes that Article 3 of the Protocol provides as follows:
 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
- 21.** The Court further notes that pursuant to Rule 49(1) of the Rules “[t]he Court shall ascertain its jurisdiction ... in accordance with the Charter, the Protocol and these Rules”.
- 22.** The Court observes that the Applicant avers that the Court has jurisdiction given that the Respondent State is a party to the Charter, the Protocol, and the ICCPR, and that he alleges violations of rights protected in the Charter and the ICCPR.
- 23.** The Respondent State on its part does not object to the Court having jurisdiction over the Application.
- 24.** Notwithstanding the Parties’ agreement as stated above, the Court must, pursuant to a joint reading of the above-mentioned provisions of the Protocol and its Rules, carry out a preliminary examination of its jurisdiction.
- 25.** The Court recalls that, to be considered, an application must fulfil all four aspects of its jurisdiction that is personal, material, temporal and territorial.

A. Personal jurisdiction

- 26.** The Court notes, with respect to its personal jurisdiction that, as stated in paragraph 2 of this Judgment, the Respondent State is a party to the Protocol and has deposited the Declaration provided under Article 34(6) of the Protocol. As a consequence, the Court holds that it has personal jurisdiction to examine this Application.

B. Material jurisdiction

- 27.** With regard to its material jurisdiction, the Court recalls that Article 3(1) of the Protocol confers on it the power to examine an application provided that it involves alleged violations of rights protected under the Charter or any other human rights instruments

ratified by the State concerned.²

28. The Court notes that, in the instant matter, the Applicant alleges the violation of the rights to equal protection of the law, to have one's cause heard and the right to property protected under Articles 3(1), 7(1), 13 of the Charter and 14 of the ICCPR. Noting further that the Respondent State is a party to these instruments, the Court holds that it has material jurisdiction to hear the Application.

C. Temporal jurisdiction

29. In relation to its temporal jurisdiction, the Court notes that, as both Parties concur, the act of forfeiture and confiscation of the deceased's properties occurred in January 1976. The Court recalls that, as per its case-law,³ such act was instantaneous in nature as it did not continue after the aforementioned date of 9 October 2008 on which the Respondent State deposited the Declaration recognising the jurisdiction of this Court to receive individual petitions. As a consequence, the Court finds that it does not have temporal jurisdiction over the originating act of forfeiture and confiscation of the deceased's property as it was instantaneous.
30. The Court however notes that, as earlier stated, the Applicant also alleges that the violations attributable to the Respondent State extend to the failure to return the properties and provide compensation. Noting that the latter alleged breaches occurred subsequently in time to the originating act of confiscation, the question that arises therefore is whether the claims related thereto fall within the temporal jurisdiction of this Court.
31. In this regard, the Court observes that the claims of failure to return the properties and pay compensation initially arose from investigations conducted by the National Compensation Tribunal, which after locating some of the properties and establishing that they belonged to the deceased, undertook processes for them to be handed over to him. The Tribunal addressed a notice of such intention to the authorities of the Respondent State. However, as it emerges from the file of the present Application, the Tribunal did

2 *Hamad Mohamed Lyambaka v United Republic of Tanzania*, ACtHPR, Application No 010/2016, Ruling of 25 September 2020, § 22; *Jebra Kambole v United Republic of Tanzania*, ACtHPR, Application No 018/2018, Judgment of 15 July 2020, § 21.

3 See *Akwasi Boateng and Others v Republic of Ghana*, ACtHPR, Application No 059/2016, Ruling of 27 November 2020 (jurisdiction), §§ 53-62; *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 64 and 65; *Norbert Zongo and Others v Burkina Faso* (preliminary objections) (25 June 2013) 1 AfCLR 197, §§ 71-77, 83.

not complete the process and could therefore not make an Order before it wrapped up its activities as its life span had expired.

32. This Court further observes that the same claims arose in the proceedings initiated by the deceased before the High Court of the Respondent State. The said proceedings resulted first, in a default judgment dated 21 October 2005 by which the High Court declared that the confiscation violated the deceased's right to property and ordered both the restitution of the property and compensation for the confiscation. However, in an order dated 29 January 2008, the High Court, in considering assessment of damages, dismissed the claims for restitution and compensation on the grounds that the action was time barred under the Limitation Act and the matter fell within the exclusive purview of the National Compensation Tribunal.
33. In light of the foregoing, the last procedural act within the national judicial sphere is the Order issued by the High Court, which was on 29 January 2008. This procedural act therefore occurred prior to the date of 9 October 2008 when the temporal jurisdiction of this Court took effect in respect of the Respondent State by way of the deposit of the Declaration. However, the Court notes that the claims that formed part of the proceedings before the High Court are the basis for the alleged violation of the rights to equality before the law and fair trial in the present Application. Furthermore, the claim related to the breach of the rights to restitution and compensation as examined by the National Compensation Tribunal and subsequently by the High Court was not substantively addressed and thus remains unsettled to date.
34. It follows from the above findings that the claims related to the alleged violations of the rights to equality before the law, fair trial, restitution and compensation subsisted in time after the originating act of forfeiture and confiscation of property. The said alleged violations are therefore continuing as the lasting effect of the acts of forfeiture and confiscation.⁴
35. As a consequence of the foregoing, the Court holds that it has temporal jurisdiction to hear the present Application with respect to equal protection of the law, fair trial, restitution and compensation.

4 See *Jebra Kambole v Tanzania*, §§ 23-24; *African Commission on Human and Peoples' Rights v Kenya* (merits), §§ 64 and 65; *Norbert Zongo and Others v Burkina Faso* (preliminary objections), §§ 71-77, 83. See also *Phosphates in Morocco (Italy v France)*, 1938 P.C.I.J. (ser. A/B) No 74 (June 14), p. 20.

D. Territorial jurisdiction

36. The Court holds that it has territorial jurisdiction to examine this Application given that the alleged violations occurred within the territory of the Respondent State, which is a party to the Protocol.
37. In light of the above, the Court holds that it has jurisdiction to hear the present Application.

VI. Admissibility of the Application

38. Pursuant to Article 6(2) of the Protocol, “[t]he Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.
39. In line with Rule 50(1) of the Rules, “[t]he Court shall ascertain ... the admissibility of an Application in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules.”
40. The Court notes that Rule 50(2) of the Rules, which in essence restates the provisions of Article 56 of the Charter, provides that:
Applications filed before the Court shall comply with all of the following conditions:
 - a. Indicate their authors even if the latter request anonymity,
 - b. Are compatible with the Constitutive Act of the Union and with the Charter;
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
 - d. Are not based exclusively on news disseminated through the mass media;
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that the procedure is unduly prolonged;
 - f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date the date the Commission is seized with the matter; and
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the Charter.
41. While some of the above conditions are not in contention between the Parties, the Respondent State raises two objections to the admissibility of the Application.

A. Objections to the admissibility of the Application

42. The first objection relates to exhaustion of local remedies while the second one is in respect of the submission of the Application within a reasonable time.

i. Objection based non-exhaustion of local remedies

43. The Respondent State argues that the Applicant should have filed a petition before the High Court, acting as a Constitutional Court, to hear his claim as one of breach of his constitutional right to property due to the National Compensation Tribunal's failure to conclude his case prior to winding up its operations. According to the Respondent State, the rights alleged to have been violated are guaranteed by the Constitution, and the Constitutional Court was empowered to enforce them if seized by the Applicant as it did in several instances.
44. The Respondent State further avers that the Applicant ought to have appealed the High Court's decisions before the Supreme Court of Appeal instead of prejudging the outcome of the proceedings before the latter. It is the Respondent State's submission that the Applicant failed to demonstrate that the appeal before the Supreme Court of Appeal did not offer any prospect of success.
45. The Applicant on his part argues that the deceased did not appeal to the Supreme Court of Appeal as it is manifest that such appeal would have been pointless and without any prospect of success, based on the jurisprudence of the Malawian courts.
46. The Applicant also submits that the deceased's Counsel attempted on several occasions to engage with the Ministry of Justice and Constitutional Affairs without success.

47. The issues for determination are, first, whether the Applicant ought to have filed a case with the Constitutional Court for enforcement of his constitutional rights; and, second, if the Applicant should have appealed to the Supreme Court of Appeal or if he has proved that doing so did not offer any prospect of success.
48. This Court recalls that, within the meaning of Article 56(5) of the Charter, the Applicant is compelled to exhaust remedies that are

available and effective among other factors.⁵ Particularly on the requirement of effectiveness, the Court observes that a valid remedy must be assessed by its ability to address the Applicant's claim.⁶ The Court has also held that there is no need for the Applicant to exhaust remedies that are futile.⁷

a. Whether the Applicant ought to have approached the Constitutional Court

49. The Court notes that pursuant to Section 108 of the Respondent State's Constitution, which also guarantees the right to property,⁸ the High Court, sitting as a Constitutional Court, has original jurisdiction to review any action of the Government for conformity with the Constitution. This remedy should have therefore been effective in addressing the Applicant's claim as it arose in the proceedings before the National Compensation Tribunal and the High Court.
50. The Court however observes that, as it undisputedly emerges from the records of the present case, pursuant to Section 138 of the Respondent State's Constitution, the National Compensation Tribunal is vested with exclusive original jurisdiction to examine claims of confiscation of properties that occurred under the pre-1994 dispensation. The same Constitution provides for two main exceptions to the exclusive jurisdiction of the Tribunal which are that: i) the Tribunal itself may remit cases or questions of law to ordinary courts for determination where it does not have jurisdiction or in the interest of justice; and ii) the High Court may exercise jurisdiction to hear applications for judicial review and proceedings against private persons.
51. It follows from the foregoing that the above stated constitutional provisions prescribe an ouster of jurisdiction for all other courts, without providing a caveat in respect of the competence of the Constitutional Court. Furthermore, the powers of both the latter Court and the Tribunal are delineated by the same Constitution,

5 *Reverend Christopher Mtikila v United Republic of Tanzania* (merits) (14 June 2013), 1 AfCLR 34, § 82.1; *Norbert Zongo and Others v Burkina Faso* (merits) (28 March 2014) 1 AfCLR 219, § 68.

6 *Jebra Kambole v Tanzania*, §§ 38; *APDH v Republic of Côte d'Ivoire* (merits) (18 November 2016) 1 AfCLR 668, § 94.

7 *Reverend Christopher Mtikila v United Republic of Tanzania* (merits) (14 June 2013) 1 AfCLR 34, § 82.3; *Lohe Issa Konate v Burkina Faso* (merits) (5 December 2014) 1 AfCLR 314, § 112.

8 Section 28, Constitution of Malawi.

which vests exclusive jurisdiction in the Tribunal. Finally, none of the above stated exceptions apply to the deceased's situation. As such, this Court considers that it would have been contrary to procedural effectiveness to revert to the Constitutional Court where the Tribunal had examined the deceased's claim, identified some of his properties and unsuccessfully engaged with the relevant authorities of the Respondent State for the said properties to be returned. This position is comforted by the High Court's finding that it lacked jurisdiction among others because the claim fell within the exclusive purview of the Tribunal.

52. In light of these considerations, this Court finds that the Constitutional Court did not constitute an effective remedy that the Applicant ought to have exhausted prior to filing the present Application.

b. Whether the Applicant should have appealed to the Supreme Court of Appeal

53. The Court notes that Section 104 of the Constitution of the Respondent State provides that the Supreme Court of Appeal is competent to hear appeals from the High Court and such other tribunals as an Act of Parliament may prescribe. Section 21 of the Supreme Court Act further elaborates on its competence to hear appeals from the High Court on any civil matter.
54. Having said that, this Court considers that its earlier findings with respect to the Constitutional Court apply to the Supreme Court of Appeal. This Court remains cognisant of the argument made by the Respondent State, namely during the public hearing, that the Applicant could challenge the High Court's decision on assessment of damages before the Supreme Court of Appeal. However, in instances involving claims that are same as that of the Applicant, the Supreme Court of Appeal itself had declined to exercise jurisdiction, and affirmed the exclusive competence of the National Compensation Tribunal.⁹ The Court considers this pronouncement of the highest court of the land made it superfluous for the Applicant to follow the same procedural course basically for the sake of doing so.
55. In light of the above, this Court finds that the Supreme Court of Appeal is not a remedy that the Applicant was compelled to approach before filing the present Application.

9 See e.g., *Donald Kaundama v Attorney General*, MSCA Civil Appeal No 43 of 2000, Judgment of 20 September 2002; *Attorney General v JB Stennings Msiska*, MSCA Civil Appeal No 42 of 1998, Judgment of 30 November 2000.

56. Given that none of the above considered remedies applied to the situation of the deceased, domestic remedies should be considered to have been exhausted when the High Court of the Respondent State dismissed his claim for compensation on 29 January 2008.
57. As a consequence of the foregoing, this Court dismisses the Respondent State's objection on the non-exhaustion of local remedies. The Court therefore holds that domestic remedies have been exhausted in the present Application.

ii. Objection based on the failure to file the Application within a reasonable time

58. The Respondent State avers that the Application was not filed within a reasonable time as it took the Applicant more than nine (9) years to do so, following the High Court's order of 29 January 2008. It also submits that the Applicant could not show that any of the exceptions to the rule of exhaustion of local remedies apply in his case, based on the jurisprudence of this Court and that of the African Commission on Human and Peoples' Rights. According to the Respondent State, the time spent by the Applicant to engage with the Attorney General should not be taken into account as the latter is not a judicial remedy as required under Article 56(6) of the Charter and stated in the jurisprudence of this Court.
59. The Applicant on his part alleges that the Application was filed within a reasonable time given that he attempted to engage with the Attorney General whose last communication on the matter is dated 18 October 2016. He further avers that the alleged violations are continuing.

60. The issues for determination are whether the time within which the present Application was filed is reasonable or if the Applicant advances justifiable exceptions to a timely submission of the Application.
61. The Court recalls that, pursuant to Article 56(6) of the Charter, applications will be considered if they are filed within a reasonable time after exhausting local remedies if they exist, unless it is obvious that the procedure is unduly prolonged. These remedies

should in principle be judicial and ordinary.¹⁰ Furthermore, the onus lies on the Applicant to state and prove any exceptions that are applicable to the peculiar circumstances of the case.¹¹

62. The Court also notes, as earlier established, that the Applicant exhausted local remedies when the High Court, on 29 January 2008, issued an order dismissing his application. However, the time to file the Application in this case should be computed from the date when the Respondent State filed the Declaration that is 9 October 2008. Therefore, it took eight (8) years, ten (10) months and nineteen (19) days before the present Application was filed on 28 July 2017.
63. The Court has however earlier found that the violations alleged by the Applicant are continuing in respect of the rights to equality before the law, fair trial, restitution and compensation. As a consequence, the alleged violations renew themselves day by day as long as they remain unsettled. As such, they may, at any point in time, form a cause of action before this Court thus making it irrelevant to adopt a strict application of the requirement of reasonable time within the meaning of Article 56(6) of the Charter.¹²
64. In light of the above, the Court dismisses the Respondent State's objection on the filing of the Application within a reasonable time. The Court therefore holds that the Application meets the requirement of Article 56(6) of the Charter.

B. Other conditions of admissibility

65. The Court notes that there is no contention in respect of compliance with the requirements prescribed under Article 56(1), (2), (3), (4), and (7) of the Charter. Even so, the Court must satisfy itself that these conditions have been met.

10 *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, §§ 63-65; *Wilfred Onyango Nganyi and Others v United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 507, § 95; *Mgosi Mwita Makungu v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 550, §§ 44-46; *Lucien Ikili Rashidi v United Republic of Tanzania* (28 March 2019) (merits and reparations) 3 AfCLR 13, § 44.

11 See *Godfred Anthony and Another v United Republic of Tanzania* (26 September 2019) (jurisdiction and admissibility) 3 AfCLR 470, §§ 48-49; *Hamad Mohamed Lyambaka v United Republic of Tanzania*, ACTHPR, Application No 010/2016, Ruling of 25 September 2020 (jurisdiction and admissibility), § 48.

12 *Jebra Kambole v Tanzania*, §§ 51-54.

66. From the record, the Applicant has been identified by name in compliance with Article 56(1) of the Charter.
67. The Application fulfils the requirement set out in Article 56(2) of the Charter as it does not contain any information suggesting that it is incompatible with the Charter of the OAU and the Charter.
68. The Application is not written in disparaging or insulting language and therefore meets the condition set out in Article 56(3) of the Charter.
69. Further, the Application is not based exclusively on news disseminated through mass media given that it is founded on official information and documents obtained from competent domestic institutions in fulfilment of the requirement prescribed in Article 56(4) of the Charter.
70. Finally, the Application does not deal with a case which has been settled in accordance with the principles the Charter of the United Nations or the Constitutive Act of the African Union or the Charter. This Application therefore meets the condition set out in Article 56(7) of the Charter.
71. As a consequence of the foregoing, the Court finds that all the admissibility requirements have been met and that the present Application is admissible.

VII. Merits

72. The Applicant alleges that the acts of the Respondent State amount to the violation of the rights to equal protection before the law and to have one's cause heard. The Applicant also alleges that the Respondent State violated the right to property.
73. In its written response to the Application and its submissions on reparations, the Respondent State denies any wrong doing and submits that its conduct does not violate any of the rights invoked by the Applicant.
74. While considering its competence *rationae temporis* earlier in the present Judgment, the Court held that it has jurisdiction to hear all the allegations made by the Application save for those related to the actual confiscation of the deceased's properties, which occurred in 1976, long before the Respondent State became a party to the Charter, the Protocol and made the Declaration. Given that the confiscation was based on the implementation of the Forfeiture Act, which ceased to exist after the Respondent State adopted its new Constitution in 1994, the Court will therefore not consider the alleged violation of the right to property.
75. Having said that, this Court observes that the issue central to the plea before domestic courts and which also arises before

this Court is the restitution of the deceased's properties and compensation for the loss suffered due to the confiscation. This issue is no other than that of the right to a remedy although the Applicant did not expressly state so in his allegations and prayers.

76. The Court recalls that, as is now well-established in its case-law, there is no requirement that the Application should expressly state or cite the right or provision of the instrument allegedly violated. It is sufficient that the complaint relates to rights guaranteed in the Charter or any other human rights instrument ratified by the State concerned.¹³
77. In light of the foregoing, the Court will now examine, in turn, the allegations of violation of the rights to equal protection before the law, to have one's cause heard and to a remedy.

A. Alleged violation of the right to equal protection before the law

78. The Applicant alleges that the Respondent State violated the right to equal protection before the law by not providing compensation and ousting the jurisdiction of domestic courts to entertain related claims.
79. The Respondent State refutes these allegations and contends that the alleged violation cannot be considered when local remedies were still available to the Applicant to vindicate the same right.

80. Article 3 of the Charter provides that: "1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law."
81. The Court first notes that the Applicant alleges the violation of Article 3(1) of the Charter on the ground that the Respondent State did not provide compensation and ousted the jurisdiction of ordinary courts to examine the matter. However, the Court recalls that, in line with its case-law, equal protection of the law presupposes

13 *Alex Thomas v Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 45; *Wilfred Onyango Nganyi and Others v Tanzania* (merits) (18 March 2016) 1 AfCLR 507, §§ 57, 58.

that the law protects everyone without discrimination.¹⁴ Upholding this right therefore requires that not only the law but also the authorities in charge of its implementation ensure equal protection to every citizen. Therefore, the violation alleged is rather of the right to equal protection of the law protected under Article 3(2) of the Charter.

82. In the present Application, it is not disputed that the National Compensation Tribunal examined petitions from many other citizens who were afforded remedies and their confiscated properties returned or compensation awarded to them for the loss suffered.¹⁵ As for the deceased, his claim was never finalised by the Tribunal and attempts to vindicate his rights in ordinary courts were frustrated. It is worth recalling that the failure of the Tribunal to complete the deceased's case was due to the fact that the Respondent State's parliament declined to extend the mandate of the Tribunal. Furthermore, when seized by the Applicant, the Attorney General maintained that Government would not address the matter outside the framework of the Tribunal.¹⁶
83. The deceased and, later on the Applicant, were therefore left in a legal limbo whereas other Malawians in the same situation were afforded protection before the law. In the circumstances, it cannot be said that the Respondent State upheld the right to equal protection of the law.
84. The Court therefore finds that the Respondent State has violated Article 3(2) of the Charter.

B. Alleged violation of the right to have one's cause heard

85. The Applicant alleges that the Respondent State violated the right to have one's cause heard due to the failure to enforce the National Compensation Tribunal's decision, the failure to extend the life span of the Tribunal, and ouster of ordinary court's jurisdiction to entertain related claims.
86. The Respondent State on its part avers that the deceased's filed an application before the High Court, which was dismissed for lack

14 *Action pour la Protection des Droits de l'Homme v Côte d'Ivoire* (18 November 2016) 1 AfCLR 668, 146.

15 See in general, Office of the Ombudsman, *Malawi's Unhealed Wounds: A Report on an investigation into allegations of maladministration and other irregularities by Malawi Government over the manner in which the National Compensation Tribunal was set up, operated and wound up*, October 2017.

16 See Correspondence dated 23 May 2016 addressed by the Attorney General to Counsel for the deceased.

of jurisdiction and being time barred. It is the Respondent State's contention this allegation lacks merit and should be dismissed.

87. Article 7(1) of the Charter provides that: "Every individual shall have the right to have his cause heard. ..." The Court notes that the Applicant also alleges violation of Article 14 of the ICCPR, which in the instant case is not any more detailed than Article 7(1) of the Charter in respect of the Applicant's claims. This Court will therefore examine only the alleged violation of Article 7(1) of the Charter.
88. The Applicant, under this allegation, raises three issues, namely i.) the failure to enforce the Tribunal's decision; ii.) the failure to extend the Tribunal's life span; and iii.) the ouster of domestic courts' jurisdiction.

i. On the failure to enforce the Tribunal's decision

89. The Court notes that, as part of the overall right to be heard, Article 7(1) of the Charter provides for "... a) The right to appeal to competent national organs against violating his fundamental rights ...". This right encompasses the right to have one's cause heard and to have the outcome of the said proceedings enforced.¹⁷
90. In the present Application, the Applicant alleges that the Respondent State's failure to enforce the decision of the Tribunal constitutes a violation of the right to have one's cause heard. However, as established earlier in this Judgment, while it investigated the matter, and engaged with the authorities to return those properties that had been identified to belong to the deceased, the Tribunal was unable to issue an actual Order. This Court is cognisant of evidence on file that, in its communications to the authorities of the Respondent State, the Tribunal indicated that some of the properties confiscated had been identified as those of the deceased. The Tribunal also requested the same authorities to lend their cooperation for the said properties to be returned.

17 Principle C(b)(ii), Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003).

91. Notwithstanding their factual correctness, the Court considers that these communications cannot obligate the Respondent State as would have a formal Order. As a consequence, it cannot be said that the Respondent State did not comply with an Order when the Tribunal did not actually make any.
92. The Court therefore finds that the Respondent State has not violated the right to have one's cause heard in respect of the issue being considered.

ii. On the failure to extend the Tribunal's life span

93. With specific respect to the extension of the Tribunal's life span, the Court recalls States' duty under Article 1 of the Charter to adopt measures to give effect to the rights therein. The Court considers that, as part of this obligation, the Respondent State had the discretion to extend the life span of a tribunal which it established under its own Constitution.
94. The Court notes that, in the instant matter, it appears that the Respondent State took the option of granting exclusive jurisdiction to the Tribunal and subsequently decided not to extend its life span while ousting the jurisdiction of other ordinary judicial institutions to entertain matters left unresolved by the Tribunal. By doing so, the Respondent State left potential applicants and right-holders, including the deceased, in a limbo, a legal uncertainty, which constitutes a breach of the right to have one's cause heard in respect of the issue being examined.

iii. On the ouster of domestic court's jurisdiction

95. Finally, regarding the ouster of domestic courts' jurisdiction, this Court recalls that, as per its case-law, ouster of domestic courts' jurisdiction generally leads to a breach of the right to have one's cause heard.¹⁸
96. In the instant matter, the Court notes that, as it has earlier found, neither the Supreme Court nor the Constitutional Court of the Respondent State were explicitly vested with jurisdiction to handle cases left unsettled by the Tribunal. As a matter of facts, the same Constitution, which established all three judicial bodies, expressly ousted the jurisdiction of all other courts with exceptions that are not applicable to the deceased. Such ouster of jurisdiction

18 *Jebra Kambole v Tanzania* (merits), §§ 96, 103, 104. See also, *Civil Liberties Organisation v Nigeria* (2000) AHRLR 188 (ACHPR 1995), § 14.

is affirmed by above referenced decisions of both the High Court and Supreme Court of Appeal.

97. This Court considers that, in the circumstances, the Respondent State deprived the deceased, and later on the Applicant, of an opportunity to pursue a new cause of action in ordinary courts after the Tribunal closed down without completing the matter. Similarly, the Applicant could not seek enforcement of the same finding in any other national judicial forum. It can therefore rightly be concluded that the ouster of jurisdiction of other domestic courts led to a breach of the right to have one's cause heard in respect of this issue.
98. As a consequence of the above, this Court finds that that the Respondent State violated the right to have one's cause heard protected under Article 7(1) of the Charter.

C. Alleged violation of the right to a remedy

99. The Applicant alleges that the Respondent State violated the deceased's right to have his confiscated properties returned and awarded compensation for the loss suffered.
100. The Respondent State on its part avers that domestic avenues were still available for the deceased and the Applicant to vindicate these rights but they did not make use of the same.

101. The Court notes that, while it does not expressly provide for a right to a remedy, Article 1 of the Charter prescribes that "The Member States ..., parties to the present Charter shall recognise the rights enshrined therein ... and shall undertake to adopt legislative *and other measures* to give effect to them." Besides, Article 7(1)(a) of the Charter provides that "Everyone has the right to have his cause heard. This right comprises: a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force."
102. The Court considers that the right to a remedy derives from the obligation set out in Article 1 of the Charter to establish judicial or other such mechanisms to address alleged breaches of substantive rights protected in the Charter. This right to a remedy is further reinforced by a joint reading of Articles 1 and 7(1)(a) of

the Charter. These provisions are in line with the general principle of law that a remedy must be afforded when rights are breached.

103. In the instant matter, as the verbatim record of the public hearing in this matter shows, the Respondent State does not deny that, subsequent to its 1994 constitutional dispensation, confiscation of properties effected under the Forfeiture Act was declared wrongful and the Tribunal was set up to address related breaches. It is also undisputed that, in 1976, the deceased was subjected to forfeiture under the said Act.¹⁹ In an Order dated 21 October 2005, the High Court found that “1. the confiscation of property by the Malawi Government is a violation of the Plaintiff’s right to property; 2. the Plaintiff is entitled to compensation for the confiscation; and 3. the said properties be returned to the Plaintiff”. Some of the said properties were actually returned in implementation of the afore cited Order.
104. The Court notes that tremendous efforts made by the deceased to have his properties returned and obtain compensation within the framework of the National Compensation Tribunal remained in vain. Furthermore, through its Order dated 29 January 2008 dismissing the Applicant’s assessment claim as time barred and falling exclusively within the jurisdiction of a Tribunal whose term has elapsed, the High Court confirmed that there was no glimmer of hope that the Applicant would obtain an effective remedy within the domestic sphere.
105. The Respondent State does not deny efforts vested by the deceased in seeking enforcement of his rights and numerous exchanges involving the Attorney General are sufficient evidence to that effect. Notably, as earlier established while determining the admissibility of this Application, both the High Court and Supreme Court of Appeal turned the Applicant back to the National Compensation Tribunal which they knew well was no longer in existence.
106. As such, the failure established above to return the properties of the deceased and provide compensation for the loss suffered constitutes a breach of the right to a remedy guaranteed under Article 7(1)(a) of the Charter as read jointly with Article 1 of the Charter.

19 See General Notice No 102 of 26 January 1976, Forfeiture Act (Cap. 14:06) Mbalanda Mwezimwapala Munthali Notice Ref. No DT/COM/173/97 of 7 February 2000 addressed by the Chief Legal Aid Advocate to the Attorney General; Notice Ref. No NCT/C/452 of 21 June 2003 addressed by the Administrator of the National Compensation Tribunal to the Director of Fisheries, cc District Commissioner.

VIII. Reparations

107. Article 27(1) of the Protocol provides that

If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

108. The Court recalls its earlier judgments and restates its position that:

To examine and assess applications for reparation of prejudices resulting from human rights violations, it takes into account the principle according to which the State found guilty of an internationally wrongful act is required to make full reparation for the damage caused to the victim.²⁰

109. The Court further restates that reparation "... must, as far as possible, erase all the consequences of the wrongful act and restore the state which would presumably have existed if that act had not been committed."²¹

110. The Court also recalls that measures that a State would take to remedy a violation of human rights includes, notably, restitution, compensation and rehabilitation of the victim, satisfaction and measures to ensure non-repetition of the violations taking into account the circumstances of each case.²²

111. The Court reiterates that with regard to material prejudice, the general rule is that there must be existence of a causal link between the alleged violation and the prejudice caused and the burden of proof is on the Applicant who has to provide evidence to justify his/her prayers.²³ Exceptions to this rule include moral prejudice, which need not be proven.

20 *Sadick Marwa Kisase v United Republic of Tanzania*, ACtHPR, Application No 005/2016, Judgment of 2 December 2021, § 88; *Wilfred Onyango Nganyi and 9 others v United Republic of Tanzania* (4 July 2019) (reparations) 3 AfCLR 308, § 13; *Ingabire Victoire Umuhoza v Republic of Rwanda* (reparations) (7 December 2018) 2 AfCLR 202, § 19.

21 *Mohamed Abubakari v Tanzania* (reparations), § 20; *Alex Thomas v Tanzania* (reparations), § 12; *Wilfred Onyango and Others v Tanzania* (reparations), § 16; *Ingabire Victoire Umuhoza v Rwanda* (reparations), § 20; *Lucien Ikili v Tanzania* (merits and reparations), § 118.

22 *Mohamed Abubakari v Tanzania* (reparations), § 21; *Alex Thomas v Tanzania* (reparations), § 13; *Ingabire Victoire Umuhoza v Rwanda* (reparations), § 20.

23 *Tanganyika Law Society, the Legal and Human Rights Centre v United Republic of Tanzania*, Application 009/2011, *Reverend Christopher R. Mtikila v United Republic of Tanzania*, 011/2011 (Consolidated Applications) (reparations) (13 June 2014) 1 AfCLR 72, § 40; *Lohé Issa Konaté v Burkina Faso* (reparations) (3 June 2016) 1 AfCLR 346, § 15; *Mohamed Abubakari v Tanzania* (reparations), § 22; *Alex Thomas v Tanzania* (reparations), § 14; *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo, Blaise Iboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (reparations) (5 June 2015) 1 AfCLR 258, § 24.

- 112.** In the present case, the Court has found that the Respondent State violated the rights to equal protection before the law, and to have one's cause heard as well as the right to a remedy guaranteed under Articles 3(2), 7(1) and Article 7(1)(a) as read jointly with Article 1 of the Charter respectively.

- 113.** The Applicant prays the Court to order pecuniary reparations for the loss suffered as a result of the confiscation; and compensation for the hardship suffered by the Applicant and other dependants of the deceased. In his written submissions, the Applicant provides a list of the deceased's dependants who are his nine (9) children as follows: Margaret Munthali, Samuel Munthali, Elliot Munthali, Davie Mwamvuni Munthali, Harold Mbalanda Munthali (the Applicant), Mwanjezga Munthali, Yawelera Munthali, Eniferg Munthali, and Fikani Munthali.

- 114.** The Respondent State prays the Court to dismiss the claims of the Applicant and declare that he is not entitled to any compensation. According to the Respondent State, the National Compensation Tribunal was not created with the intention to provide compensation understood as 'damages' in ordinary courts or "heal the wounds" completely but only to acknowledge the injury and make a token relief. The Respondent State does not challenge the list of dependants supplied by the Applicant.

- 115.** In light of these prayers and subsequent submissions made by both Parties during the public hearing, the Court finds it preliminary to restate some main considerations which will apply in the present determination on reparations. These considerations are drawn not only from written pleadings but also agreements reached by the Parties during the public hearing.

- 116.** Firstly, both the National Compensation Tribunal, the High Court and representatives of the Respondent State have acknowledged that confiscation done by virtue of the Forfeiture Act during the

pre-1994 constitutional dispensation was unlawful and must be remedied. It is also established that the deceased was wrongly subjected to such forfeiture, for which reparation is warranted. The list of properties involved in the present claim is that which was supplied by the Applicant as Item No 13 on file. The said list complements that featuring in the Valuation dated 17 March 1976 drawn by Licensed Valuer Howard J. Downs upon the request of the Attorney General of the Respondent State.

117. Secondly, following the implementation of the High Court Order dated 21 October 2005, the immovable properties, namely lands and houses, were returned to the deceased. During the public hearing, the Applicant reiterated that i.) the immovable properties recovered were in dilapidated conditions; and ii.) some of them were even destroyed. The Respondent State does not dispute these statements.
118. Thirdly, the movable properties can no longer be traced; the deceased lost the related documents while he was being expelled during the confiscation; the ownership titles could not be recovered from competent Government offices since the Respondent State did not at the time have any registration procedure for movable properties.
119. Finally, in respect of the assessment of quantum, the Tribunal's Rules of Procedure and determination by the Supreme Court of Appeal establish a threshold of Malawi Kwacha Ten Million (MWK 10,000,000) for compensation to be granted by the Tribunal.
120. The Court notes that the Applicant makes claims for material loss regarding the confiscated properties, and asks for moral damages for hardship suffered by dependants. The Court will examine the claims bearing in mind these factors.

A. Material loss

121. The Applicant claims that, at the time of filing the present Application, the total value of the loss was estimated at One Million One Hundred Four Thousand Five Hundred Thirty-Nine Dollars and Eighty-Seven Cent (US\$ 1 104 539.87). However, he avers that the assessment conducted by the deceased in 1995 was done in Malawian Kwacha and was of the value of Ten Million Two Hundred Eighty-Five Thousand Two Hundred Fifty-Four Malawian Kwacha and Ninety-Seven Cent (MWK 10,285,254.97).
122. The Respondent States avers that, irrespective of the amount of loss, the Tribunal had no capacity to compensate a victim with more than Ten Million Kwacha (MKW 10, 000, 000). It is the submission of the Respondent State that, even if the Tribunal

had completed its processes, the compensation would not have exceeded that amount.

123. The Court notes that, as established earlier in this Judgment, claims for reparation should cover only compensation but not restitution of the movable properties which could not be traced. The same claims will also be considered in light of loss ensuing from the deterioration of immovable properties returned in a dilapidated state.
124. The Court observes that two main issues are in dispute between the Parties as to the assessment of material loss. These are: i.) the contents and accuracy of the list adduced by the Applicant; and ii.) the monetary value of the properties involved.
125. Regarding the first issue, the Court notes that the Respondent State challenges the accuracy of the list adduced by the Applicant without however submitting its own list. The Court considers that, as the authority which enacted and enforced the Forfeiture Act, the Respondent State bore the responsibility to keep an accurate list of items that were seized in implementation of that legislation. In any event, the accuracy of the list becomes irrelevant when the Parties agree that the properties involved in the claim made under the present Application are worth no more than a total of Ten Million Kwacha (MKW 10, 000, 000) as at the time of seizure.
126. With respect to the second issue, the Court restates the Parties' agreement on the value of Ten Million Kwacha (MKW 10, 000, 000) of the properties involved. However, this value is premised on a valuation dating back at the time of seizure of the properties in 1976, or at least as at the time of valuation by the deceased which is in 1995. The question that arises at this juncture is then whether, as the Applicant prays, the amount as initially evaluated should, due to exchange and currency appreciation over time, be reevaluated up to the amount of One Million One Hundred Four Thousand Five Hundred Thirty-Nine Dollars and Eighty-Seven Cent (US\$ 1 104 539.87). The Applicant submits that the figure is arrived at by referring to the official exchange rate between the Malawi Kwacha and the United States Dollar.
127. Be that as it may be, in light of the earlier cited provisions of the Article 27(1) of the Protocol, it is only logical that limitations in terms of the type of remedy and ceiling of quantum of reparation

are applicable within the framework of the Tribunal and not to ordinary courts of the Respondent State let alone to this Court. This point is corroborated by provisions of the Tribunal's Act, and the Constitution of the Respondent State.

128. The Court is cognizant of the fact that material properties appreciate over time and so should the monetary value attached to them. This notwithstanding, none of the Parties is able to supply the Court with the most accurate such updated valuation which would have been provided by a jointly appointed valuer. Given the significant length of time that has elapsed since the events occurred, any expertise procedure would have proved time costly and delayed justice. In the Court's view, assessment which is closest to accurate would be one that is pegged on inflation.
129. In arriving at a figure that meets the need of justice, the Court cannot ignore the subjective circumstances of this Application. The deceased was a wealthy businessman involved in industrial fishing whose products he exported in Africa and overseas but died destitute. As earlier established, material damage for which reparation is sought includes not only all movable properties but also deterioration of houses that were returned. Bearing this in mind, the business for which they served had a potential of growth over time had the movable properties not been confiscated.
130. Finally, the Court notes that, based on inflation as earlier decided, the amount of Ten Million Two Hundred Eighty-Five Thousand Two Hundred Fifty-Four Malawian Kwacha and Ninety-Seven Cent (MWK 10,285,254.97) was worth Four Hundred Ninety-Three Million Six Hundred Ninety-Two Thousand One Hundred and Ninety-Two Malawian Kwacha (MKW 493,692,192) as at the time the Application was filed in 2017 (i.e. based on the rate of USD1 equals MWK725 according to which the initial amount had increased by Forty-Eight (48) times). If the assessment was to be done as at the time of reparation, which would be as at the date of the present Judgment, the initial amount stated above would be worth Six Hundred Seventy-Eight Million Eight Hundred Twenty-Six Thousand Seven Hundred Sixty-Four Malawian Kwacha (MKW 678,826,764) to date (i.e. based on the rate of USD1 equals MWK1,000.17 according to which the initial amount would increase by Sixty-Six (66) times).
131. In deciding the quantum of damages to award in the instant case, the Court takes into account all the parameters elaborated earlier, but also the general context of the establishment by the Respondent State of the National Compensation Tribunal with a view, not to necessarily address the prejudice fully, but to attempt to alleviate the suffering of the victims.

132. Against these considerations, and in the interest of justice, the Court awards the Applicant and other dependants of the deceased the amount of Two Hundred Million Malawian Kwacha (MKW200,000,000) for material prejudice on account of the movable properties and loss incurred from the deterioration of houses returned in a dilapidated state.

B. Moral prejudice

133. The Applicant prays the Court to grant moral damages to him and the eight (8) other dependants of the deceased for the hardship suffered due to the actions of the Respondent State. The Applicant does not put any figure to the prejudice.
134. The Respondent, in its written submissions, avers that the issue of reparation does not arise given that the matter should not be admitted in the first place. However, during the public hearing, the Respondent State acknowledged that the deceased was wronged as part of the unlawful actions that occurred under the pre-1994 dispensation. It also agreed that national mechanisms were established in recognition of Government's duty to grant reparation.

135. The Court recalls that, as established in its case-law, moral prejudice is presumed in cases of human rights violations, and quantum of damages in this respect is assessed based on equity, taking into account the circumstances of the case.²⁴ The Court has adopted the practice of granting a lump sum in such instances.²⁵
136. The Court notes that, as earlier established, the Respondent State violated the rights to equal protection before the law, to have one's cause heard and to a remedy.
137. The Court notes that the deceased was survived by his nine (9) children who are: Margaret Munthali, Samuel Munthali, Elliot

24 *Norbert Zongo and Others v Burkina Faso* (reparations), § 55; and *Ingabire Victoire Umuhoza v Rwanda* (reparations), § 59.

25 *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 119; *Minani Evarist v United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 402, § 18; and *Armand Guehi v Tanzania* (merits and reparations), § 177.

Munthali, Davie Mwamvani Munthali, Harold Mbalanda Munthali (the Applicant), Mwanjezga Munthali, Yawelera Munthali, Eniferg Munthali, and Fikani Munthali. It is worth recalling that the deceased was the breadwinner of his family. He was subjected to forfeiture in 1976 and died in 2010 after recovering just part of his properties only in 2008, most of them in a dilapidated state. His wife died a month earlier. As has also emerged from the public hearing, all the movable properties which mainly consist of boats and other materials supporting the deceased's business could not be recovered thus causing him and his family to face economic hardship.

138. Close relationship between the deceased and the claimants is established based on the list of dependants provided in the written submissions of the Applicant, which he reiterated during the public hearing. The Respondent State did not challenge the said list. The Applicant and other dependants of the deceased have also, upon the demise of the deceased in November 2010, inherited the properties recovered through a High Court order appointing the Applicant as the Administrator of the deceased's estate. As such prejudice has necessarily ensued from the continued failure to provide compensation since 2010, and the uncertainty as to whether they will ever recover the property or be compensated for the loss.
139. In light of these considerations, the Court considers that damages are warranted. In applying fairness, the Court grants the Applicant and other dependants of the deceased the token amount of One Million Malawi Kwacha (MKW 1, 000, 000) each as moral damages.

IX. Costs

140. Rule 32(2) of the Rules provides that, "[u]nless otherwise decided by the Court, each Party shall bear its own costs."
141. The Applicant prays the Court to make an order for costs.
142. The Respondent State on its part prays the Court to order that the Applicant should bear the costs.

143. The Court notes that, in line with its earlier judgments, reparation may include payment of legal fees and other expenses incurred in

the course of both domestic and international proceedings.²⁶ The Applicant must provide justification for the amounts claimed.²⁷

144. In this case, the Applicant does not put any figure to the costs claimed, nor does he provide justification or evidence for the same. The prayers is consequently dismissed.
145. The Court consequently rules that each party bears its own costs as there is no compelling reason for it to depart from the applicable Rules.

X. Operative part

146. For these reasons,

The Court

Unanimously,

On jurisdiction

- i. *Declares* that it has jurisdiction.

On admissibility

- ii. *Dismisses* the objections to the admissibility of the Application;
- iii. *Declares* that the Application is admissible.

On the merits

- iv. *Holds* that the Respondent State has violated the right to equal protection before the law guaranteed under Article 3(2) of the Charter;
- v. *Holds* that the Respondent State has violated the right to have one's cause heard protected under Article 7(1) of the Charter;
- vi. *Holds* that the Respondent State has violated the right to a remedy guaranteed under Article 7(1)(a) as read jointly with Article 1 of the Charter.

On reparations

- vii. *Grants* the Applicant's prayer for reparation for material loss as a result of the failure to make compensation for the loss suffered as a result of the confiscation; and *awards* the Applicant and other dependants of the deceased the sum of Two Hundred Million Malawian Kwacha (MKW 200,000,000);

26 *Norbert Zongo and Others v Burkina Faso* (reparations), §§ 79-93 and *Reverend Christopher R. Mtikila v Tanzania* (reparations), § 39; *Alex Thomas v Tanzania* (reparations), § 77; and *Mohamed Abubakari v Tanzania* (reparations), § 81.

27 *Norbert Zongo and Others v Burkina Faso* (reparations), § 81 and *Reverend Christopher R. Mtikila v Tanzania* (reparations), § 40; *Alex Thomas v Tanzania* (reparations), § 77; and *Mohamed Abubakari v Tanzania* (reparations), § 81.

- viii. *Grants* the prayer for reparation for moral prejudice suffered by the Applicant and other dependants of the deceased who are Margaret Munthali, Samuel Munthali, Elliot Munthali, Davie Mwamvuni Munthali, Harold Mbalanda Munthali (the Applicant), Mwanjezga Munthali, Yawelera Munthali, Eniferg Munthali, and Fikani Munthali for the hardship suffered due to the continued failure of the Respondent State to return the deceased's properties and compensate him for the loss suffered as a result of the confiscation; and *awards* them the amount of One Million Malawi Kwacha (MKW 1, 000, 000) each as moral damages;
- ix. *Orders* the Respondent State to pay the amounts indicated under (vii) and (viii) above free from taxes effective one year from the date of notification of this Judgment, failing which it will pay interest on arrears calculated on the basis of the applicable rate of the Reserve Bank of Malawi throughout the period of delayed payment until the amount is fully paid.

On implementation and reporting

- x. *Orders* the Respondent State to submit to this Court, within six (6) months from the date of notification of the present Judgment, a report on the measures being taken to implement the orders set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On costs

- xi. *Does not grant* the prayer on costs;
- xii. *Decides* that each party shall bear its own costs.

Nhabi v Tanzania (striking out) (2022) 6 AfCLR 355

Application 004/2018, *Ngasa Nhabi v United Republic of Tanzania*

Order, 23 June 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSOUOLA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant, a citizen of the Respondent State, was in prison awaiting execution of the death sentence for murder, when he filed this Application. He claimed that the proceedings leading to his conviction and sentence, as well as his unsuccessful appeal, were in violation of his Charter guaranteed rights. After the Court ordered provisional measures, the parties did not file the required pleadings even after reminders and extensions. Accordingly, the Court ordered the case to be struck out.

Procedure (duty of parties to be diligent, 13-14; Court's discretion, 15)

I. The Parties

1. Mr. Ngasa Nhabi (hereinafter, "the Applicant") is a Tanzanian national, who at the time of filing this Application, was incarcerated at Uyui Central Prison. He contests the procedure that led to his conviction and sentence to death for the offence of murder.
2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol, through which it accepted the jurisdiction of the Court to receive applications from individuals and NGOs (hereinafter referred to as "the Declaration"). On 21 November 2019, the Respondent State deposited, with the African Union Commission, an instrument withdrawing the said Declaration. The Court has held that this withdrawal has no bearing on pending cases and new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period of one year after its deposit.

II. Subject of the Application

A. Facts of the matter

3. At the time of filing the Application, the Applicant was incarcerated at Uyui Central Prison in Tabora, following his conviction and sentencing to death for the offence of murder contrary to section 196 of the Respondent State's Penal Code by the High Court of Tanzania at Tabora in Criminal Case No 24 of 2009.
4. The Applicant appealed against the High Court decision at the Court of Appeal of Tanzania at Tabora in Criminal Appeal No 94 of 2008. His appeal was dismissed on 24 June 2011.
5. The Applicant, dissatisfied by the decision of the Court of Appeal, on 15 August 2011, filed an Application for Review of the judgment of the Court of Appeal, through Criminal Application No 2 of 2014. This Application for review was dismissed by the Court of Appeal on 5 October 2015.

B. Alleged violations

6. The Applicant alleges that the Respondent State violated his rights under Article 3(2) of the Charter. He claims that the Court of Appeal of the Respondent State procured its judgment by error for not having adequately considered all the evidence on record.

III. Applicant's Prayers

7. The Applicant prays the Court to restore justice where it was overlooked, quash the sentence imposed upon him and order his immediate release from prison. He further prays the Court to grant any other legal remedy that may be appropriate in these circumstances.

IV. Summary of the Procedure before the Court

8. The Application was filed on 19 February 2018 and on 2 March 2018 the Applicant was requested to file copies of the record of the proceedings against him before the High Court within thirty (30) days. The Court granted him an extension of time to file the same on 18 July 2018, on 26 November 2018, on 28 January 2019 and on 28 August 2019. The Applicant has not responded to the Court's requests.

9. On 18 July 2018, the Court also requested the Applicant to file submissions on reparations within thirty (30) days and granted an extension of time to file the same on 26 November 2018, on 28 January 2019 and on 28 August 2019. The Applicant is yet to file his submissions on reparations.
10. The Application was served on the Respondent State on 23 July 2018, and it was requested to submit its Response within sixty (60) days. The Court provided the Respondent State an extension of time to file its Response to the Application on 26 November 2018, on 20 March 2019 and on 28 August 2019. The deadline for the Respondent State to submit its Response lapsed on 14 October 2019.
11. On 20 March 2019, the Court delivered an Order of Provisional Measures to stay execution of the death sentence and to report to the Court within sixty (60) days of measures taken to implement it. A copy of the Order was transmitted to both parties on 9 April 2019.

V. On the striking out of the Application

12. The Court notes Rule 65(1) of the Rules which provides that:
 1. The Court may at any stage of the proceedings decide to strike out an Application from its cause list where:
 - a. An Applicant notifies the Court of his/her intention not to proceed with the case;
 - b. An Applicant fails to pursue his case within the time limit provided by the Court;
 - c. It, for any other reason, concludes that it is no longer justified to continue with the examination of the Application.
13. The Court reiterates that parties to an application should pursue their case with diligence.¹ Where they fail or implicitly or expressly indicate their lack of interest to do so, Rule 65 of the Rules empowers the Court to remove the application from its cause list. The Court may also strike out an application if in the circumstances, it is no longer justified to continue with the determination of the matter.
14. The rationale behind Rule 65 of the Rules is to encourage parties to demonstrate some level of diligence in pursuing their case or else their application could be struck out from the Court's cause list.

¹ *Abdallah Ally Kulukuni v the United Republic of Tanzania*, ACtHPR, Application No 007/2018 Order (Strike Out) of 25 September 2020, § 18; *Magweiga Mahiri v United Republic of Tanzania*, ACtHPR, Application No 029/2017 Order (Strike Out) of 24 March 2022, § 21.

15. Subject to the circumstances of each case, the Court retains the discretion to decide on whether a particular application should be struck out or not.
16. In the instant case, the Court notes that despite the various extensions of time granted to the Applicant to file copies of the record of the proceedings against him before the High Court and to file his submissions on reparations, the Applicant has failed to do so. In this regard, the Court notes from the record that there is proof of delivery of the notices sent to both parties.
17. In view of the circumstances of this case, the Court thus finds that it is no longer justified to continue with the examination of the Application. Consequently, the Court decides to strike it out from its Cause List.
18. The Court notes that, the striking out of the Application is without prejudice to the Applicant's right to file for restoration of his Application in accordance with Rule 65(3) of the Rules.

VI. Operative part

19. For these reasons,
The Court
Unanimously,
Strikes out this Application from its Cause List.

Sangaré & Ors v Mali (judgment) (2022) 6 AfCLR 359

Application 007/2019, *Tiéboro Sangaré and 15 Others v Republic of Mali*

Judgment, 23 June 2022. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM and NTSEBEZA

Recused under Article 22: SACKO

The Applicants are citizens and police officers of the Respondent State. They brought this Application alleging that they were unfairly denied selection for admission to a police training school which impacted on their career progression when other officers in a similar situation were selected. The Applicants claimed that their non-selection and the failure of their challenge before the domestic courts amounted to a violation of their rights by the Respondent State. The Court found that the Respondent State had not violated the Applicants' rights as claimed. Accordingly, the Court dismissed the Applicants' prayers for reparations.

Admissibility (exhaustion of local remedies, 32-38)

Jurisdiction (duty to confirm all aspects of jurisdiction, 17)

Equality before the law (interconnection with equal protection, 55; onus to prove, 56; proof of unfair grounds, 62-63; implication for judicial authorities; 70-75, 77)

Access to public service (access under conditions of equality, 86-87; unreasonable restriction of, 89-93)

Education (access to higher education, 100-104)

Work (access to promotion opportunities, 108-113)

I. The Parties

1. Mr. Tiékoro Sangaré and fifteen (15) others¹ (hereinafter referred to as "the Applicants") are Malian nationals who are police officers. They allege that their applications to the National Police School were unfairly rejected by the Ministry of Internal Security and Civil Defence.
2. The Application is filed against the Republic of Mali (hereinafter "the Respondent State") which became a party to the African Charter on Human and Peoples' Rights (hereinafter "the Charter") on 21 October 1986 and to the Protocol on 20 June 2000. The

¹ Jean Marie Samake, Saniba Sanogo, Brehima Sangare, Moise Traore, Modibo Traore, Abdoulaye Natie Diarra, Mohamed Dantioko Camara, Tiokon Traore, Fily Coulibaly, Makan Traore, Boubacar Amadou Soumano, Noel Sangare, Ousmane Diarra, Moussa Sow, Aboubacar Samake.

Respondent State also deposited, on 19 February 2010, the Declaration provided for in Article 34(6) of the Protocol, by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations.

II. Subject of the Application

A. Facts of the matter

3. The Applicants aver that pursuant to Decree No 06-53/P-RM of 6 February 2006 setting out the special provisions applicable to the various bodies of the national police force (hereinafter referred to as “Decree of 6 February 2006”), the Minister of Internal Security and Civil Defence instructed the Director General of the national police force to identify officers with higher qualifications, with a view to promoting them to the corps of police inspectors and commissioners after training at the National School Police. The qualifications to be considered in this regard were: a Master’s degree, a Bachelor’s degree, a University Diploma of General Studies (UDGS) and a University Diploma of Technology (UDT).
4. They aver that following the census and verification, the Director General of Police, sent the list of police officers who had the higher qualifications to the Minister of Internal Security and Civil Defence and the Minister, enrolled the identified police officers by Ministerial orders as trainee police commissioners and trainee police inspectors.
5. The Applicants contend that they were not selected although they had the required qualifications. They aver that some of their colleagues whose applications were rejected, appealed to the Administrative Section of the Respondent State’s Supreme Court, which by various judgments,² granted the prayers of the said colleagues, based on the principles of equality of all before the law and non-discrimination, which paved the way for their administrative regularisation by the supervisory authority.
6. They aver that they filed hierarchical appeals with the Minister of Internal Security and Civil Defence to regularise their situation but did not get any replies, following which, they filed a case on 1 August 2016 before the Administrative Section of the Supreme

2 Judgment No 40 of 7 March 2013 of the Administrative Division of the Supreme Court; Judgment No 362 of 22 November 2013 of the Administrative Division of the Supreme Court; Judgment No 093 of 17 April 2014 of the Administrative Division of the Supreme Court.

Court, which dismissed their case by Judgment No 586 of 13 October 2016. They further filed a petition before the same Section of the Supreme Court, for review of its decision alleging an error on record, which was dismissed by Judgment No 498 of 30 August 2018.

7. They aver that by an unjustified reversal of case law, the Administrative Section of the Supreme Court discriminated against them and breached the principle of equality before the law.
8. The Applicants further submit that Article 125 of Law No 10-034 of 12 July 2010 on the status of police officers³ (hereinafter “Law of 12 July 2010”), which requires prior authorisation from the hierarchical superior for enrolment in higher education, is incompatible with human rights instruments ratified by the Respondent State.

B. Alleged violations

9. The Applicants allege the violation of the following:
 - i. The right to equality before the law and the right to equal protection of the law, protected by Article 3(1) and (2) of the Charter and Article 26 of the International Covenant on Civil and Political Rights (hereinafter referred to as the “ICCPR”);
 - ii. The right to equal access to the public service in their country, protected by Articles 13(2) of the Charter and 25(c) of the ICCPR;
 - iii. The right to education protected by Article 17(1) of the Charter and Article 13(1) of the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as the “ICESCR”);
 - iv. The right to be promoted to a higher category protected by Article 7(c) of the ICESCR.

III. Summary of the Procedure before the Court

10. The Application was filed on 21 February 2019 and served on the Respondent State on 27 May 2019.

3 Article 125: “To be promoted to a higher category through training, a police officer is required to have successfully completed studies at a level corresponding to the category to which he/she is being promoted. To be eligible to undertake the training referred to in the previous paragraph, the police officer must have: served at least five (5) years in his or her corps; received a favourable evaluation from the hierarchical authority, based in particular on his or her most recent performance appraisal and the speciality of the corps to which he or she is planning to be promoted; be at least five (5) years from retirement at the end of the training.

11. The Parties filed their submissions on the merits and on reparations within the prescribed time limits.
12. Pleadings were closed on 29 January 2021 and the Parties were duly notified.

IV. Prayers of the Parties

13. The Applicants pray the Court to:
 - i. Find that it has jurisdiction to hear the Application;
 - ii. Declare the Application admissible;
 - iii. Find that the Respondent State has violated the rights to equality of all before the law and equal protection of the law without discrimination (Article 3(1)(2) of the Charter and Article 26 of the ICCPR); the right to equal access to public service (Article 25(c) of the ICCPR); the right to education (Article 17(1) of the Charter and Article 13(1)(c) of the ICESCR); and the right to promotion to higher office (Article 7(c) of the ICESCR)
 - iv. To find that Article 125 of Law No 10-034 of 12 July 2010 on the status of civil servants of the National Police is incompatible with Article 17(1) of the Charter, and Articles 7(c) and 13(1)(c) of the ICESCR;
 - v. To order the State of Mali to revise the law of 12 July 2010 so as to make it consistent with the above provisions;
 - vi. Order the Respondent State to regularise and reclassify them to the category of Divisional Commissioner 1st step, the category immediately above that held by their colleagues Djinéssira Siama Ballo, Fantiémé Coulibaly, Bê Dackouo, Issa Coulibaly, Fatoma Fomba and others;
 - vii. Order the State of Mali to pay each Applicant the sum of eight million, eight hundred thousand (8,800,000) CFA francs, in respect of arrears of pay since the signing of their appointment order in July 2008 until the delivery of the Court's decision;
 - viii. Order the State of Mali to pay to each Applicant the sum of one hundred million (100 000 000) CFA francs for all causes of damage;
 - ix. Order the State of Mali to pay the costs.
14. The Respondent State prays the Court to:
 - i. Rule on the admissibility of the application;
 - ii. Dismiss the Application as ill-founded;
 - iii. Order the Applicants to pay all the costs.

V. Jurisdiction

15. The Court notes that Article 3 of the Protocol provides as follows:
 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
16. Under Rule 49(1) of the Rules,⁴ “The Court shall conduct preliminary examination of its jurisdiction [...] in accordance with the Charter, the Protocol and these Rules”.
17. Based on the above-mentioned provisions, the Court must, for every application, examine its jurisdiction and rule, where appropriate, on any objections to its jurisdiction.
18. The Court notes that no objections were raised to its material, personal, temporal and territorial jurisdiction. Nevertheless, in accordance with Article 49(1) of the Rules, it must ensure that all aspects of its jurisdiction are met.
19. The Court notes that it has material jurisdiction, because the Applicants allege the violation of Articles 3(1) and (2), 13(2) and 17(1) of the Charter, Articles 25 and 26 of the ICCPR, as well as Articles 7(2) and 13(1) of the ICESCR to which the Respondent State is a party.⁵
20. The Court further notes that it has Personal jurisdiction, because the Respondent State is a party to the Charter and the Protocol, and has deposited the Declaration that allows individuals such as the Applicants to file cases against it before the Court.
21. As regards temporal jurisdiction, the Court finds that it is established because the alleged violations occurred after the Respondent State became a party to the Charter, the Protocol and had deposited the Declaration allowing individuals to file cases before the Court.
22. The Court finds that it has territorial jurisdiction, because the facts of the case and the alleged violations occurred in the Respondent State’s territory.

4 Rule 39(1) of the Rules of Court of 2 June 2010.

5 The Respondent State became a party to the ICCPR and ICESCR on 16 July 1974.

- 23.** Accordingly, the Court finds that it has jurisdiction to consider the Application.

VI. Admissibility

- 24.** Article 6(2) of the Protocol provides that “the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.
- 25.** According to Rule 50(1) of the Rules of Court, “The Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules”.⁶
- 26.** Rule 50(2) of the Rules of Court, which restates in substance the provisions of Article 56 of the Charter, provides:
Applications filed before the Court shall comply with all of the following conditions:
- a. Indicate their authors even if the latter request anonymity
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter;
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union,
 - d. Are not based exclusively on news disseminated through the mass media,
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
 - f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date the Commission is seized with the matter, and
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the Charter.
- 27.** The Court notes that the Respondent State has not raised any objection to the admissibility of the Application. However, it is obliged to examine whether the requirements of the above-mentioned provisions have been met.
- 28.** In this respect, it notes, in accordance with Rule 50(2)(a) of the Rules, that the Applicants have clearly indicated their identity.
- 29.** The Court further notes that the claims made by the Applicants seek to protect their rights guaranteed by the Charter. Also, one of the objectives of the Constitutive Act of the African Union, as set

6 Rule 40 of the Rules of Court of 2 June 2010.

out in its article 3(h) is to promote and protect human and peoples' rights. Moreover, nothing on file indicates that the Application is incompatible with any provision of the Constitutive Act of the African Union. Consequently, the Court finds that the Application is compatible with the African Union Constitutive Act and the Charter, and considers accordingly that it meets the requirement of Rule 50(2)(b) of the Rules.

30. The Court notes that the Application does not contain any disparaging or insulting language about the Respondent State, its institutions or the African Union and it thus fulfils the requirement of Rule 50(2)(c) of the Rules.
31. The Court further finds that the Application meets the requirement of Rule 50(2)(d) of the Rules, given that it is not based exclusively on news disseminated through the mass media but rather relates to the legislative and regulatory provisions of the Respondent State.
32. The Court notes, with regard to the exhaustion of local remedies under Rule 50(2)(e), that the Application is based on allegations of human rights violations in relation to the administration's refusal to enrol the Applicants on the list of trainee police inspectors and commissioners, and on the incompatibility of Article 125 of Law No 10-034 of 12 July 2010 with Articles 25(c) and 26 of the ICCPR, Articles 13(2)(c) and 7(c) of the ICESCR.
33. As regards the administration's refusal to include the Applicants on the list of students authorised to enrol in the national police academy, the Applicants submit, without being challenged, that they exhausted the local remedies because they brought the matter before the Administrative Section of the Respondent State's Supreme Court and awaited the outcome of the said appeal before filing the instant Application.
34. Indeed, the record indicates that the Applicants filed a petition for review before the Administrative Section of the Supreme Court for the purpose of "*regularising* their administrative situations by putting them on the list of trainee commissioners to undergo police commissioners' training", alleging that they were victims of gross inequality before the law. The petition for review resulted in Judgment No 586 of 13 October 2016 by the Administrative Section of the Supreme Court dismissing their petition. Based on Article 256⁷ of Law No 2016-046 of 23 September 2016 on the organic

7 Law No 2016-046 of 23 September 2016, Article 256: "When a judgment of the Administrative Section is vitiated by a material error likely to have influenced the judgment of the case, the interested party may lodge an appeal for trainee before the Division.

law setting out the organisation, operating rules of the Supreme Court and the procedure followed before it (hereinafter referred to as the “Organic Law of 23 September 2016”), the Applicants filed a petition before the same Section for review alleging an error on record. The petition was dismissed by Judgment No 498 of 30 August 2018.

35. The Court notes, moreover, that Articles 110⁸ and 111⁹ of the Organic Law of 23 September 2016, provide that the Administrative Section of the Supreme Court is the final adjudicator and its decision is not subject to appeal. It follows that the Applicants have exhausted local remedies with regard to the claim relating to the administration’s refusal to enrol the Applicants on the list of trainee police inspectors and commissioners.
36. With regard to the incompatibility of Article 125 of the Law of 12 July 2010 with human rights instruments, the Court observes that, in accordance with Article 85 of the Organic Law setting the rules of organisation and functioning of the Constitutional Court,¹⁰ the only remedy that could be exercised is to challenge the constitutionality of the impugned law especially, its compatibility with fundamental human rights.
37. The Court notes that, pursuant to Article 45¹¹ of the said organic law, the Applicants do not have standing to file a case before the Constitutional Court challenging the constitutionality and respect of fundamental rights of organic laws, ordinary laws and international commitments. Moreover, there is no indication in the record that any other judicial remedy was available to the Applicants in the Respondent State’s legal system.

8 *Idem*, Article 110: The Administrative Section is the supreme judge of all decisions rendered by the lower administrative courts as well as of decisions rendered in last resort by administrative bodies of a judicial nature.

9 *Idem*, Article 111 “The Administrative Section has jurisdiction to hear, in the first and last instance, appeals on grounds of abuse of power directed against decrees, ministerial or inter-ministerial orders and acts of national or independent administrative authorities...”

10 Organic Law No 97-010 of 11 February 1997, Article 85 “the Constitutional Court is the judge of the constitutionality of laws and it guarantees the fundamental rights of the human person and public liberties”.

11 *Idem*, Article 45 “Organic laws adopted by the National Assembly must be transmitted to the Constitutional Court by the Prime Minister prior to promulgation. The accompanying letter shall state, where appropriate, that there is an emergency. Other categories of laws, before their promulgation, may be referred to the Constitutional Court either by the President of the Republic, or by the Prime Minister, or by the President of the National Assembly or one tenth of the Deputies, or by the President of the High Council of the Collectivities or one tenth of the National Councillors, or by the President of the Supreme Court.

38. Based on the foregoing, the Court considers that no remedy was available to the Applicants regarding the compatibility of Article 125 of the Law of 12 July 2010 with human rights instruments ratified by the Respondent State.
39. The Court therefore finds that the Applicants have exhausted local remedies so that the Application complies with Rule 50(2) (e) of the Rules.
40. With regard to the requirement under Rule 50(2)(f) of the Rules that the Application be filed within a reasonable time, the Court recalls that it has adopted a case-by-case approach to assessing what constitutes a reasonable time, taking into account the particular circumstances of each case.¹² The Court has thus held that the time taken by the applicant to attempt to exhaust a remedy before domestic courts should be taken into account in determining the reasonableness of the time.¹³
41. The Court notes in the instant case that following the Supreme Court's judgment of 13 October 2016, the Applicants filed a petition for review of the case on the account that the Supreme Court erred in its judgment which resulted in the judgment of 30 August 2018. The Court considers that it must take into account the time taken by the Applicants in the review proceedings before coming before it. Thus, between 30 August 2018, the date of the decision of the review, and 21 September 2019, when the Applicants seized this Court, twelve (12) months and twenty-one (21) days elapsed. In accordance with its jurisprudence,¹⁴ the Court considers that this period constitutes reasonable time.
42. Furthermore, with regard to the complaint concerning the incompatibility of Article 125 of the Law of 12 July 2010 with the human rights instruments invoked by the Applicants, the Court found that there was no remedy to be exhausted, so that there is no reasonable period to be taken into account.¹⁵ The Court also emphasised that the violations alleged in this connection were of

12 *Beneficiaries of the late Norbert Zongo and Others v Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 204, §121; *Alex Thomas v United Republic of Tanzania* (20 November 2015) (merits) 1 AfCLR 465, §73.

13 *Guehi v Tanzania* (7 December 2018) (merits and reparations) 2 AfCLR 477, §56; *Nguza v Tanzania* (23 March 2018) (merits) 2 AfCLR 287 §61.

14 *Boubacar Sissoko and 74 others*, ACTHPR, Application No 037/2017, judgment of 25 September 2020 (merits and reparations), §53(iv); *Lucien Ikili Rashidi v Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 13, §56;

15 *Jebra Kambole v United Republic of Tanzania*, ACTHPR, Application No 018/2018, Judgment of 15 July 2020 (merits and reparations), § 50; *Yusuph Said v United Republic of Tanzania*, ACTHPR, Application No 011/2019, Judgment of 30 September 2021 (jurisdiction and admissibility), §§ 42.

a continuing nature and therefore recurred on a daily basis given that they arise from a law passed on 12 July 2010 that is still in force. Consequently, the Applicants could have seized the Court at any time as long as measures had not been taken to remedy the said alleged violations.¹⁶

43. Finally, the Court notes that, in accordance with Rule 50(2)(g) of the Rules, the instant Application does not concern a matter already settled by the parties in accordance with either the principles of the Charter of the United Nations, the Constitutive Act of the African Union or the provisions of the Charter.
44. In view of the foregoing, the Court finds that the Application meets all the requirements of Article 56 of the Charter and Rule 50(2) of the Rules and accordingly declares it admissible.

VII. Merits

45. The Applicants allege: (A) the violation of the right to equality before the law and equal protection of the law and non-discrimination by the Supreme Court and the Ministry of Internal Security and Civil Defence, (B) the violation of the right to equal access to public service, (C) the violation of the right to education, and (D) violation of the right to be promoted to a higher category.

A. Alleged violation of the right to equality before the law and to equal protection of the law

46. The Applicants allege that the Respondent State, through the Ministry of Internal Security and Civil Defence and the Administrative Section of the Supreme Court violated their rights to equality before the law and equal protection of the law and to non-discrimination, protected by Articles 3(1) and (2) of the Charter and Article 26 of the ICCPR.
47. The Court notes that although, the Applicants allege the violation of Article 3(1) and (2) of the Charter, their alleged violations occasioned by both the Minister of Internal Security and Civil Defence and the Supreme Court, in fact only fall under the right to equality before the law, a right protected by Article 3(1) of the Charter.

16 *Idem. Jebra Kambole v United Republic of Tanzania*, §53.

B. Alleged violation by the Ministry of Internal Security and Civil Defence

48. The Applicants contend that the principle of equality was breached by the Minister of Internal Security and Civil Defence of the Respondent State, who applied the criteria for promoting police officers in a discriminatory manner, with regard to Decree No 06/053 of 6 February 2006 and Article 125 of Law No 10-034 of 12 July 2010.
49. They submit that without legal justification, the authorities enrolled to the Police Academy as trainee police commissioners Fantiémé Coulibaly, Fousseiny Siaka Berthé, Bê Dackouo, Fatoma Fomba, Djinessira Siama Ballo and Issa Coulibaly although they obtained their diplomas after the decree of 6 February 2006.
50. In response, the Respondent State emphasises that Article 47 of the Decree of 6 February 2006 provides that:
- Police inspectors and non-commissioned police officers who hold a Master's degree on the date of entry into force of this Decree are authorised to enter the National Police Academy in successive waves, according to seniority in category and in service.
51. It considers that the above-mentioned Article 47 leaves no room for ambiguity. The police inspectors and non-commissioned officers concerned are those who held the required qualifications on the date the said decree entered into force.
52. The Respondent State asserts that none of the Applicants held the required qualifications on the date of entry into force of the above-mentioned decree to be part of the contingent admitted to the training institute for the trainee commissioners and inspectors, given that all of them obtained diplomas after the said decree had been signed.

53. The Court notes that Article 3 of the Charter provides:
1. Every individual shall be equal before the law.
 2. Every individual shall be entitled to equal protection of the law.
54. Article 26 of the ICCPR states that:
- All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground

such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status

55. The Court observes that there is an interconnection between equality before the law and equal protection of the law, on the one hand, and the right to the non-discriminatory enjoyment of the rights guaranteed by the Charter, on the other, insofar as the entire legal structure of the national and international public order is based on this principle, which transcends any norm.¹⁷
56. The Court has held that “ it is incumbent on the Party purporting to have been a victim of discriminatory treatment to provide proof thereof.¹⁸ and that general statements that a right has been violated are not sufficient. More substantiation is required”.¹⁹
57. The Court notes in the instant case that the Applicants accuse the Respondent State of not having included them on the list of trainee police inspectors and commissioners whose training had been authorised under the Decree of 6 February 2006, whereas some of their colleagues who were in the same situation as them were included on the list.
58. The Court notes that Article 47 of the Decree of 6 February 2006 sets out the conditions relating to the date of graduation and length of service, in order to qualify to train as police commissioners and inspectors.²⁰
59. The Court further observes that it is clear from the documents produced by the Applicants that they all obtained their diplomas after the date of the above-mentioned decree, which they do not dispute.
60. The Court notes that, on the one hand, the Respondent State applied the criteria laid down by the decree of 6 February 2006, which was a general and impersonal instrument, taking into account the situation of the Applicants on the date of the decree. On the other hand, there is nothing on record to indicate that the said decree occasions inequality to the detriment of the Applicants and also, the latter did not prove that they were unjustifiably

17 This is shared by: African Commission on Human and Peoples' Rights, *Open Society Justice Initiative v Côte d'Ivoire*, 28 February 2015, 318/06, and the Inter-American Court of Human Rights, Legal Opinion OC-18 of 17 September 2003.

18 *Mohamed Abubakari v United Republic of Tanzania* (3 June 2016) (merits) 1 AfCLR 599 §153.

19 *Alex Thomas v United Republic of Tanzania* (20 November 2015) (merits) 1 AfCLR 465 §140.

20 Article 47 “Police inspectors and non-commissioned officers holding the master's degree on the date of entry of the present decree shall be authorised to enter the National Police Academy in successive batches according to seniority in rank and length of service in order to undergo training as police commissioners.

treated differently.

61. The Court notes, moreover, that the Applicants' allegation that Fantiémé Coulibaly, Fousseiny Siaka Berthé, Bê Dackouo, Fatoma Fomba, Djinessira Siama Ballo and Issa Coulibaly were enrolled as trainee police commissioners although they were in the same situation is not supported by any evidence.
62. The Court observes that the Applicants did not provide any evidence to show that they were not allowed to enter the National Police College to be trained as commissioners or inspectors because of their status such as race, ethnicity, colour, sex, language, religion, political or other opinion, national or social origin, property or birth.
63. Accordingly, the steps taken by the Ministry of Internal Security and Civil Defence did not violate the Applicants' rights to equality before the law and non-discrimination under Article 3(1) of the Charter [as read together with] Article 26 of the ICCPR.
64. Alleged violation by the Supreme Court
65. The Applicants allege that the Administrative Section of the Supreme Court, through its reversal of its jurisprudence, established a disproportionate and unjustified infringement of the principle of equality of all before the law.
66. They contend that the Supreme Court dismissed their appeal, while it granted their colleagues' request for enrolment to the Police Academy in a similar situation of graduation date, length of service and rank.²¹
67. The Applicants conclude that the Supreme Court's decision resulted in a breach of equality between them and their police colleagues, in violation of Article 3 of the Charter.
68. The Respondent State submits that the Supreme Court reversed its decision because it realised that it had misinterpreted the legislation governing the training of national police officers.
69. It asserts that this jurisprudential turnaround took place well before the Applicants' appeal, in particular by Judgment No 186 of 7 April 2016 in which the Supreme Court dismissed the Applicants' application for regularisation, stating for the first time that "*it is a general principle of civil service law that a civil servant cannot avail himself of a right illegally obtained by another; that he who claims to have a right is required to prove it*".
70. The Respondent State submits that the Applicants want to mislead the Court by arguing that all other civil servants benefited

21 §140.Judgment No 55 of 25 March 2010; Judgment No 362 of November 2013 Judgment No 93 of 17 April 2014.

from privileges, as if this illegality constituted a source of rights which accrued to them.

71. The Court recalls that the right to full equality before the law means that “all persons are equal before the courts and tribunals”.²² In other words, the authorities responsible for enforcing or applying the law must do so without discrimination, depending on the situation in question.
72. The Court recalls that the principle of equality before the law does not mean that judicial institutions must necessarily deal with all cases in the same way, since the treatment of each case may depend on its specific circumstances.²³
73. The Court endorses the position of the European Court of Human Rights that “an evolution of case law is not, in itself, contrary to the proper administration of justice, since to assert the opposite would be to fail to maintain a dynamic and evolutionary approach, which would risk impeding any reform or improvement”.²⁴
74. The Court considers that, in general, the term “reversal” refers to a change of opinion or behaviour. In a particular type of facts or legal relationship under litigation, it applies to any change in how a court interprets the law.
75. The Court notes in the instant case that although the Supreme Court judgments referred to by the Applicants were favourable to regularising the status of their colleagues who were, according to them, in the same situation as them, it is not in contention that the said Court, by Judgment No 186 of 7 April 2016, had already reversed its case law on the grounds that “it is a general principle of civil service law that a civil servant may not avail himself of a right unlawfully obtained by another; that the person who claims to have a right is obliged to prove it”.

22 *Kijiji Isiaga v United Republic of Tanzania* (Judgment of 21 March 2018) (merits) 2 AfCLR 218 § 85.

23 *Zongo and Others v Burkina Faso* (Judgment of 28 March 2014) (merits) 1 RJCA 219.

24 *Boubacar Sissoko and 74 others*, ACtHPR, Application No 037/2017, judgment of 25 September 2020.

76. The Supreme Court also noted in the said judgment that “these applicants obtained their diplomas after the reference date and did not provide proof that they had obtained prior authorisation from their hierarchical authority to enrol in the training, as provided for in Article 125 of Law No 034-2010 of 12 July 2010 on the status of police officers”.
77. The Court observes that the Applicants are not contesting that they obtained their diplomas after the date the decree of 6 February 2006 was signed and also that they did not obtain prior authorisation from their superiors. It is on this ground, as it did in Judgment No 186 of 7 April 2006, that the Supreme Court dismissed the Applicants’ request for regularisation after considering their submissions.
78. The Court considers that since the Supreme Court had a different interpretation of the applicable law, without any other considerations, and did explain this, it was perfectly within its powers to develop the jurisprudence. In so doing, the Court does not consider that the Applicants were treated unfairly or that they were discriminated against in the proceedings before the Supreme Court.
79. Accordingly, the Court dismisses the allegation that the Respondent State violated the right to equality before the law and non-discrimination before the Supreme Court provided for under Article 3(1) of the Charter and Article 26 of the ICCPR.

C. Alleged violation of the right to equal access to the public service

80. The Applicants allege that Article 125 of the Law of 12 July 2010 unreasonably restricts the right to equal access to the public service protected by Article 25(c) of the ICCPR.
81. The Respondent State recalls that Article 70 of its Constitution provides that: “the law shall establish the rules pertaining to civil rights and the fundamental guarantees granted to citizens for the exercise of public freedoms...; the general status of civil servants; the general status of the personnel of the armed and security forces”.
82. It further contends that the above-mentioned legal provisions come with a set of regulations that set out the modalities of implementation. The public servant, irrespective of the body he belongs to, is therefore in a legal and regulatory situation and no derogation can be granted outside the above-mentioned framework, without committing an illegality.

83. The Court recalls that Article 13(2) of the Charter provides that “[e]very citizen shall have the right of equal access to the public service in their country.
84. Article 25(c) of the ICCPR, which is more detailed, provides that “[e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions ... c) to have access, on general terms of equality, to public service in his country”.
85. The Court recalls that Article 2 of the ICCPR provides that
Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
86. Article 13(2) of the Charter will be interpreted in the light of Articles 25(c) and 2 of the ICCPR.
87. The Court notes that in order to guarantee access to public office under general conditions of equality, the criteria and procedures for appointment, promotion, suspension and dismissal must be objective and reasonable.
88. The Court is also of the view that it is particularly important to ensure that there is no discrimination against such persons in the exercise of their rights under Article 25(c) on any of the grounds referred to in Article 2.
89. The Court observes, in the instant case, that Article 125 of the Law of 12 July 2010 does not contain any ground of discrimination as provided under Article 2.
90. However, it is for the Court to assess whether the requirement to obtain authorisation from the hierarchical superior in order to access training for promotion is an unreasonable restriction within the meaning of Article 25(c) of the ICCPR.
91. The Court notes in this respect that Article 125 of the Law of 12 July 2010 provides that a police officer who has obtained the diploma attesting to new training shall join a higher category after his or her training at the Police Academy.
92. The Court observes that the “automatism” of Article 125 does not prevent the administration from ensuring that the police officer has the skills required to take up the post envisaged after the training.

93. The Court considers that, given this understandable concern for competence, which is a general requirement of public and private administrations, it is therefore reasonable for the hierarchical superior to give his or her opinion. This opinion, moreover, is not discretionary since it is based on a known objective assessment, in this case the official's report. The aforementioned staff report is forwarded by the hierarchical superior to the Minister for Security for verification of the relevant provisions.²⁵ Moreover, an officer who feels aggrieved by the report may contest it.²⁶
94. The Court thus notes that the requirement to obtain prior authorisation in order to enter the National Police College to undergo training as a trainee commissioner or trainee inspector, which allows access to a higher post, does not constitute an unreasonable restriction.
95. The Court finds that the Respondent State did not violate the Applicants' right to equal access to the public service protected by Article 13(2) of the Charter as read together with Article 25(c) of the ICCPR read together.

D. Alleged violation of the right to education

96. The Applicants argue that the right to education enshrined in Article 17(1) of the Charter and Article 13(1)(c) of the ICESCR is an unconditional right for every individual who aspires to gain knowledge, with a view to a better and brighter future.
97. They submit that Article 125 of the Act of 12 July 2010 violates the right to education because it requires prior authorisation of the hierarchical superior before starting training for promotion to a higher category in the national police force, failing which, the administration would not recognise the diploma obtained.
98. The Respondent State points out that the Law of 12 July 2010 merely lays down the rules applicable to serving police officers who wish to undertake training for the purpose of changing category.
99. It further submits that it is up to the Respondent State to define the modalities for implementing the purported training by spelling out the requirements, without this being in contradiction with

25 The Law of 12 July 2010, Article 109: "the ratings are, prior to notification to the National Police officers concerned, submitted for weighting to the Minister in charge of Security...the weighting consists of verifying compliance with the provisions of Article 108 above"

26 *Idem*, Article 34 "When a National Police officer considers that his rights have been violated, he shall have access to administrative and legal remedies".

its international commitments. Consequently, the Court should dismiss the Applicants' case.

- 100.** The Court notes that the Applicants' allegation does not fall under Article 17(1) of the Charter which provides that "[e]very individual shall have the right to education " but rather under Article 13(2) (c) of the ICESCR which provides that " Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education".
- 101.** The Court notes that access to higher education as guaranteed by Article 13(2)(c) of the ICESCR must be without discrimination and based on ability.
- 102.** The Court notes in this regard that the United Nations Educational, Scientific and Cultural Organization's Convention against Discrimination in Education²⁷ (hereinafter referred to as the "UNESCO Convention"), provides in Article 1 that:
For the purposes of this Convention, the term 'discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:
 - a. Of depriving any person or group of persons of access to education of any type or at any level;
 - b. Of limiting any person or group of persons to education of an inferior standard.
- 103.** In view of the above provisions, the Court notes that the requirement to obtain prior authorisation in order to upgrade a diploma to a higher category does not constitute a discriminatory act within the meaning of Article 1 of the UNESCO Convention insofar as it is a legal provision applicable to all police officers and there is nothing to indicate that this provision violates the right to education.
- 104.** Furthermore, with regard to the condition relating to the citizen's ability, the Court observes that with regard to access to higher

27 It was ratified by the Republic of Mali on 7 December 2007.

education, Article 125 of the Law of 12 July 2010 takes into account the officer's length of service and rating, which is perfectly compatible with the provisions of Article 13(2)(c) of the ICESCR.

- 105.** The Court finds that by virtue of Article 125 of the Law of 12 July 2010, the Respondent State has not violated the Applicants' right of access to higher education.

E. Alleged violation of the right to be upgraded to a higher category

- 106.** The Applicants assert that the right to be upgraded to a higher category is accorded to every individual without any consideration with exception to, the length of service and aptitude in accordance with Article 7(c) of the ICESCR.

- 107.** They emphasise that by making any training for reclassification subject to prior authorisation by the hierarchical authority under the terms of Article 125 of the Law of 12 July 2010, the Respondent State violated this right under Article 7(c) of the ICESCR.

- 108.** In response, the Respondent State submits that Article 125 does not contradict the provisions of the ICESCR insofar as it only aims to ensure the well-functioning and continuity of the National Police Service while guaranteeing officers the right to training and personal development without discrimination.

- 109.** The Court recalls that Article 7(c) of the ICESCR provides that:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular [...] equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence.

- 110.** The Court notes that in this context, the UN Committee on Economic, Social and Cultural Rights has stated that:

All workers have the right to equal opportunity for promotion through fair, merit-based and transparent processes that respect human rights. The applicable criteria of seniority and competence should also include an assessment of individual circumstances, as well as the

different roles and experiences of men and women, in order to ensure equal opportunities for all.²⁸

111. The Court also notes that while Article 7(c) of the ICESCR sets out in general terms the requirements of seniority and competence, it is for each State to define the modalities of application in accordance with international law.
112. The Court observes, in the instant case, with reference to Article 125²⁹ of Law No 10-034 of 12 July 2010, that the criteria for promoting the Respondent State's police officers are length of service and competence through training, without any other consideration, in accordance with Article 7 of the ICESCR.
113. It notes that the opinion of the hierarchical authority is a means by which it assesses competence and that does not have any discretionary power in the matter, insofar as it must rely on the official's staff report to verify his or her suitability for training in the speciality of the body to which he or she is considering joining.
114. The Court finds that the Respondent State did not violate the Applicants' right to be upgraded to a higher category protected by Article 7(c) of the ICESCR.

VIII. Reparations

115. The Applicants pray the Court, in accordance with Article 27(1) of the Protocol and Article 34(5) of the Rules, to order the Respondent State to promote them and reclassify them to the rank of Divisional Commissioner, and to order the Respondent State to pay each of them the sum of:
 - i. Eight Million Eight Hundred Thousand (8,800,000) CFA francs as salary arrears corresponding to the rank claimed, starting from the signing of the appointment order of 10 July 2008;
 - ii. One hundred million (100 000 000) CFA francs for harm suffered as a result of the violations of rights proven;
116. They also pray the Court to order the Respondent State to amend the Law of 12 July 2010 and bring it in compliance with the relevant provisions of the Charter and the ICESCR.

28 General Comment No 23, Committee on Economic, Social and Cultural Rights 2016, § 31.

29 *Idem*. Note 5.

- 117.** The Respondent State prays the Court to dismiss the Applicants' prayers for reparation insofar as it did not commit any violation.

- 118.** Article 27(1) of the Protocol reads as follows:

If the Court finds that there has been a violation of a human right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

- 119.** The Court notes that in the instant case no violation of the Applicants' rights has been found, consequently there are no grounds for ordering reparations.

- 120.** The Court therefore dismisses the Applicants' prayers for reparations.

IX. Costs

- 121.** The Applicants pray the Court to order that Respondent State to pay costs.

- 122.** The Respondent State prays the Court to order the Applicants to pay costs.

- 123.** According to Rule 32(2) of the Rules, "Unless otherwise decided by the Court, each party shall bear its own costs, if any".

- 124.** In the light of the above provision, the Court decides that each Party shall bear its own costs.

X. Operative part

- 125.** For these reasons,

The Court

Unanimously,

On jurisdiction

- i. *Declares* that it has jurisdiction.

On admissibility

- ii. *Declares* that the Application is admissible.

On merits

- iii. *Finds* that the Respondent State did not violate the Applicants' rights to equality before the law and non-discrimination, protected by Article 3(1) of the Charter as read together with Article 26 of the ICCPR;
- iv. *Finds* that the Respondent State did not violate the Applicants' right not to be discriminated against protected by Article 26 of the International Covenant on Economic, Social and Cultural Rights as read together with Article 2 of the Charter;
- v. *Finds* that the Respondent State did not violate the Applicants' right to equal access to the public service protected by Article 13(2) of the Charter as read together with Article 25(c) of the International Covenant on Civil and Political Rights;
- vi. *Finds* that the Respondent State did not violate the Applicants' right of access to higher education, protected by Article 13(2)(c) of the International Covenant on Economic, Social and Cultural Rights;
- vii. *Finds* that the Respondent State did not violate the Applicants' right to be upgraded to a higher category based only on length of service and competence, protected by Article 7(c) the International Covenant on Economic, Social and Cultural Rights;

On reparations

- viii. Dismisses the Applicants' prayers for reparations.

On costs

- ix. Decides that each Party should bear its own costs.

Zabron v Tanzania (order) (2022) 6 AfCLR 381

Application 051/2016, *Nzigiyimana Zabron v United Republic of Tanzania*

Order, 23 June 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSOUOLA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant, a citizen of Burundi, was in prison in the Respondent State awaiting the execution of a death sentence for murder, when he filed this Application. He alleged that the proceedings leading to his conviction and sentence as well as his unsuccessful appeal were in violation of his Charter guaranteed rights. After the Court ordered provisional measures *suo moto* against execution of the Applicant's death sentence, it provided free legal representation for the Applicant. Consequently, the Applicant applied for leave to amend his pleadings and for oral proceedings before the Court. In this ruling, the Court granted the Applicant's requests and ordered the Applicant to file amended pleadings.

Procedure (reasons for amendment of pleadings, 24, 26; request for oral hearing 30-31)

I. The Parties

1. Mr. Nzigiyimana Zabron (hereinafter, "the Applicant") is a Burundian national who, at the time of filing this Application was incarcerated at Butimba Central Prison, following his conviction and sentence to death for murder. He alleges violation of several of his rights under the Charter.
2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol, through which it accepted the jurisdiction of the Court to receive applications from individuals and NGOs (hereinafter referred to as "the Declaration"). On 21 November 2019, the Respondent State deposited, with the African Union Commission, an instrument withdrawing the said Declaration. The Court has held that this withdrawal has no bearing on pending cases and new cases filed before 22 November 2020, which is the day on which the

withdrawal took effect, being a period of one year after its deposit.

II. Subject of the Application

3. From the record before the Court, the Applicant was charged before the High Court of Tanzania at Tabora, in Criminal Session No 20 of 2008, with murder contrary to Section 196 of the Penal Code. He was convicted and sentenced to death on 25 June 2012.
4. The Applicant appealed his conviction and sentence to the Court of Appeal of Tanzania in Criminal Appeal No 182 of 2013. On 25 September 2013, the Court of Appeal dismissed the appeal in its entirety.
5. The Applicant filed the Application at this Court alleging that the proceedings in the domestic courts violated his rights as guaranteed in the Charter, namely, the right to a fair trial (Article 7), the right to dignity (Article 5), the right to life (Article 4) and the right to consular assistance (Article 36 of the Vienna Convention on Consular Assistance).

III. Summary of the Procedure before the Court

6. The Application was filed before this Court on 1 September 2016.
7. On 18 November 2016, the Court *suo motu*, issued an Order on Provisional Measures for the Respondent State to refrain from executing the death penalty against the Applicant pending the determination of the Application.
8. On 17 May 2017, the Respondent State filed its Response to the Application and on 14 July 2017 the Applicant filed the Reply to the Respondent State's Response.
9. On 16 May 2018, the Court accepted the offer from the International Human Rights Clinic of Cornell University Law School to provide the Applicant free legal representation, subject to receiving a signed Power of Attorney from the Applicant accepting the said representation.
10. On 6 August 2018, the Applicant filed his Submissions on Reparations.
11. On 14 September 2018, Cornell University provided the signed acceptance from the Applicant regarding their offer to represent him. By the same letter, Cornell University informed the Court that it has designated Advocate William Ernest Kivuyo to represent the Applicant.
12. On 24 October 2018, the Applicant sought leave to amend his pleadings. On 26 October 2018, the Registry sent to the

Respondent State the notice transmitting the Applicant's request for leave to amend his pleadings. By the same notice, the Registry requested the Respondent State to submit its Response within forty-five (45) days. This period elapsed on 17 December 2018 without a response from the Respondent State.

13. On 21 January 2019, the Respondent State filed a request for a six month extension of time to submit its Response to the Application and submissions on reparations.
14. On 19 February 2019, the Respondent State was informed that the Court had granted it an extension of three (3) months to file its Response to the Applicant's request to amend his Application and his submissions on reparations. This period elapsed with the Respondent State not having filed a Response.
15. On 18 December 2020, the Applicant, filed without leave of the Court, further amended pleadings.

IV. Prayers of the Parties

16. In the first request for amendment of pleadings, the Applicant prays the Court to grant the following orders:
 - i. That the Applicant be permitted to amend – or file a supplement to – his 2016 Application and be given 90 days to do so;
 - ii. That the Applicant be permitted to amend his 2018 Submissions on Reparations within the same period;
 - iii. That the Applicant be permitted to adduce additional evidence under Rule 50 of the Court's rules in relation (1) and (2) above;
 - iv. That drafting or issuing of the judgment in this matter be deferred until the Applicant has had the opportunity to make the contemplated further submissions; and
 - v. That the case be heard in oral proceedings, pursuant to Rules 27 and 71 of the Rules of Court
17. The Applicant did not make any prayers with regard to the second request for amendment of pleadings
18. The Respondent State did not respond to the prayers of the Applicant as set out in his first request for amendment of pleadings.

V. On the request for amendment of pleadings

19. In the request for leave to amend pleadings, the Applicant argues that this case raises complex legal issues, including the infringement of the Applicant's right to a fair trial and the legal propriety of the mandatory death penalty as a sentencing rule.
20. The Applicant further submits that, since he filed the Application without the benefit of representation by Counsel, he did not

properly address the different human rights implications of his case. This was only possible after he obtained representation by Counsel.

21. The Respondent State has not responded to the request for leave to amend pleadings.

22. The Court notes that Rule 47 of the Rules provides as follows:
 1. A party may, subject to the approval of the Court, amend its pleadings before the close of pleadings.
 2. A request for amendment of pleadings shall be made by a written notice explaining the specific part of the pleadings to be amended. The request shall also state the reasons thereof.
 3. If the request is made after the close of pleadings, the Court may grant leave on exceptional basis.
23. The Court recalls that the Applicant filed his Application, his Reply to the Respondent State's Response to the Application and submissions on Reparations without the benefit of legal Counsel. It was only thereafter, that the Applicant received legal assistance through the International Human Rights Clinic of Cornell University Law School which designated Counsel to represent him.
24. The Court notes the reasons for the request to amend pleadings, most notably that this case raises complex legal issues, including alleged violations of the Applicant's right to a fair trial and the legal propriety of the mandatory death penalty as a sentencing rule. The Court also takes note of the Applicant's submission that without the benefit of legal assistance, he had not yet had the opportunity to properly address the different human rights implications of his case.
25. The Court further notes that the specific parts of the pleadings the Applicant wishes to amend, namely: the Application, his submissions on reparations and submission of further evidence have been clearly set out. The Court observes, therefore, that there is compliance with Rule 47(2) of the Rules.
26. Having reviewed the Applicant's Request to amend his pleadings, and the reasons for the same, the Court finds that these reasons warrant it to grant the Applicant's request amend his application and submissions on reparations and to submit further evidence. The Court, therefore, deems it reasonable and in the interest of justice to allow the amendment of the pleadings.

27. The Court notes that regarding the further amended Application filed on 18 December 2020, the Applicant filed the amended pleadings prior to the Court granting him leave to do so. However, the Court, in exercise of its discretion pursuant to Rule 90 of the Rules, finds that it is in the interest of justice that these further amended pleadings be deemed to have been properly filed.

VI. On the request for oral proceedings

28. The Applicant, in his first request to amend his pleadings, also included a prayer that the matter be heard in oral proceedings. The Applicant cited, without further details, Rule 27 and 71 of the Rules of Court of 2010 to support this request.
29. The Respondent State did not make any submissions in regard to this request for oral proceedings.

30. The Court notes Rule 85 of the Rules which provides: “[O]n exceptional basis, the Court, after consideration of the written submissions, shall decide whether to hold a public hearing and fix a date for such hearing.” In addition, the Court notes the provisions of Rule 52 which states: “[S]ubject to the provisions of Rule 30(1) of these Rules, the Court may hold a hearing on its own accord or upon a request of a party.”
31. In view of the above-stated Rules, the Court finds that it is appropriate to decide on this request after the Respondent State has been served with the amended pleadings and afforded an opportunity to file its Response, thereto, if any.
32. Pursuant to Rule 52 as read together with Rule 85 of the Rules, the Court considers that the determination of whether oral proceedings can be held in a matter can only be made after considering, in their totality, written submissions from both parties. The Court therefore holds that since the Respondent State’s Response to the amended pleadings and further evidence is pending, the Applicant’s request for oral proceedings is not ripe to be considered at this juncture of the proceedings.

VII. Operative part

33. For the above reasons,

The Court

Unanimously,

- i. *Grants* the Applicant's request for leave to amend the pleadings.
- ii. *Orders* that the Applicant's amended pleadings filed on 18 December 2020 be deemed to have been duly filed and be served on the Respondent State.
- iii. *Defers* the decision on the Applicant's request to have oral proceedings to a later date.

Murimi & Ors v Tanzania (order) (2022) 6 AfCLR 387

Application 039, 040, 041/2019, *Chacha Jeremiah Murimi, Methew Jeremiah Daud and Paschal Ligoye Mashiku v United Republic of Tanzania*

Order, 28 July 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSOUOLA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicants, all citizens of the Respondent State, were in prison awaiting the execution of a death sentence for murder. They initially filed separate Applications in which they each claimed that their convictions and sentencing violated the right to a fair trial as guaranteed in the African Charter. Based on the similarity of the factual and legal bases of the claims, the Court ordered that the claims be consolidated. The Court further appointed counsel to provide free legal representation for the Applicants. Following the consolidation of the Applications and appointment of counsel to represent them, the Applicants applied for leave to amend pleadings. In this ruling, the Court granted the application and ordered the Applicants to file amended pleadings.

Procedure (conditions for amendment of pleadings, 15)

I. The Parties

1. Chacha Jeremiah Murimi, Methew Jeremiah Daud and Paschal Ligoye Mashiku (hereinafter referred to as “the Applicants”), are nationals of the United Republic of Tanzania (hereinafter referred to as “the Respondent State”) who at the time of filing the Application were incarcerated at Butimba Prison following their conviction and sentence to death for murder by the High Court of Tanzania sitting at Mwanza.
2. The Respondent State became a Party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment an African Court on Human and Peoples’ Rights on 10 February 2006. It deposited the Declaration prescribed under Article 34(6) of the Protocol on 29 March 2010. On 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration. The Court has held that this withdrawal will have no bearing on pending cases and will only take effect one year after its filing,

namely, 22 November 2020.¹

II. Subject matter of the request

3. The Applications, filed on 22 July 2019, are based on the Respondent State's alleged violations of the Applicants' right to a fair trial.
4. The Applicants have, pursuant to Rule 47 of the Rules, requested to amend the Application.

III. Summary of the Procedure before the Court

5. The Applications were filed separately by the Applicants on 22 July 2019.
6. On 26 September 2019, the Court ordered the joinder of three Applications 039/2019, 040/2019 and 041/2019 as they arise from the same legal and factual basis, the alleged violations and prayers of the Applicants are similar, and the Applicants themselves indicated that they were co-accused in national proceedings.
7. The Applications were served on the Respondent State on 21 October 2019 and it was requested to file its Response within sixty (60) days of receipt.
8. On 12 October 2021, the Applicants were granted legal aid by the Court.
9. On 24 March 2022, the Applicant filed a request to amend the Application.
10. On 29 March 2022, the Registry transmitted the Applicant's request for leave to amend pleadings to the Respondent State for observations.
11. The Respondent State has not filed any observations on the Applicant's request for leave to amend pleadings.

IV. On the request for leave to amend pleadings

12. The request for leave to amend the pleadings is on the basis that, the Applicants seek to substantiate their pleadings by amending paragraphs 1 through 4, prayers of the Applicants and submitting supplementary affidavits through counsel as they were previously unrepresented.

1 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application No 004/2015, Judgment of 26 June 2020 (merits and reparations) §§ 37-39.

13. The Respondent State did not file observations on the request.

14. The Court observes that Rule 47 of the Rules provides as follows:
1. A party may, subject to the approval of the Court, amend its pleadings before the close of pleadings.
 2. A request for amendment of pleadings shall be made by a written notice explaining the specific part of the pleadings to be amended. The request shall also state the reasons thereof.
 3. If the request is made after the close of pleadings, the Court may grant leave on exceptional basis.
15. The Court notes that the Applicant's request has been filed before the close of pleadings and it also specifies the part of the pleadings sought to be amended. Furthermore, given that the Applicants were self-represented when they filed their Applications, whereas they are now represented by advocates, the interest of justice requires that they are granted the opportunity to amend their pleadings. The Court therefore, finds that the Applicant's request complies with Rules 47(1) and 47(2) of the Rules.
16. In the circumstances, the Court grants the Applicant's request for leave to file the amended pleadings.

V. Operative part

17. For these reasons,
The Court

Unanimously,

Grants the request by the Applicants for leave to amend the Application and orders that the amended Application be filed within thirty (30) days of notification of this Order.

Noudehouenou v Benin (provisional measures) (2022) 6 AfCLR 390

Application 004/2020, *Houngue Éric Noudehouenou v Republic of Benin*
 Ruling, 15 August 2022. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

The Applicant originally brought an Application along with an initial request for provisional measures alleging that his trial and conviction by a special criminal tribunal of the Respondent State violated his human rights. In the present Application, the Applicant alleged that despite the initial order of provisional measures by the Court, he remained in hiding and had been unable to pursue treatment for his health condition or attend judicial proceedings against him as a result of subsisting arrest warrants issued against him. He, therefore, sought provisional measures in relation to his health, well-being, and the well-being of his family. The Court granted some of the measures sought and ordered the Respondent State to remove all impediments to the Applicant's access to medical care.

Jurisdiction (*prima facie*, 20-21)

Provisional measures (extreme gravity and urgency, 26-27; irreparable harm, 28; impediments to health, 39, 41; clarity of measures sought, 22; proof of urgency and extreme gravity, 47-48; previously ordered measure, 53-54, 57; implementation, 78)

I. The Parties

1. Mr. Houngue Éric Noudehouenou (hereinafter referred to as “the Applicant”) is a Benin national. He seeks provisional measures in connection with the 25 July 2019 judgment of the Court of Repression of Economic and Terrorist Offenses (hereinafter referred to as “CRIET”) which found him guilty of the offenses of abuse of office and usurpation of title.
2. The Application is filed against the Republic of Benin (hereinafter referred to as “the Respondent State”), which became a party to the African Charter on Human and Peoples’ Rights (hereinafter, referred to as “the Charter”) on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (hereinafter referred to as “the Protocol”) on 22 August 2014. On 8 February 2016, the Respondent State deposited the Declaration provided for in Article 34(6) of the said Protocol (hereinafter referred to as “the Declaration”) by virtue of which it

accepts the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 25 March 2020, the Respondent State deposited with the African Union Commission the instrument of withdrawal of the said Declaration. The Court has ruled that this withdrawal has no effect on pending cases and on new cases filed before the withdrawal came into effect, that is, on 26 March 2021.¹

II. Subject of the Application

3. On 21 January 2020, the Applicant filed an application together with an initial request for provisional measures. He alleged the violation of his rights in criminal proceedings initiated against him before the CRIET. Indeed, the CRIET delivered, on 25 July 2019, a judgment which sentenced him on the one hand, to ten (10) years' imprisonment with a warrant for his arrest, and on the other, to the payment of the sum of One billion two hundred and seventy-seven million nine hundred and ninety-Five Thousand Four Hundred and Seventy-Four (1.277,995.474) CFA francs to the National Shippers' Council of Benin (CNCB) as reparation for the damage suffered.
4. On 6 May 2020, the Court issued an order for provisional measures, suspending the said judgment.
5. In the present request for provisional measures, the Applicant avers that despite the above order, he is forced to go into hiding, which prevents him from personally appearing at judicial proceedings initiated against him and from getting proper treatment for his serious health problems that started during his detention in 2018 during which he suffered serious physical and moral abuse. He also notes that he was scheduled to undergo surgery in late October 2018, but it did not take place due to the assassination attempt against him on 31 October 2018.
6. He further states that his state of health requires extensive medical consultations and tests, hospitalization for increased surveillance and specialized medical care, which he is unable to obtain due to the impediments posed by the Respondent State, including arrest warrants, in disregard of the provisional measures ordered by this Court on 6 May 2020. Furthermore, the Applicant avers that he no longer remembers the treatment prescribed to him during his detention, insofar as his medical records and treatment

¹ *Houngue Éric Noudehouenou v Republic of Benin*, ACtHPR, Application No 004/2020, Order of 6 May 2020 (provisional measures), §§ 4-5 and corrigendum of 29 July 2020.

apparatus were confiscated by the Respondent State. He further states that the few pharmacies that were willing to provide him with medication to relieve his pain now refuse to do so.

7. The Applicant further contends that the Respondent State has confiscated his property, which has left him destitute and unable to support his family.
8. The Applicant therefore seeks provisional measures in relation to his health and well-being and that of his family, pending the decision on the merits.

III. Alleged violations

9. In the Application, the Applicant alleges a violation of:
 - i. His right to be tried by a competent court, to equality of all before the courts, to an impartial tribunal, to a reasoned decision consistent with the adversarial principle, to protection against arbitrariness and to legal certainty, all of which are protected by the purpose of the Charter and Articles 10 of the Universal Declaration of Human Rights (UDHR) and 14(1) of the International Covenant on Civil and Political Rights (ICCPR);
 - ii. His rights of defence, including equality of arms, to legal representation, to the facilities necessary for the organisation of his defence, to be notified of the indictment and the charges, to participate in his trial, to the principle of adversarial proceedings, to present evidence and make submissions, to cross examine witnesses against him, and to be present at his trial, protected by Article 14(3) of the ICCPR and article 7(1)(c) of the Charter;
 - iii. His right to appeal against judgments protected by Article 10 of the UDHR, Article 7(1)(a) of the Charter and Article 2-3 of the ICCPR;
 - iv. His right to have his conviction and sentence reviewed, protected by Article 14(5) of the ICCPR;
 - v. His right to the presumption of innocence protected by Article 7(1) of the Charter;
 - vi. His rights to gainful employment, property and an adequate standard of living, protected by Articles 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Articles 15 and 14 of the Charter and Article 23 of the UDHR;
 - vii. His rights to reputation and dignity, to be free from inhuman and degrading treatment protected by Article 7 of the ICCPR and Article 5 of the Charter and his right to freedom of movement protected by Articles 12, 14(5) and 17 of the ICCPR.

IV. Summary of the Proceedings before the Court

10. On 21 January 2020, the Applicant filed the Application together with a request for provisional measures. These were served on the Respondent State on 18 February 2020.
11. On 6 May 2020, as a provisional measure, the Court ordered the Respondent State to “stay the execution of the 25 July 2019 judgment of the Court of Repression of Economic Offences and Terrorism against the Applicant, Houngue Éric Noudehouenou, pending the final decision of this Court “. The Order was served on the Parties on the same day.
12. On 20 July and 10 August 2021, the Applicant filed two additional requests for provisional measures. On 22 November 2021, the Court ruled on the said requests by a single order, the operative part of which is as follows:
 - i. Dismisses the requests for provisional measure relating to obstacles to medical care and protection;
 - ii. Dismisses the requested provisional measures to unfreeze the Applicant’s bank account and to remove obstacles to his presence before the Cotonou Court.
 - iii. Dismisses the request to stay execution of the arrest warrant pursuant to the CRIET’s judgment of 25 July 2019;
 - iv. Dismisses the request for a public apology;
 - v. Dismisses the request regarding observance of the Applicant’s rights by the Cotonou Court;
 - vi. Orders the Respondent State to disclose to the Applicant or his Counsel the expert report referred to in the CRIET judgment of 25 July 2019;
 - vii. Orders the Respondent State to take all measures to issue a valid national identity card to the Applicant;
 - viii. Orders the Respondent State to report to the Court on the implementation of the measures ordered in (vi) and (vii) above, within fifteen (15) days of notification of this Ruling.
13. The Order was served on the Parties on 30 November 2021.
14. On 27 May 2022, the Applicant filed a request for provisional measures which was notified to the Respondent State on 20 June 2022 for its observations within fifteen (15) days of receipt.
15. On 4 July 2022, the Respondent State filed its observations on the request for provisional measures. The observations were duly notified to the Applicant.

V. *Prima facie* jurisdiction

16. The Applicant asserts, based on Article 27(2) of the Protocol and

Rule 51(1) of the Rules, that in matters of provisional measures the Court does not have to establish that it has jurisdiction on the merits of the case, but merely that it has *prima facie* jurisdiction.

17. Referring further to Article 3(1) of the Protocol, the Applicant submits that the Court has jurisdiction insofar as the Respondent State has ratified the Charter and the Protocol and has also deposited the Declaration under Article 34(6) of the Protocol. He contends that although the Respondent State withdrew the said Declaration on 25 March 2020, the Court has already held that “this withdrawal can only have effect from 26 March 2021 and has no bearing on cases brought before the Court before that date”.
18. The Applicant further alleges that the Respondent State violated his rights under human rights instruments to which it is a party. He concludes that the Court has *prima facie* jurisdiction to hear requests for provisional measures.
19. The Respondent State did not submit on this point.

20. The Court notes that the rights whose violation the Applicant alleges are protected by the Charter and the human rights instruments to which the Respondent State is a party.² The Court further notes that the Respondent State is a party to the Protocol and has deposited the Declaration under Article 34(6) of the Protocol. The Court recalls that in the Order of 6 May 2020³ rendered in the instant case, it held that the withdrawal of the Declaration by the Respondent State does not affect the Court’s personal jurisdiction in the instant case.
21. The Court states that although the request for provisional measures was filed after the withdrawal came into effect on 26 March 2021, this does not affect its personal jurisdiction in the instant case either, insofar as the said request is related to the Application filed on 21 January 2020 prior to the said withdrawal.

2 The Respondent State became a party to the ICCPR and ICESCR on 12 March 1992.

3 *Houngue Éric Noudehouenou v Republic of Benin*, ACTHPR, Application No 004/2020, Order of 6 May 2020 (provisional measures), §§ 4-5 and corrigendum of 29 July 2020.

22. Accordingly, the Court finds that it has *prima facie* jurisdiction to hear the request for provisional measures.

VI. Provisional measures requested

23. The Applicant seeks the following provisional measures:

- order the Respondent, through its competent organs, to return to him his medical file and health care materials both the part seized by the Respondent State from the *Centre National Hospitalier Universitaire* (CNHU) in the Applicant's hospital room on 31 October 2018 when the Applicant's 7 year-old child, his wife and his adoptive mother were illegally detained (first measure), as well as those held by the CNHU (second measure), so that the Applicant can produce his entire medical record before the Court, and use it for the purpose of his health care ;
- Order the Respondent to take all appropriate measures on the one hand to remove all impediments to his right to health, in particular the impediments to obtaining his medical file from the CNHU in total freedom, and all impediments to medical consultations, medical examinations to be carried out by the Applicant, hospitalization, medical follow-ups of the Applicant, and the surgery he has been awaiting since 2018;
- Order the Respondent State, through all the pharmacies on its territory, in accordance with the right to health, the right to life and human dignity, to remove all impediments so that the Applicant may be sold all the medicines and health products he needs for his good health;
- Order the Respondent State to immediately remove all impediments to the rights to health of his brother, and to those of the Applicant to take care of his brother HOUNGUE Louis Gbèmavo, to have him access to adequate health care and follow-up, at the Applicant's own expense, and to report to the Court within fifteen (15) days of notification of the Court' decision.
- Order the Respondent State to remove all impediments to his rights to work, pay and a normal family life and to the rights of his family and children and to report to the Court within fifteen days;
- Order the Respondent to produce all incriminating evidence used against him and evidence of their discussion to which the Respondent has alluded in his submissions of 30 April 2020, and in particular to make the following available to the Applicant and his counsel and to this Court:
 - The Inspectorate General of the Ministry of Transport audit report referred to in the CRIET judgment in support of the proceedings against the Applicant;
 - The CNCB audit report indicating to the Court the parts which incriminate the Applicant as well as proof of the facts and figures mentioned by the said auditors;

- Documents proving the status of “tax advisor to the CNCB assigned to the Applicant” as stated in the Respondent State’s submission;
- Documentary proofs of the 1,300,000,000-tax adjustment the existence of the Tax Consult mentioned in the CRIET judgment, the amount of 600,000,000 that the CRIET judgment affirms was paid to the Applicant’s firm, the amount of 300,000,000 paid in respect of the above tax adjustment mentioned in CRIET’s judgment of 20 March 2019;
- Documentary evidence of the Applicant’s advice to the CNCB, documentary proof of the irregularity of the payments made and documentary proof of the damage caused to the CNCB by the Applicant’s tax advice and which warranted its conviction;
- Documentary proof that he used the title of Certified Public Accountant in the contract between the CNCB and Fisc Consult Sarl;
- The minutes of the hearing proving that all of the above documents were discussed as alleged by the Respondent State;
- The full 25 July 2018 CRIET ruling; and
- Evidence that there was no impediment to the local remedies he exercised in June and July 2019;
- Order the Respondent State to indicate to the Court as well as to the Applicant and his Counsel, within fifteen days, the concrete measures taken by the Respondent State and its organs to ensure his effective protection against all acts of inhuman and degrading treatment by the Beninese police and the Respondent State’s agents during his appearance before the Court of Cotonou in August 2022 and subsequent days;
- Order the Respondent to execute the above measures within three days of notification of the Court’s order; and to report on the execution of this order to the Court within fifteen (15) days of the date of service of this order;

- 24.** The Court notes that Article 27(2) of the Protocol provides: “In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.
- 25.** It observes that it is for it to decide in each individual case whether, in light of the particular circumstances of the case, it should

exercise the jurisdiction conferred on it by the above provisions.

26. The Court recalls that urgency, which is consubstantial with extreme gravity, means that a “real and imminent risk that irreparable harm will be caused before it renders its final judgment.”⁴
27. It underlines that the risk in question must be real, which excludes the purely hypothetical risk and justifies the need to repair it immediately.⁵
28. With regard to irreparable harm, the Court considers that there must be a “reasonable probability of occurrence” having regard to the context and personal circumstances of the Applicant.⁶

A. Removal of impediments to accessing medical care, obtaining medical records and the return of medical equipment

29. The Applicant contends that by failing to enforce the Court’s order for provisional measures of 6 May 2020, the Respondent State made it impossible for him to properly access his health care in his own country, for fear of arrest or assassination. He further claims that the Respondent State is obstructing the return of his medical health care equipment and medical records held by the *Centre National Hospitalier et Universitaire* (CNHU) of Cotonou. According to the Applicant, his medical file contains all information in respect of his state of health, including its evolution and all the care prescribed.
30. In this regard, he notes that there is an urgent need for action in view of the worsening headaches, abdominal pain and pain in the lower limbs due to blood circulation problems.
31. He further avers a tumor in his abdomen, which is in an advanced stage, causes him great pain and prevents him from sitting properly, so that he must undergo surgery.
32. With regard to irreparable harm, the Applicant contends that if he is unable to acquire medication and receive adequate care as soon as possible, he will suffer irreversible deterioration of his health or even die.

4 *Ajavon Sébastien v Republic of Benin*, ACTHPR, Application No 062/2019, Provisional Measures Order of 17 April 2020, § 61.

5 *Ibid*, § 62.

6 *Ibid*, § 63.

33. The Respondent State submits that the Applicant provides no evidence that public service doctors have been instructed not to attend to him or that a system is put in place to prevent him from accessing health care, or from buying medicines in pharmacies for himself or for his family members.
34. It further submits that, in a hospital setting, documents containing the results of medical examinations are not kept in the patient's medical file, which is why the Applicant produced copies of the results of the brain scan and the proctoscopy.
35. It states that, with regard to the return of his medical apparatus, the Applicant also fails to prove his ownership of the apparatus.
36. The Respondent State concludes that the Applicant's insistence on awaiting the return of his medical records and equipment before accessing treatment means that there is no urgency or irreparable harm and therefore no need to order the measures requested.

37. The Court notes that the Applicant has produced documents issued in 2018 by doctors at the CNHU of Cotonou relating to his physical health. Regarding the brain scan report dated 27 June 2018, Doctor Lokossou Andréa and Professor Olivier Biauou concluded that the Applicant suffers from acute right maxillary sinusitis. On 30 October 2018, Professor J. L. Togbe diagnosed him with an external hemorrhoid. Finally, on 02 August 2018, Dr. Martin Sokpon, after proctoscopy, concluded that he had a stage 3 hemorrhoidal prolapsed intra-rectal Fecaloma.
38. The Court holds that although the documents submitted by the Applicant date back to 2018, all of these elements constitute conclusive evidence of his poor state of health which is likely to worsen for want of adequate medical care, thus endangering his life.
39. The Court notes moreover, that the Respondent State does not dispute the fact that the Applicant underwent medical examinations at the CNHU of Cotonou and that doctors practicing at the medical centre made diagnoses concerning him. It follows that the CNHU of Cotonou holds a medical file on the Applicant which contains all information relating his state of health. The Court considers that all this medical information in the file, as long as it concerns the patient and is part of this medical file, must be brought to his

knowledge and made available to him if he so requests.

40. With regard to the medical care equipment, the Court notes that the Applicant has not specified the nature of the equipment or details about it, let alone prove his ownership thereof.
41. The Court finds, therefore, that the Respondent State should be ordered to remove all impediments to the Applicant's access to medical care and to provide him with a copy of his medical file held by the CNHU.

B. Removal of impediments to his brother's access to medical care

42. The Applicant submits that his brother, Houngue Louis Gbémavo, who has been paralysed since 2019, was found unconscious in December 2020, which forced him to live at their sister's home in the territory of the Respondent State.
43. He further alleges that he is his brother's sole breadwinner but can no longer afford to pay for his brother's medical expenses due to the freezing of his assets by the Respondent State. He thus considers that the Respondent State is fully responsible for his brother's poor health.
44. The Applicant further asserts that his brother's health continues to deteriorate and that without adequate health care, he may die in 2023 or no later than 2024 so that there is manifest urgency and irreparable harm.
45. The Applicant therefore requests the Court to order the Respondent State to immediately remove all impediments to his brother's access to health care.
46. The Respondent State submits in response that the Applicant does not provide evidence that public or private hospitals in Benin and pharmacies have refused to provide care and sell medication prescribed for his brother, so that the request should be rejected.

47. The Court notes the Applicant's assertion that his brother currently suffers from serious health problems requiring urgent treatment. It observes that there is no link between the Application and the alleged situation of the Applicant's brother, especially as none of the violations alleged therein specifically relates to the latter.

48. Furthermore, the Applicant does not provide the Court with any evidence of his brother's poor health or of the impediments that prevent him personally from accessing health care. The Court considers that the Applicant's brother is therefore free to seek medical treatment, especially as he is in the territory of the Respondent State. The Applicant therefore has failed to provide the Court with elements that sufficiently demonstrate the urgency and irreparable harm facing his brother, as required by Article 27 of the Protocol.
49. The Court therefore considers that there are no grounds for ordering the measure sought.

C. Removal of obstacles to work, remuneration and a normal family life for the Applicant and his family

50. The Applicant states that he is no longer able to meet his family's expenses since he no longer has any professional activities or financial resources. He maintains, to this end, that all the companies in which he and his family have economic interests, including Fisc Consult, Hen & Associés, Hémos SA, Groupe Hemos-CIAT, Tax Expertise, Afrique Finances Consulting, have had their contracts arbitrarily terminated and are subject to legal proceedings. He also claims that the Respondent State has closed all his bank accounts as well as those of the said companies.
51. He avers that in these circumstances it is important that he has a job and resources in order to meet the needs of his family. He further affirms that all this is impossible for him owing to the impediments imposed by the Respondent State, namely the failure to issue him the National Identity Card and the freezing of his bank accounts by virtue of the CRIET judgment of 25 July 2019. He further expresses his fear of not being able to resume his teaching profession as he lacks freedom of movement by virtue of the conviction against him. He concludes that there is an urgent need to avoid irreparable harm, including violations of his and his family's right to a decent life and to protection.
52. The Respondent State counters that the situation complained of by the Applicant is of his own making as it is the consequence of his escape from hospital.

53. The Court notes that on 22 November 2021, in the present case, it ordered the Respondent State, as provisional measure, “Orders the Respondent State to take all measures to issue a valid national identity card to the Applicant”.
54. The Court therefore considers that there are no grounds for ordering the same measure again.
55. With regard to the bank accounts, the Court observes that the Applicant does not provide evidence of the freezing of his bank account in execution of the 25 July 2019 CRIET judgment.
56. Finally, as regards the resumption of teaching, the Court notes that it has issued on 6 May 2020 in this Application No 004/2020 an order staying the execution of the 25 July 2019 judgment of the CRIET.
57. The Court therefore considers that since the stay of execution ordered by the Order of 6 May 2020 remains in effect and the Respondent State is under an obligation to implement it, there is no need to reorder the same measure.
58. Accordingly, the Court dismisses the measures sought.

D. Submission of evidence

59. The Applicant contends that in the present case on the merits, the Respondent State filed its Reply brief dated 30 April 2020 in which it referred to certain documents that served as the basis for his conviction by the CRIET, including the Inspectorate General of the Ministry of Transport audit report, the report of the auditor of the CNCB, proof of his status as tax advisor to the CNCB, tax reassessment and payments made to Cabinet Fiscal Consul, as well as the minutes of investigation.
60. He contends that the Respondent State did not notify to him of any of these information of the judicial file, or any evidence that was relied upon at all stages of the proceedings before the domestic courts, let alone before this Court. He submits that this failure to notify him violated his rights and that the Court cannot render its decision without examining the contents of the judicial file at the domestic level.
61. He submits that it is therefore necessary for the Court to order the Respondent State to produce evidence in support of its allegations in order to prevent the Respondent State from using non-existent facts to obtain convictions before the courts and to win its case before this Court.

- 62. The Applicant states that there is an urgency to this requested measure insofar as the Court may rule at any time and that there is irreparable harm as the Application may be dismissed on the merits.
- 63. The Respondent State argues that the Applicant has no one to blame but himself, since he chose to deprive himself of the right to defend himself before the courts of his country by escaping from the hospital, which escape is the cause of the situation he complains about.

- 64. The Court notes that the Applicant requests that the Respondent State provide him with the audit report of the General Inspectorate of the Ministry of Transport, evidence of his status as tax advisor to the CNCB, the tax adjustment, the payments made to Cabinet Fiscal Consul, and the minutes of the investigation.
- 65. The Court observes that in cases pending before the Court, documents are not notified directly between the parties but by the Registry in accordance with its rules. It is therefore for the Registry to send a notice to the Respondent State requesting it to produce the documents to be notified to the applicant by the same means.
- 66. Accordingly, the Court dismisses the requested measure.

E. Protection against inhuman and degrading treatment during his hearing before the Cotonou court

- 67. The Applicant states that in the case against Elbaz David, despite the regular presence of his counsel before the Cotonou Court, the judge adjourned the case severally by requiring his physical presence at the hearing and that the said judge could use his absence as a pretext to wrongfully strike out the case.
- 68. He alleges that if he goes to the said court, there is no assurance that he will be effectively protected and therefore fears that he will be abused or worse.
- 69. The Applicant further submits that the intention of the Cotonou Court and the Respondent State is to violate his fundamental rights under Articles 2(3) and 14(1) of the ICCPR and Articles 7 and 14 of the Charter.

70. He argues that there is an urgent need for the Court to order the requested measure since the hearing starts in August and there is a risk that he will suffer irreparable harm through inhuman and degrading treatment when he appears before the Cotonou court.
71. The Respondent State replies that it is committed to human rights, including the African Charter on Human and Peoples' Rights. It further states that, in accordance with its Code of Civil Procedure, it ensures that the parties to a hearing are treated with dignity during proceedings.
72. Finally, the Respondent State notes that the Applicant has not provided any evidence in support of his allegations.

73. The Court notes that the provisional measure requested is predicated on a possible violation by the Cotonou Tribunal of rights protected by the Charter and the ICCPR.
74. The Court observes that the Applicant has not provided evidence of the violation of his rights by the Tribunal.
75. Accordingly, the Court dismisses the provisional measure requested.

F. On the implementation of the Order and the implementation report

76. The Applicant submits that all the measures sought relate to his fundamental rights, including the rights to health and life. Therefore, he submits that it is very urgent that this order be executed within a short period of time.
77. The Respondent State did not submit on this request.

78. The Court observes that the measures ordered in this Order meet the requirements of Article 27(2) of the Protocol and must therefore be implemented as a matter of urgency. Accordingly, the Respondent State should report in a timely manner on the

implementation of this Order.

79. Accordingly, the Court orders the Respondent State to report back within fifteen (15) days from the date of service of the Order.
80. For the avoidance of doubt, the Court makes it clear that this Order is provisional in nature and in no way prejudices any decisions it may take regarding its jurisdiction, admissibility and the merits of the Application.

VII. Operative part

81. For these reasons,

The Court

Unanimously,

- i. *Orders* the Respondent State to take all measures to remove all impediments to the Applicant's access to medical care and to provide him with a copy of his medical file held by the Centre National Hospitalier Universitaire de Cotonou;
- ii. *Orders* the Respondent State to report to the Court on the implementation of the measures ordered in (vi) above, within fifteen (15) days of the service of this Order.
- iii. *Dismisses* the others measures requested.

Baguian v Burkina Faso (ruling) (2022) 6 AfCLR 405

Application 014/2019, *Gérémy Baguian v Burkina Faso*

Ruling, 22 September 2022. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

The Applicant is a citizen of the Respondent State who had been tried, convicted, and sentenced to life imprisonment for murder. In this Application, he alleged that his human rights were violated in the proceedings leading to his conviction and sentencing before the domestic courts. In a default ruling, following the Respondent State's failure to file the relevant pleadings, the Court held that the Applicant had not exhausted the available local remedies. The Court thus declared the Application inadmissible.

Procedure (conditions for default ruling, 14-17)

Admissibility (exhaustion of local remedies, 28-34)

I. The Parties

1. Mr. Gérémy Baguian (hereinafter, "the Applicant") is a national of Burkina Faso. He was sentenced to life imprisonment for murder. He alleges a violation of his rights to a fair trial during proceedings before the domestic courts.
2. The Application is filed against Burkina Faso (hereinafter, "the Respondent State") which became a Party to the African Charter on Human and Peoples' Rights (hereinafter, "the Charter") on 21 October 1986 and to the Protocol to the Charter on the Establishment of an African Court on Human and Peoples' Rights (hereinafter, "the Protocol") on 25 January 2004. On 28 July 1998, the Respondent State deposited the Declaration provided for in Article 34(6) of the Protocol (hereinafter, "the Declaration"), by which it accepted the jurisdiction of the Court to receive applications from individuals and non-governmental organisations.

II. Subject of the Application

A. Facts of the matter

3. It emerges from the Application that on 31 July 2006, the judicial

authorities of the Respondent State issued an arrest warrant for the Applicant in connection with investigations into the murder of Mr. Nikiema Michel. The Applicant has since been incarcerated in prison in Ouagadougou.

4. On 17 January 2012, by Judgment No 62 of the Criminal Chamber of the Ouagadougou Appeal Court, the Applicant was sentenced in default, to life imprisonment for murder. According to Counsel for the Applicant, while the latter was in detention at the Ouagadougou prison, he was not conveyed from his cell to take part in the hearing at which he was convicted.
5. On 4 May 2018, he filed a cassation appeal. To date, the said appeal is pending before the Cassation Court.

B. Alleged violations

6. The Applicant alleges:
 - i. A violation of the right to a fair trial;
 - ii. A violation of the right to an effective remedy guaranteed by Article 8 of the Universal Declaration of Human Rights (UDHR);
 - iii. A violation of the right of access to the judge and to justice protected by Article 10 of the UDHR and Article 7 of the Charter;
 - iv. A violation of the duty to state the grounds of a judgment in criminal proceedings;
 - v. A violation of the right to protection of the dignity of a person imprisoned as provided for in Article 10(1) of the International Covenant on Civil and Political Rights (ICCPR);
 - vi. A violation of the right to equality of arms;
 - vii. A violation of the adversarial principle; and
 - viii. A violation of the principle of proportionality of punishment.

III. Summary of the Procedure before the Court

7. The Application was received at the Registry on 28 May 2019.
8. The Application was served on the Respondent State, which did not file its submissions and did not request for additional time to file its Response.
9. On 30 June 2022, the Registry informed the Parties that the Court would render judgment in default if the Respondent State did not file a response within forty-five (45) days. At the expiration of the said period, the Respondent State had still not filed the required submissions.

10. Pleadings were closed on 16 August 2022 and the Parties were duly notified.

IV. Prayers of the Parties

11. The Applicant prays the Court to order the following measures:
 - i. Order the President of the Republic to grant him a presidential pardon;
 - ii. Order the due and proper commutation of the life sentence to a shorter term of imprisonment;
 - iii. Order parole;
 - iv. Order an out-of-court settlement;
 - v. Order financial compensation for the damage suffered as a result of the unfair court decisions against him.
12. As noted earlier, the Respondent State did not respond to the Application.

V. On the default of the Respondent State

13. Rule 63(1) of the Rules provides:

Whenever a party does not appear before the Court or fails to defend its case within the period prescribed by the Court, the Court may, on the Application of the other party, or on its own motion, enter judgment in default after it has satisfied itself that the defaulting party has been duly served with the Application and all other documents pertinent to the proceedings.
14. The Court notes that Rule 63(1) sets out three requirements for a judgment in default, namely, (i) notification to the defaulting party; (ii) the default of one of the Parties; and (iii) Application by the other Party or the Court acting on its own motion.
15. With regard to the first requirement, that is, notification to the defaulting party, the Court notes that the Application together with relevant all documents were served on the Respondent State as stated earlier under the section on the procedure before the Court. The Court thus finds that the Respondent State was duly notified of the Application and the relevant documents.
16. As regards the second requirement, namely, default by one of the Parties, the Court notes that despite being served with the Application, being provided time to file its Response and further being notified that the Court would render a judgment in default pursuant to Rule 63 of the Rules, the Respondent State failed to file a Response. Therefore, the Respondent State has failed to defend its case within the prescribed time.

17. Finally, with respect to the third requirement relating to the request by the other party or to its inherent power, the Court notes that in the instant case, the Applicant did not request for a default decision. Accordingly, and by virtue of its inherent power, the Court decides, in the interest of the proper administration of justice to issue a decision in default.¹
18. The requirements of Rule 63(1) of the Rules having been met, the Court enters this judgment in default.

VI. Jurisdiction

19. The Court notes that Article 3 of the Protocol provides:
 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
20. Under Rule 49(1) of the Rules of Court, “[T]he Court shall conduct preliminary examination of its jurisdiction [...] in accordance with the Charter, the Protocol and these Rules “.
21. Based on the above-mentioned provisions, the Court must, in each application, make a preliminary examination of its jurisdiction and rule on objections thereto, if any. In the instant case, the Court must satisfy itself that it has jurisdiction to entertain the Application.
22. Having found that its jurisdiction is not in contention, the Court finds that it has:
 - i. Material jurisdiction insofar as the Applicant alleges violation of rights guaranteed by the Charter, the ICCPR² and the UDHR, instruments to which the Respondent State is party.
 - ii. Personal jurisdiction insofar as the Respondent State is a party to the Charter, the Protocol and has deposited the Declaration which allows individuals and non-governmental organisations to bring cases directly before the Court.

1 *Robert Richard v United Republic of Tanzania*, ACTHPR, Application No 035/2016, Judgment of 2 December 2021 (merits and reparations) §§ 17-18; *Fidele Mulindahabi v Republic of Rwanda*, ACTHPR, Application No 010/2017, Ruling of 26 June 2020 (jurisdiction and admissibility) § 30.

2 The Republic of Mali ratified the two United Nations International Covenants of 1966 (International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights) on 16 July 1974.

- iii. Temporal jurisdiction insofar as the alleged violations were committed, in relation to the Respondent State, after the entry into force of the instruments in question.
 - iv. Territorial jurisdiction, insofar as the alleged violations were perpetrated in the territory of the Respondent State.
- 23.** In view of the foregoing, the Court finds that it has jurisdiction to consider the Application.

VII. Admissibility

- 24.** Article 6(2) of the Protocol provides that “[t]he Court shall decide on the admissibility of applications taking into account the provisions of Article 56 of the Charter”.
- 25.** Pursuant to Rule 50(1) of the Rules, “[t]he Court shall proceed to an examination of the admissibility of the Application in accordance with the Charter, the Protocol and these Rules”.
- 26.** Rule 50(2) of the Rules of Procedure, which in substance restates Article 56 of the Charter, provides:
- Applications filed before the Court shall comply with all of the following conditions:
- a. Indicate their authors even if the latter request anonymity;
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter;
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
 - d. Are not based exclusively on news disseminated through the mass media;
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 - f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter; and
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of African Union or the provisions of the Charter.
- 27.** The Court notes that it must, in accordance with the provisions of Rule 50(1) of its Rules, the Court must proceed to examine the admissibility conditions provided for in Rule 50(2) of the Rules of Court to ensure that they are met.
- 28.** The Court observes that, as the records show, the appeal lodged on 4 May 2018 before the Respondent State’s Cassation Court was still pending at the date of the filing of the present Application

on 28 May 2019. It is therefore appropriate for the Court to rule, as a preliminary matter, on the question whether the requirement to exhaust local remedies under Article 56(5) of the Charter has been met.

29. The Court recalls that, in accordance with Article 56(5) of the Charter, applications must be filed after exhaustion of local remedies, if any, unless it is clear that the procedure in respect of such remedies is being unduly prolonged.³
30. It emerges from these provisions that the Applicant is not only required to initiate local remedies, but also to await their outcome unless it can be shown that the related proceedings are unduly prolonged.⁴
31. The Court notes that in the instant case, the Applicant filed the Application on 29 May 2019, while the Court of Cassation, seized on 4 May 2018, had not yet ruled on his appeal. The Court notes that it is not the Applicant's case, nor is it the Court's position, that the said procedure was unduly prolonged. In any event, the Court observes that between the referral of the case to the Cassation Court and the filing of the present Application, a period of eleven (11) months and twenty-five (25) days elapsed. The Court considers that in view of the circumstances of the case, it cannot be considered that the cassation remedy was unduly prolonged within the meaning of Article 56(5) of the Charter.
32. From the foregoing, it follows that the present Application is premature, as it was not filed after exhaustion of local remedies as required by Article 56(5) of the Charter as reflected in Rule 50(2)(e) of the Rules.
33. The Court, therefore, finds that local remedies were not exhausted in the instant case.
34. Having concluded that the Application does not meet the requirement of Rule 50(2)(e) of the Rules, the Court does not have to rule on the admissibility conditions under Article 56(1), (2), (4), (6), and (7) of the Charter as restated in Rule 50(2)(a)(b) (d)(f) and (g) of the Rules, insofar as the admissibility conditions are cumulative. Therefore, if one condition is not met, the entire Application is inadmissible.

3 *Lohé Issa Konaté v Republic of Faso* (merits) (5 December 2014) 1 RJCA 314, § 77; see also *Godfred Anthony and Ifunda Kisite v United Republic of Tanzania* (Jurisdiction and Admissibility) (26 September 2019) 3 RJCA 470, § 12.

4 *Komi Koutché v Republic of Benin*, ACtHPR, Application No 020/2019, Judgment of 25 June 2021 (jurisdiction and admissibility), § 61; *Sébastien Marie Aikoué Ajavon v Republic of Benin*, ACtHPR, Application No 027/2020, Judgment of 2 December 2021 (jurisdiction and admissibility), § 74.

- 35.** In view of the foregoing, the Court declares the Application inadmissible and dismisses it.

VIII. Costs

- 36.** None of the Parties made any submission on costs.

- 37.** Rule 32(2) of the Rules provides that “[u]nless otherwise decided by the Court, each party shall bear its own costs, if any “.

- 38.** In view of the circumstances of the case, the Court decides that each Party shall bear its own costs.

IX. Operative part

- 39.** For these reasons,

The Court

Unanimously,

On jurisdiction

- i. Declares* that it has jurisdiction.

On admissibility

- ii. Declares* the Application inadmissible for non-exhaustion of local remedies.

On costs

- iii. Orders* that each Party shall bear its own costs.

Belgheith v Tunisia (judgment) (2022) 6 AfCLR 412

Application 017/2021, *Ibrahim Ben Mohamed Ben Ibrahim Belgheith v Republic of Tunisia*

Judgment, 22 September 2022. Done in Arabic, English and French, the Arabic text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: BEN ACHOUR

The Applicant is a citizen of the Respondent State. He brought this Application alleging that the Respondent State violated his human rights by abrogating aspects of its Constitution and the promulgation of certain presidential decrees. Along with the main Application, the Applicant submitted a request for provisional measures. The Court held that the Respondent State had violated the rights claimed by the Applicant and ordered the State to repeal the decrees in question and take measures to operationalise an independent Constitutional Court. The Court further held that the request for provisional measures had become moot in the face of the present judgment.

Jurisdiction (material jurisdiction, 28-33, 43-47)

International law (principle of state sovereignty, 43-46)

Admissibility (exhaustion of local remedies, 70-80; filing within a reasonable time, 86-87)

Fair trial (right to be heard, 96-102)

Political participation (reopening of pleadings, 110-112, 116-120)

African Charter (obligations of state parties, 125-127)

Reparations (basis of, 133; scope of, 134; measures of, 135; Guarantees of non-repetition, 139)

Provisional measures (mootness of request 140-142)

I. The Parties

1. Mr Ibrahim Ben Mohamed Ben Ibrahim Belgheith, is a national of Tunisia and a lawyer (hereinafter “the Applicant”). He alleges a violation of his rights in Articles 1, 7, 13(1), 20(1) of the Charter and other human rights instruments as a result of the promulgation of several presidential decrees in 2021.
2. The Application is filed against the Republic of Tunisia (hereinafter “the Respondent State”), which became a party to the African Charter on Human and Peoples’ Rights (hereinafter “the Charter”) on 21 October 1986 and to the Protocol on 5 October 2007, The Respondent State also deposited with the Chairperson of

the African Union Commission on 2 June 2017, the Declaration provided for in Article 34(6) of the Protocol by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations.

II. Subject of the Application

A. Facts of the matter

3. The Applicant alleges in his Application that the President of the Respondent State, abrogated the Constitution, halted the democratic process and arrogated to himself more powers by promulgating the following presidential decrees:
 - No 69 of 26 July 2021, pertaining to the termination of the duties of the Head and members of Government,
 - No 80 of 29 July 2021, pertaining to the suspension of the powers of Parliament, lifting the immunity of its members for one month, starting 25 July 2021 subject to extension, by a presidential decree as per the provision of Article 80 of the Constitution.
 - No 109 of 24 August 2021, pertaining to the extension of exceptional measures on the suspension of the powers of Parliament and lifting the immunity of its members until further notice,
 - No 117 of 22 September 2021, pertaining to exceptional measures, Article 20 of which revokes the constitution, except Chapters I and II and maintaining the provisions which do not contradict the Presidential Order, and
 - Nos. 137 and 138 of 11 October 2021, pertaining to the appointment of the Head and members of Government, respectively.
4. The Applicant asserts that the above decrees unlawfully terminated the functions and appointment of the Head and members of Government, and suspended the powers of Parliament and the provisions of the Constitution, except the preamble and Chapters I and II.

B. Alleged violations

5. The Applicant alleges the violation of the following rights:
 - i. The right of the people to self-determination within the meaning of Article 20(1) of the Charter, Article 1(1) of the International Covenant on Economic and Social Rights (hereinafter “the ICESCR”), the International Covenant on Civil and political Rights (hereinafter “the

ICCPR”)¹and Article 21(3) of the Universal Declaration of Human Rights (hereinafter “the UDHR”);

- ii. The right to participate in the conduct of public affairs guaranteed by Article 13(1) of the Charter, and Article 21(5) of the ICCPR;²
 - iii. The right to develop democratic values and human rights, guaranteed in Articles 2, 3, 4, 5, 10 11, 14 and 15 of the African Charter on Democracy, Elections and Governance (hereinafter “the ACDEG”);³
 - iv. The right to have the guarantees of human rights protected by Article 1 of the Charter; and
 - v. The right of access to justice guaranteed by Article 7(1)(a) of the Charter, Article 8 of the UDHR and Articles 2(3) and 14 of the ICCPR.
6. The Applicant also alleges violation of Articles 1, 2, 3, 5, 20, 21, 49, 50, 52, 62, 65, 70, 72, 76, 77, 80, 81, 91, 92, 94, 95, 97, 100, 102, 110 and 148(7) of the Constitution of the Respondent State of 27 January 2014.

III. Summary of the Procedure before the Court

- 7. The Application, together with the request for provisional measures, was received at the Registry on 21 October 2021.
- 8. On 10 November 2021, the Application was served on the Respondent State for its Response to the request for provisional measures within fifteen (15) days and to the main application within ninety (90) days.
- 9. The Respondent State did not respond to the request for provisional measures. On 16 February 2022, the Respondent State submitted its Response to the Application. This was served on the Applicant for his Reply, and which he submitted on 23 February 2022.
- 10. On 7 March 2022, the Applicant’s Reply was notified to the Respondent State for its information.
- 11. Pleadings were closed on 8 March 2022 and the Parties were duly notified.
- 12. On 24 March 2022, the Court issued an Order on procedure in which it ruled on the request for provisional measures together with the merits as both had substantially the same allegations and prayers.

1 The Respondent State ratified the instruments on 18 March 1969.

2 Error by the Applicant, the article concerned is 25(a).

3 Although the Respondent State signed the ACDEG on 27 January 2013, it has not ratified it to date; See https://au.int/sites/default/files/treaties/36384-sl-AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_GOVERNANCE.pdf (accessed on 30 March 2022).

IV. Prayers of the Parties

- 13.** The Applicant prays the Court to issue an order for provisional measures to put an end to the so-called exceptional measures taken by the Respondent State, and return to constitutional democracy and respect for the Constitution.
- 14.** The Applicant also prays the Court to:
 - i. Declare that it has jurisdiction
 - ii. Declare the Application admissible.
- 15.** He also requests the Court to declare that the Respondent State has, by promulgating the aforementioned decrees, violated both his rights and the rights of the Tunisian people, particularly:
 - i. the right of peoples to self-determination guaranteed under Article 20(1) of the Charter;
 - ii. the right to participate in the conduct of the affairs of the country guaranteed in Article 13(1) of the Charter;
 - iii. the right to enjoy democratic values and human rights enshrined under Articles 2, 3, 4, 5, 10, 11, 14 and 15 of the ACDEG;
 - iv. the right to have the guarantees of human rights protected by Article 1 of the Charter;
 - v. the right of access to justice guaranteed by Article 7 of the Charter.
- 16.** The Applicant further requests the Court to order the Respondent State to repeal all the six (6) presidential decrees listed in paragraph 3 above; namely, No 69 of 26 July 2021, No 80 of 29 July 2021, No 109 of 24 August 2021, No 117 of 22 September 2021 and No 137 and No 138 of 11 October 2021 and guarantee the human rights set out in the Charter and the other instruments, by taking the following measures:
 - i. Adopt the necessary legislative and regulatory instruments to ensure the supremacy of the Constitution, including the speedy operationalisation of the Constitutional Court and the removal of all legislative, regulatory, political and practical challenges hindering it;
 - ii. Pass laws that criminalise participating in, and supporting unconstitutional change of power;
 - iii. Pass laws that guarantee the inculcation of the democratic culture in the people, in particular young people;
 - iv. Provide effective procedural avenues to remedy the violation of the Constitution, pending the operationalisation of the Constitutional Court, by ordering the Respondent State to submit to the Court a report on the procedures for the execution of the judgment and guarantees of non-repetition.
- 17.** On its part, the Respondent State requests the Court to find that:
 - i. The Applicant has not exhausted all local remedies;
 - ii. No evidence of a human rights violation has been provided;

- iii. The subject of the case infringes the principle of national sovereignty;
- iv. Dismiss the Application in form and on the merits.

V. Jurisdiction

18. The Court notes that Article 3 of the Protocol provides as follows:
 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and Application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
19. Under Rule 49(1) of the Rules of Court, “[t]he Court shall ascertain... its jurisdiction and the admissibility in accordance with the Charter, the Protocol and these Rules.”
20. Based on the above-mentioned provisions, the Court must conduct an assessment of its jurisdiction and rule on any objections to its jurisdiction, if any.
21. In the instant case, the Respondent State raises two (2) objections to the Court’s material jurisdiction. The first is based on the fact that the subject of the Application does not relate to violations of human rights while the second is based on the fact that the subject of the Application affects national sovereignty. The Court will therefore rule on these two objections before deciding on other aspects of its jurisdiction.

A. Objections to material jurisdiction

i. The subject of the Application is not related to any violation of human rights

22. The Respondent State submits that, in accordance with Articles 3 and 26 of the Protocol, the jurisdiction of the Court is primarily limited to taking measures to stop and prevent violations against African citizens and to deter governments from doing so, in order to preserve the rights of citizens, as defined by international instruments, mainly the Charter from which the Protocol emanated.
23. The Respondent State considers that the rights of citizens are entirely centred on four (4) rights as stipulated in the Charter, namely the right to freedom, the right to equality, the right to justice and the right to dignity. It avers that the concept of human rights violations refers to depriving individuals of their fundamental rights and treating them as if they were sub-human and do not

deserve life and dignity by committing abominable acts such as genocide, torture, starvation and slavery. Furthermore, the concept of human rights violations also refers to the violation of economic, social and cultural rights whereby the State does not fulfil its obligations to ensure the enjoyment of these rights without discrimination for example, by failing to guarantee the right to work to lead a decent life.

24. The Respondent State also submits that the main mission of this Court is to protect universal and inalienable human rights and to help avoid grave and imminent cases of violations and the occurrence of irreparable harm. As regards the original subject of the case, however, the Respondent State submits that the Applicant based his claims on a series of decrees issued by the President of the Republic based on the powers conferred upon him by the Constitution.
25. The Respondent State challenges the Applicant to prove the human rights which he was deprived of and how the said right was violated, if at all, leading him to bring a case before this Court. It asks the Applicant whether the issuance of presidential decrees in line with the powers conferred on him by the Constitution constitutes a violation of his human rights. With regard to the Applicant's allegation that the Tunisian people were deprived of their will for self-determination, the Respondent State questions who authorised the Applicant to take the place of all Tunisian people and to bring a case before a foreign regional court to obtain a judgment in his favour against the said people and on their behalf. The Respondent State requests that he produces the popular mandate given to him to act against an entire people. It further contends that if, as the Applicant claims, the Tunisian people have been deprived of their right to self-determination, then he has also deprived them of their right to decide who should act on their behalf. Further, the Applicant also abused the Court's jurisdiction by filing a case without obtaining authorisation.
26. The Respondent State concludes that there is no human rights violation alleged or proven by the Applicant. It therefore argues that his case before this Court is frivolous and must be dismissed.
27. The Applicant did not respond to this objection.

28. The Court recalls that under Article 3(1) of the Protocol, it has jurisdiction to examine any Application submitted to it, provided that the rights of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.⁴
29. In the instant case, the Court notes that the Applicant alleges violation of Articles 2, 3, 4, 5, 10, 11, 14 and 15 of the ACDEG. The Court further notes that the Respondent State is not a State party to this Charter and therefore, the Court cannot apply this instrument to the instant case.
30. However, the Applicant also alleges violations of the rights guaranteed in Articles 1, 7, 13(1), 20(1) of the Charter and Articles 1(1), 2(3), 14 and 21(5) of the ICCPR and Article 1(1) of the ICESCR. The Respondent State is a party to these three instruments and thus, the Court has the power to interpret and apply them to this case and consider the Applicant's allegations in accordance with the provisions thereof.
31. The Court notes the Respondent State's objections that the Applicant has not provided proof of the alleged human rights violations and that he does not have an attestation of representation from the Tunisian people to file a case on their behalf.
32. With respect to the first issue, the Court observes that the proof of alleged violations is irrelevant to the determination of its competence to consider an application filed before it. It is a question that can only be dealt with at the merits stage.
33. As regards the second issue, the Court notes that the Applicant alleges violations of his own rights and that of the Tunisian people. However, it is evident from his Application that the Applicant has instituted a public interest case and, in this vein, the Court has previously observed that the Protocol does:
[...] not require individuals or NGOs to demonstrate a personal interest in an Application in order to access the Court, especially in the case of public interest litigation. The only precondition is that the Respondent State, in addition to being a party to the Charter and the Protocol, should have deposited the Declaration allowing individuals and NGOs to file a case before the Court. This is also in cognisance of the practical difficulties that ordinary African victims of human rights violations may encounter in bringing their complaints before the Court, thus allowing any person to bring applications to the Court on others'

4 *Masoud Rajabu v United Republic of Tanzania*, ACtHPR, Application No 008/2016 Judgment of 25 June 2021 (merits and reparations) § 21.

behalf without a need to demonstrate victimhood or a direct vested interest in the matter.⁵

34. Accordingly, the Court dismisses the Respondent States' objections in this regard.

ii. Objection to material jurisdiction based on the infringement of national sovereignty

35. The Respondent State submits that international relations are based on the principle of sovereignty, which grants the State full authority over its territory and vests in its supreme authority over its territory, its institutions, its political, legal and economic choices, and the conduct of its external relations, so that in all this, it is not subject to any higher authority.
36. It also submits that in the preamble to the Charter: "The Member States of the Organization of African Unity which are parties to this Charter... [Reaffirm] the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights".
37. The Respondent State further submits that Article 2(7) of the United Nations Charter similarly states that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter ...". The Respondent State considers that this article enshrines the principle of non-interference, which is one of the cardinal principles of public international law and on which the actions of sovereign states and international courts are based. It asserts that this concept of non-interference is what is considered the nucleus of the internal power of the State to protect its independence and sovereignty, unless the State takes actions that threaten international peace and security or commits aggression against another State, as spelt out in Chapter VII of the United Nations Charter.
38. The Respondent State contends that State sovereignty is manifested in the sovereignty of its government through the exercise of three powers, namely the legislature, the executive

5 *XYZ v Republic of Benin*, ACTHPR, Application No 010/2020, Judgment of 27 November 2020 (merits and reparations), §§ 47-48.

and the judiciary. It further submits that the legislative and judicial powers represent an aspect of State sovereignty and are considered to be the nucleus of its internal authority, as set out in Article 2(7) of the Charter of the United Nations. The Respondent State avers that the UN Charter is one of the sources of law that the Court should consider in its jurisprudence, so that it does not intervene in the work of its national courts and compel them to deliver certain judgments or decisions, or to control them by issuing external opinions and decisions influencing or opposing their decisions.

39. The Respondent State recalls the Applicant's request to order it to adopt the necessary legislative and regulatory instruments to ensure the supremacy of the Constitution, to criminalise unconstitutional change of power and foster a democratic culture in the people, as well as to compel it to provide procedural avenues and solutions to remedy violations of the Constitution. In response, the Respondent State notes that the independence of its authorities is governed by Constitutional provisions and that no one may interfere in cases which fall within the internal power of a State, and that citizens are not allowed to submit these issues to be resolved under the Charter of the United Nations.
40. The Respondent State further submits that the task of the legislature and the adoption of laws and regulations within it are at the heart of its internal authority and that no party has the right to interfere with it or the power to compel it to adopt laws and regulations in any domain. It further contends that, from a purely legal point of view, decisions rendered by this Court are decisions rendered by the Member States in their capacity as legal persons, independent of their internal authorities. According to the Respondent State, the decisions of this Court are not to be rendered against the internal authority of Member States, neither are its decisions considered as decisions above that of its judiciary since no decision is superior to the internal judicial decisions of African Union Member States.
41. The Respondent State concludes that this Court cannot render a decision which infringes its sovereignty except where the State undertakes actions that threaten international peace and security or has committed aggression against another State, as stipulated in Chapter VII of the Charter of the United Nations. It reiterates that an outside party is not allowed to interfere in cases that fall within the internal jurisdiction of the Respondent State. Consequently, the Respondent State requests the Court to dismiss the Application on the merits.

42. The Applicant did not respond to this objection.

43. The Court notes that at the heart of the Respondent State's objection is the contention that this Court does not have the jurisdiction to examine an application except where the application relates to acts that threaten international peace and security within the terms of Chapter VII of the UN Charter. It is the Respondent State's submission that, in all other cases, the Court does not have jurisdiction to consider an application as this would be against the Respondent State's sovereignty and the principle of non-intervention enshrined in Article 2 of the UN Charter.
44. The Court observes that rules of international law, including the provisions of the Protocol from which it derives its jurisdiction, stem from the consensual undertakings of States. In general, States are not bound by any rules to which they have not consented, and this is one of the highest manifestations of their sovereignty. Nonetheless, once they have given their consent, they cannot raise the defence of sovereignty to circumvent or limit their obligation arising from a rule that they have voluntarily agreed to be bound by.
45. In this regard, the Court underscores that the ratification by a State of international treaties and instruments establishing an international tribunal is an expression of its will or consent to cede part of its sovereignty and submit itself to the jurisdiction of that tribunal.⁶
46. In the instant Application, the Respondent State has ratified the Protocol and deposited the Declaration required under Article 34(6) thereof. The ratification and deposit of the Declaration are both optional and voluntary acts but they generate an international obligation towards the Respondent State *vis-à-vis* the Court, that is, to submit to its jurisdiction.⁷ Such an obligation stems from the Respondent State's own conduct in the exercise of its sovereign

6 See Article 2 (b) of the Vienna Convention on the Law of Treaties (1969).

7 *Ali Ben Hassen Ben Youssef v Republic of Tunisia*, ACtHPR, Application No 033/2018, Judgment of 25 June 2021, § 45; *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) (2014), Decisions on the effects of the withdrawal of the Declaration provided for in Article 34(6) of the Protocol, 3 June 2016 (including a corrigendum to the decision, 5 September 2016) 1 AfCLR 540, § 58.

power. It cannot therefore invoke its sovereignty and the principle of non-intervention in its internal affairs to oust the jurisdiction of the Court.

47. The Court wishes to point out that its jurisdiction is not limited to considering applications containing allegations of violations of human rights only, insofar as these threaten 'international peace and security'. It reiterates its position that as long as an application contains allegations of the violation of one or more of the rights protected in the Charter or any other human rights instrument ratified by the Respondent State, it assumes jurisdiction over such application, regardless of whether the violations allegedly relate to international peace and security. The Court thus dismisses the Respondent State's objection in this regard.
48. In view of the foregoing, the Court finds that it has material jurisdiction to consider the instant Application.

B. Other aspects of jurisdiction

49. The Court notes that no objection has been raised to its personal, temporal and territorial jurisdiction.
50. Having established that nothing on the record indicates that it lacks jurisdiction, the Court concludes that it has:
 - i. Personal jurisdiction insofar as the Respondent State is a party to the Charter and Protocol and has deposited the Declaration allowing individuals and NGOs such as the Applicant to bring cases before the Court.
 - ii. Temporal jurisdiction, insofar as the alleged violations were committed after the entry into force of the above instruments in relation to the Respondent State.
 - iii. Territorial jurisdiction, insofar as the facts of the case and the alleged violations took place in the Respondent State's territory.
51. The Court therefore declares that it has jurisdiction to rule on the case.

VI. Admissibility

52. Article 6(2) of the Protocol provides that "The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter".
53. Rule 50(1) of the Rules provides: "the Court shall ascertain (...) the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules."

- 54.** Rule 50(2) of the Rules, which, in substance restates the provisions of Article 56 of the Charter, provides as follows:
- Applications filed before the Court shall comply with all of the following conditions:
- a. Indicate their authors even if the latter request anonymity;
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter;
 - c. Not contain any disparaging or insulting language;
 - d. Are not based exclusively on news disseminated through the mass media,
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 - f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter; and
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the Charter.
- 55.** The Court notes that the Respondent State raises an objection to the admissibility of the Application based on non-exhaustion of local remedies.

A. Objection based on non-exhaustion of local remedies

- 56.** The Respondent State contends that Article 50 of the Charter stipulates that “the Commission” may consider a case before it only after ensuring that all local remedies, if any, have been exhausted, unless it appears that the examination procedures have been unduly prolonged. It also states that Article 56 of the Charter also stipulates that “the Commission” shall examine the communications referred to in Article 55 on human and peoples’ rights only after local remedies have been exhausted, where appropriate, unless it is clear to “the Commission” that the procedures for these remedies have been unduly prolonged.
- 57.** The Respondent State similarly submits that Article 6 of the Protocol provides that when deciding on a case instituted before it under Article 5 of the Protocol to assess whether it meets the admissibility requirements, the Court may request the opinion of the Commission, which shall give it as soon as possible. Moreover, the Court decided that the Applications submitted must satisfy the admissibility requirements, in line with the provisions of Article 56 of the Charter.

58. The Respondent State considers that the Applicant has brought the matter directly before this Court without prior recourse to the competent domestic court of the Respondent State, which the Applicant has acknowledged in his Application.
59. Accordingly, the Respondent State asserts that one of the admissibility requirements of Applications before the Court in accordance with Articles 50 and 56 of the Charter and Article 6 of the Protocol has not been met. It further contends that, Article 8 of the Protocol provides that after having declared a case admissible in line with the above-mentioned provisions, the Court may, by a two-thirds majority of its members, decide to dismiss it⁸ if, in its opinion, one of the requirements mentioned in Article 56 of the Charter is not met.

60. On his part, the Applicant considers that the Constitution of the Respondent State is the highest law in the hierarchy of the Respondent State's laws. According to the Constitution, the Constitutional Court has jurisdiction to review the constitutionality of draft laws, to resolve conflicts of jurisdiction between the President of the Republic and the Prime Minister, to dismiss the President of the Republic, to receive the oath and to declare the post of President of the Republic vacant. It is the Applicant's submission that this makes the Constitutional Court the only competent authority exclusively empowered to rule on serious breaches of the Constitution by the Head of State (Article 69 of this organic law) and on the power relations between the Head of the Executive (Articles 47 to 76)) and more generally all the constitutional violations that can be imputed to him.
61. The Applicant affirms that, although more than five (5) years have elapsed since Organic Law No 50 of 2015 was passed, the Constitutional Court has not yet been set up and that all attempts to set it up and elect its members have failed, which makes domestic litigation impossible with regard to violations imputed to the Respondent State in the present case. He also avers

8 Error by the Respondent State, Article 8 of the Protocol states: "The Rules of Procedure of the Court shall lay down the detailed conditions under which the Court shall consider cases brought before it, bearing in mind the complementarity between the Commission and the Court"

that Law No 50 of 2015 stipulates in its transitional provisions (Article 80) that the provisional body in charge of determining the constitutionality of draft laws established under Organic Law No 14 of 2014 of 18 April 2014 (hereinafter “the Law of 18 April 2014 on IPCCPL”) shall remain in place until the establishment of the Constitutional Court. However, he contends that the jurisdiction of IPCCPL is limited to examining challenges to the constitutionality of draft laws raised only by the President of the Republic, the Prime Minister or a number of parliamentarians, so that it is impossible to bring cases before it. He further submits that, in any event, Article 21 of Presidential Decree No 117 of 2021, having dissolved the IPCCPL, there is therefore no mechanism for ascertaining the constitutionality of laws and thus, no remedies are available in this regard.

62. The Applicant also asserts that the unavailability of a local remedy is confirmed by the last paragraph of Article 3 of the Law of 18 April 2014 on IPCCPL, which states that: “The courts lack jurisdiction to examine the constitutionality of laws”. This corresponds to the first paragraph of Article 120 of the Constitution relating to the exclusive jurisdiction of constitutional control.
63. Furthermore, the Applicant considers that, even in the event of recourse to the Administrative Court in accordance with its Law of 4 February 2002 as amended, which provides for the possibility of appealing against regulatory decrees, this remedy is nonetheless sterile and ineffective owing to the unsettled nature of that court’s jurisprudence. He avers to this effect that the jurisdiction of the court is based on the administrative character of the law. This means that the decrees challenged must be organisational, that is, within the scope of the administrative law, which is not the case with the decrees that occasioned the violations in question.
64. The Applicant also argues that the existence of the act of State doctrine, the absence of an administrative character, that is, the normal administrative activity and operation of a public administrative establishment, and the constitutional nature of the subject of the orders, prevents the administrative court from accepting cases brought against such Orders, which makes the standing to bring cases before it inoperative. In this regard, he recalls the *Al-Sahbi Al-Omari administrative decision against the Prime Minister* issued by First Appeals Chamber No 26758 on 15 July 2008. The Applicant considers that, since the contested decree relates to a call of electors to a referendum on the draft constitutional law pertaining to the amendment of certain constitutional provisions, it does not belong to the category of administrative decisions which may be challenged for annulment

within the meaning of Article 3 of the Administrative Tribunal Law, but rather falls in the category of sovereign acts which the administrative judge does not have the power to control.

65. He further submits in the same vein that in the decision on stay of execution in *Ziyad Al-Hani v the President of the Republic*, which sought to repeal Presidential Ordinance No 95 of 2016, pertaining to the appointment of a person to form a government (Resolution No 4100120 of 25 August 2016), the administrative court ruled that it was not allowed to consider the appeal or to request for a stay of execution of the decisions regarding the relationship between public authorities as provided for in the Constitution. The court also held that citizenship does not confer the legal capacity to challenge a presidential order, because it is a public interest issue that does not relate directly to individual request, except only for where a direct personal interest is involved. The Applicant further refers to Administrative Decision No 134049 of 6 July 2018 in *Abdel-Raouf Al-Ayadi and Rabi' Al-Abedy v the President of the National Constituent Assembly* and Decision No 123610 issued on 14 July 2016, *Muhammad Imad Trabelsi v the Prime Minister*.
66. The Applicant alleges that the decrees that occasioned the violations in question do not, for the most part, fall within the limited regulatory jurisdiction of the President of the Republic, within the meaning of Article 78 of the Constitution. General regulatory power is exercised by the Head of Government, explicitly in Article 94 of the Constitution, which stipulates that the latter lacks jurisdiction unless the Administrative Tribunal has ruled on compliance with the above material standard.
67. The Applicant further submits that the Court's jurisprudence in its judgment in *Christopher Mtikila v United Republic of Tanzania* is that it is not necessary to resort to the same remedy where the outcome is already known, a position confirmed in its judgment in *Lohe Issa Konate v Burkina Faso* at paragraph 112 thereof. This also resonates with the jurisprudence of the Inter-American Court of Human Rights in the decision in *Velasquez Rodriguez v Honduras* of 29 July 1988, at paragraph 64 thereof, which states that: "If a remedy is not adequate in a specific case, it obviously need not be exhausted". Moreover, this Court has defined the effectiveness of the judicial procedure as "the ability to find a solution to the case complained of by the one who initiates the procedure", as stated in *Norbert Zongo v Burkina Faso*, 28 March

2014, paragraph 92.⁹

68. The Applicant also contends that the Court has dealt with the question of the domestic remedy of administrative courts examining the constitutionality of legislative and regulatory instruments. This was in its judgment in the case of *Association Pour la Protection le Droits de L'Homme v Republic of Côte d'Ivoire* at paragraph 98 wherein the Court concluded that administrative courts, by virtue of the laws that govern them, have no jurisdiction to examine the constitutionality of laws, and therefore this Application cannot be contested on the basis that this remedy was not utilised. Accordingly, the Applicant concludes from the foregoing that local remedies are unavailable, which makes them ineffective. Therefore, the Application is admissible in relation to the requirement to exhaust local remedies.
69. Finally, the Applicant submits that the Respondent's State's response states nothing new that would negate his Application or warrant its dismissal. To the contrary, the Applicant asserts that the Response itself seemingly confirmed what was stated in the Application, thereby making it consistent with his requests therein.

70. The Court notes that, in accordance with Article 56(5) of the Charter and Article 50(2)(e) of the Rules of Court, all applications before the Court must be filed after the exhaustion of local remedies, unless it is clearly demonstrated that domestic proceedings for such remedies are unduly prolonged. The requirement to exhaust local remedies aims at providing States the opportunity to deal with human rights violations within their jurisdictions before an international human rights body is called upon to determine the State's responsibility for the same.¹⁰
71. The Court emphasises that the local remedies to be exhausted are those of a judicial nature, which must be available, that is, they can be used without hindrance by the Applicant, be effective and satisfactory in the sense that they are “capable of satisfying

9 The correct reference is to paragraph 92 of *Lohé Issa Konaté v Burkina Faso* (merits), Judgment of 5 December 2014, 1 AfCLR, 319.

10 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.

the complainant or of remedying the situation in dispute”.¹¹

72. In the present case, the Court finds, on the one hand, that the Respondent State has not indicated which remedy the Applicant may exhaust at the national level. On the other hand, the Court notes that the Applicant has raised the question of compliance with the requirement to exhaust local remedies and concluded that the Respondent State’s judicial system provides no avenues for challenging the constitutionality of laws, owing to the fact that the Constitutional Court has not been put in place. This means that the only means of appealing decisions is to lodge a complaint of abuse of authority. The Applicant contends that these remedies are not effective and cannot settle the conflict caused by the publication of the presidential decrees.
73. The Court observes that Article 148(7) of the Respondent State’s Constitution provides that: “...Ordinary Courts are deemed to lack jurisdiction to ascertain the constitutionality of laws”. In the same vein, Article 120 of the Constitution states that:

The Constitutional Court has exclusive jurisdiction to check the constitutionality of the laws submitted to it by the courts, upon an objection based on constitutionality raised by one of the parties to a dispute, in the cases and in accordance with the procedures defined by law (...).
74. The Court notes that on 3 December 2015, the President of the Republic of the Respondent State promulgated Organic Law No 050/2015 on the Constitutional Court and that this law was published in the Official Gazette. Article 1 of the Law states:

The Constitutional Court is an independent judicial body guaranteeing the supremacy of the Constitution, and protecting the republican democratic regime and rights and freedoms, in accordance with its powers and prerogatives provided for in the Constitution and laid down in this Law.¹²
75. The Court further notes that Article 54 of Organic Law No 2015-50 of 3 December 2015 on the Constitutional Court provides “The parties in cases on the merits pending in the courts may raise an objection based on the constitutionality of the law applicable to the dispute”.

11 *Beneficiaries of Norbert Zongo, Abdoulaye Nikiema dit Ablassé, Ernest Zongo, Blaise Ilboudo and Burkinabé Movement for Human and Peoples’ Rights c. Burkina Faso*, Judgment (merits) (28 March 2014), 1 AfCLR 219, §68; *Lohé Issa Konaté v Burkina Faso* Application No 004/2013 (merits) (5 December 2014), 1RJCA 314, §108; *Sébastien Germain Marie Ajavon v Republic of Benin*, ACtHPR, Application No 027/2020 Judgment of 2 (jurisdiction and admissibility), December 2021, § 73.

12 Official Journal of the Republic of Tunisia No 98 of 8 December 2015.

76. On the other hand, the Court notes that Article 3 of the IPCCPL Law No 14 of 18 April 2014, in its last paragraph, provides that “The courts are deemed to lack jurisdiction to ascertain the constitutionality of laws”.
77. The Court further notes that Presidential Decrees are decrees of a legislative nature in accordance with Article 7 of Presidential Decree No 117, and cannot be challenged before existing ordinary courts for the purpose of annulment.
78. The Court observes that according to afore-cited Article 120 of the Constitution, the determination of the constitutionality of laws is within the exclusive jurisdiction of the Constitutional Court, which according to Article 1 of Organic Law No 2015-50 on the Constitutional Court of 3 December 2015, “(...)is an independent judicial body guaranteeing the supremacy of the Constitution, and protecting the republican democratic regime and rights and freedoms, in accordance its powers and prerogatives provided for in the Constitution and set forth in this Law.”
79. The Court notes that given that the Constitutional Court has not been operationalised since the promulgation of its constituting law referred to above, the remedy that would allow the Applicant to challenge the constitutionality of the presidential decrees in question are not available in the Respondent State’s judicial system. In the circumstances, the Applicant is not required or expected to exhaust a remedy which is not available in the Respondent State.
80. Accordingly, the Court finds that the Application is deemed to have met the requirement of exhaustion of local remedies.

B. Other conditions of admissibility

81. The Court notes that the Respondent State does not contest the compliance with the admissibility requirements set out in Article 56(1)(2)(3)(4)(6) and (7) of the Charter, which are restated in Rule 50(2)(a)(b)(c)(d)(f) and (g) of the Rules. Nevertheless, the Court must satisfy itself that these requirements have been met.¹³
82. It emerges from the records that the Application meets the requirement of Rule 50(2)(a) of the Rules since the identity of the Applicant has been clearly stated.
83. The Court further notes that the by filing the instant Application, the Applicant seeks to protect his rights guaranteed under the Charter.

¹³ *Kennedy Owino Onyachi and Charles John Mwanini v United Republic of Tanzania* (merits) Application No 003/2015 (28 September 2017) (2017) 2 ACtHPR 65, § 56.

It further notes that one of the objectives of the Constitutive Act of the African Union, as stated in Article 3(h) thereof, is the promotion and protection of human and peoples' rights. The Application also does not contain any claim or prayer that is incompatible with a provision of the Act. Therefore, the Court considers that the Application is compatible with the Constitutive Act of the African Union and the Charter, and thus meets the requirement of Rule 50(2)(b) of the Rules.

84. The Court further finds that the Application does not contain disparaging or insulting language and therefore, meets the admissibility requirement of Rule 50(2)(c) of the Rules.
85. The Court also notes that the Application is not based exclusively on news disseminated through the mass media, so that it fulfils the requirements set out in Rule 50(2)(d) of the Rules.
86. With regard to the reasonable time-limit for bringing a case before the Court, Rule 50(2)(f) requires that Applications be filed before the Court within a reasonable time after local remedies have been exhausted or after the date set by the Court. The Court recalls that the Presidential decrees which gave rise to the instant Application were issued on 26 and 29 July, 24 August, 22 September and 11 October 2021. The Applicant filed this Application on 21 October 2021.
87. The Court notes that only a period of ten (10) days elapsed between the date of the last decree issued on 11 October 2021 and the date of filing of the Application on 21 October 2021. The Court considers this to be a reasonable time and accordingly, holds that the Application meets this admissibility requirement.
88. Finally, as regards the requirement in Rule 50(2)(g) of the Rules, the Court finds that the present Application does not relate to a case which has already been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union. Accordingly, it holds that it meets the requirement of Rule 50(2)(g) of the Rules.
89. In view of the foregoing, the Court finds that the Application meets all the admissibility requirements under Article 56 of the Charter, as restated in Rule 50(2) of the Rules, and accordingly, finds it admissible.

VII. Merits

90. The Applicant alleges violations of the right to be heard, the right to self-determination, the right to participate in the conduct of public affairs, and the right to the protection of human rights and

freedoms guaranteed in Articles 7(1), 13(1), 20(1), and 1 of the Charter and Article 1(1) of ICESCR and Articles 1(1), 25(1), 2(3) and 14 of ICCPR.

A. Alleged violation of the right to have one's cause heard

91. The Applicant alleges violation of the right to have his cause heard contrary to in Articles 7 of the Charter, Article 8 of the UDHR and Articles 2(3) and 14 of the ICCPR.
92. The Applicant further avers that the Presidential Decree No 2021-117 violates the right to be heard before the courts by stipulating in its Article 7 that decrees issued by the President of the Republic are not subject to appeal.
93. The Applicant submits that the said Decree jeopardises the guarantees of the right to bring a case before the courts as provided for in international instruments ratified by the Respondent State, to the extent that the organisation of justice and judicial power is done by decrees issued by the President of the Republic. However, the Applicant avers that the Constitution guarantees human rights relating to the right to bring a case before the courts and the right to a fair trial by conferring on the legislative branch the organisation of judicial power and the judiciary in the form of organic laws, in line with Article 65 of the Constitution, which are inviolable compared to ordinary laws.
94. The Respondent State did not respond on the alleged violation of this right.

95. The Court notes that, Article 7(1)(a) of the Charter provides that:
Every individual shall have the right to have his cause heard. This comprises:
 - a. the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.
96. The Court notes that the right to be heard confers on the individual a set of rights, including the right to bring proceedings before a competent tribunal of a judicial or quasi-judicial nature, the right to have the opportunity to express one's opinion on matters and procedures that affect one's rights, and the right to appeal to higher courts or authority when one's causes are not properly

considered by the lower courts or authorities.¹⁴

97. The Court emphasises that Article 7(1)(a) of the Charter makes it clear that the existence of a competent tribunal is a *sine qua non* to the enjoyment of the right to be heard, including the right to appeal. This must be read together with Article 26 of the Charter which imposes on State Parties the obligation to establish and improve appropriate national institutions for the promotion and protection of human rights and freedoms and to guarantee the independence of the courts.
98. The Court observes that for the enjoyment of the right to be heard, the competent tribunal or authority should exist both in law (*de jure*) and in fact (*de facto*). The right to be heard becomes illusory if the competent judicial or quasi-judicial authority or institution is established in the law but does not exist in fact.
99. In the instant Application, the Court observes that according to Article 118 of the 2014 Respondent State Constitution and the Organic Law No 50 of 2015, a Constitutional Court was created within the structures of the Respondent State's judiciary. Pursuant to Article 120 of the Constitution, the Constitutional Court was mandated to consider, among others, cases involving disputes that require the interpretation and application of the Constitution. These, according to Article 101 of the Constitution, includes "Any disputes that arise regarding the respective powers of the President of the Republic and of the Head of Government".
100. Nevertheless, at the time the Application was filed before this Court, the Constitutional Court had not been operationalised. The Court notes that there was also no other Court or authority in the Respondent State that could consider constitutional disputes relating to the powers of the President. The absence of the Constitutional Court thus created a vacuum in the Respondent State's judicial system in relation to resolution of constitutional disputes, particularly, those questioning the constitutionality of decrees issued by the President.
101. As a result, it is evident that the Applicant was not able to challenge the constitutionality of the Presidential decrees. This in effect left him with no legal avenue to seek a remedy for his grievances and deprived him of his right to be heard.
102. In view of the foregoing, the Court holds that the Respondent State violated the Applicant's right to be heard contrary to Article 7(1) (a) of the Charter as read together with Article 26 of the Charter.

14 *Jebra Kambole v United Republic of Tanzania*, ACTHPR, Application No 018/2018, Judgment of 15 July 2020, § 96. *Werema Wangoko Werema v United Republic of Tanzania* (merits) (2018) 2 AfCLR 520, § 69.

B. Alleged violation of the people's right to self-determination and the right to political participation

- 103.** The Applicant alleges a violation of Article 20(1) of the Charter and Article 1(1) of the ICCPR relating to the right of the people to existence and self-determination. He submits that respect for the right of the people to self-determination is one of the most important human rights achievements enshrined in the Constitution of the Respondent State, which led to the prohibition of its violation by constitutional amendment and, more importantly, it is not possible for any text below the constitution to infringe this right.
- 104.** The Applicant asserts that these rights were violated by the presidential decrees, in particular, Presidential Decree No 117. He contends that this jeopardises human rights and freedoms by removing them from the ambit of organic laws pursuant to Article 65 of the Constitution which, in terms of its form and procedures, provides guarantees which elevate ordinary laws to decrees. According to the Applicant, this means that a mere decision taken by one person, namely, the President of the Republic constitutes a “menace” and a grave violation of rights and freedoms, especially in the absence of any oversight or counter authority and in the absence of any imminent danger within the meaning of Article 80 of the Constitution.
- 105.** The Applicant further alleges a violation of the right guaranteed under Article 3(1)¹⁵ of the Charter, Article 21(1) of the Universal Declaration of Human Rights and Article 25(1) of the ICCPR concerning participation in the conduct of the country's political affairs. In this regard, the Applicant cites the judgment of the Court of 22 September 2011¹⁶ in *the Tanganyika Law Society, the Legal Centre for Human and Peoples' Rights and the Reverend Christopher Mtikila v United Republic of Tanzania*, where the Court emphasised that the rights contained in Article 13(1) of the Charter are individual rights which may be exercised by the citizen directly and individually. The Applicant contends that by issuing the Presidential Decrees Nos. 69, 80, 109, 117, 137 and 138 of 2021, the Respondent State created a situation where citizens could not enjoy their right to participate in the affairs of their own country.

15 This is an error by the Applicant as the correct reference should be Article 13(1) of the Charter.

16 This is an error by the Applicant as the correct reference should be to the judgment on the merits in the above-mentioned case, dated 14 June 2013.

106. Consequently, the Applicant submits that the Respondent State has violated his and Tunisian peoples' right to political participation and right to self-determination contrary to its obligations under Articles 13 and 20 of the Charter.
107. The Respondent State did not respond to both alleged violations.

108. The Court notes that the Applicant alleges violations of both the right to self-determination and the right to political participation, which are guaranteed in Articles 13 and 20 of the Charter. The Court acknowledges in this regard the fundamental importance of the individual's right to political participation under Article 13 and to the peoples' free determination of their political status within the terms of Article 20(1) of the Charter.
109. However, the Court finds that in the instant Application, the main issues raised by the Applicant relate to the right to political participation, and thus, the Court limits its determination to this aspect of the Applicant's allegation. In the circumstances of this case and considering the nature the Applicant's submissions, the Court does not find it necessary to consider the allegation relating to the violation of the right to self-determination.
110. The Court notes that, the right of citizens to participate in the political affairs of their country is one of the fundamental democratic rights protected by the Charter and other international human rights instruments.¹⁷ Article 13(1)(c) of the Charter provides that:
Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
111. The right to participation confers on all citizens the right to be involved in the government of their country directly or through their freely chosen representatives. It includes the right to vote and stand for elections to assume political or official positions as well as obtain, without discrimination, the opportunity to serve

17 Similarly, Article 21(1) of the UDHR also stipulates that "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives". Article 25(1) of the ICCPR also states that "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives".

their nation being part of the government. Where citizens vote to indirectly participate in the affairs of their country through representatives, the right entails respect for the citizens' freedom to choose their representatives and the prohibition of any measure that would compromise their representatives' ability to perform functions that they have assigned to them.

112. The Court has previously held that, under the Charter, the right to participate in the conduct of public affairs may be subject to some exceptional restrictive measures in the public interest, respect for the rights of others and to considerations in relation to the security and higher national interests of the State.¹⁸ Such measures must also be taken in accordance with procedures established by law and must be necessary and proportionate to the legitimate aim(s) that they are designed to achieve.
113. In the instant case, the Court notes that the exceptional measures taken by the Respondent State were implemented within the framework of Presidential decrees issued by a democratically elected President owing to certain situations. The decrees were passed in accordance with Article 80 of the Respondent State's Constitution (2014), which provided that:

In the event of imminent danger threatening the nation's institutions or the security or independence of the country, and hampering the normal functioning of the state, the President of the Republic may take any measures necessitated by the exceptional circumstances, after consultation with the Head of Government and the Speaker of the Assembly of the Representatives of the People and informing the President of the Constitutional Court. The President shall announce the measures in a statement to the people.
114. The Court also notes that, as mentioned in the preamble of the Presidential Decree No 117 of 2021, the circumstances that led to the issuance of the decrees would have resulted from a dysfunction of a democratically elected institution, namely the Assembly of People's Representatives. Moreover, as the above-mentioned Presidential Decrees shows, the functioning of the public authorities "was hampered, that the danger became not imminent, but real". The Court observes that, in the light of these findings, there is every reason to believe that the measures adopted in the decrees were purportedly, aimed at ensuring the normal function of the State, to achieve the legitimate objective of preserving collective security or common interest within the terms of Article 27 of the Charter.

¹⁸ *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania* (merits) (2013) 1 AfCLR 34, § 100.

115. However, the Court observes that the above-cited provision of the Constitution of the Respondent State allows the President to take “any measures”, which could include promulgating Presidential decrees, to counter “imminent danger threatening the nation’s institutions or the security, independence of the country, and hampering the normal functioning of the state”. The President’s power to take such measures is however limited by the substantive conditions and procedural requirements indicated in Article 80 the Constitution, including the need for “consultation with the Head of Government and the Speaker of the Assembly of the Representatives of the People” and the duty to inform “the President of the Constitutional Court”.
116. The Court notes that there is nothing on record showing that the substantive conditions of an imminent danger to the nation’s institutions or the security and independence of the country or the abovementioned procedural requirements were met before the President issued the decrees in question. In this regard, the Court recalls its finding in paragraph 79 above that the Constitutional Court was not operational at the time the decrees were promulgated. This simply means that there was no possibility for the President to inform the President of the Constitutional Court prior to issuing the decrees. Accordingly, the decrees were not promulgated in accordance with the legal procedures provided for by the Constitution.
117. Furthermore, the Court finds that the decrees in question disproportionately disrupted the work of the government including that of elected institutions such as the House of People’s Representatives. In this regard, the Court again finds that there is nothing on the record indicating that the measures introduced by the decrees to resolve the dispute among the government organs and reinstate the normal functioning of the state were taken after consideration and implementation of other less restrictive measures.
118. In this vein, the Court notes that the Respondent State was under an obligation to consider other least restrictive measures to deal with the said dispute prior to taking such drastic measures as the suspension of the powers of Parliament, and limiting the immunity of its members, who were freely elected by citizens in the exercise of their right to participate in the affairs of their government. The Respondent State’s failure to do so made the adopted measures not only disproportionate in relation to the stated goals¹⁹ but also

19 *Lohé Issa Konaté v Burkina Faso* (merits), §-§ 145-166.

with the Respondent State's own Constitutional dispensation.²⁰

119. Accordingly, the Court finds that the Respondent State's restrictive measures were neither adopted in accordance with the law nor were they proportionate for the purpose for which they were adopted.
120. Consequently, the Court holds that the Respondent State has violated the right of the people to participate in the conduct of public affairs contrary to Article 13(1) of the Charter.

C. Alleged violation of guarantees of human rights and freedom

121. The Applicant alleges a violation of the right to obtain guarantees for the protection of human rights and freedoms as provided in Article 1 of the Charter. He submits that the Constitution of the Respondent State accords great importance to human rights and public freedoms, which are embodied in its preamble as one of the pillars of the State. The Applicant further alleges that by the Respondent State recognising and enumerating in Part One on General Principles and in Part Two on Rights and Freedoms under Article 49 of the Constitution²¹ it underscores the importance it attaches to the said rights and freedoms.
122. Furthermore, the Applicant submits that the Tunisian Constitution also stipulates in its last paragraph that no amendment may undermine the human rights and freedoms guaranteed by the Constitution.
123. The Respondent State did not respond to the alleged violation of this right.

20 *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania* (merits), § 100.

21 The limitations that can be imposed on the exercise of the rights and freedoms guaranteed in this Constitution will be established by law, without compromising their essence. Any such limitations can only be put in place for reasons necessary to a civil and democratic state and with the aim of protecting the rights of others, or based on the requirements of public order, national defence, public health or public morals, and provided there is proportionality between these restrictions and the objective sought. Judicial authorities ensure that rights and freedoms are protected from all violations. No amendment may undermine the human rights and freedoms guaranteed in this Constitution.

124. The Court recalls that Article 1 of the Charter provides as follows:
The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.
125. The Court notes that this provision imposes dual obligations on State Parties, namely, the duty to recognise the rights, duties and freedoms protected by the Charter and the duty to adopt legislative or other measures to give effect to the same.
126. The Court also recalls its established position that a violation of any of the rights contained in the Charter results in a violation of Article 1 of the Charter.²²
127. In the instant Application, the Court further notes that the right to be heard and various forms of the right to political participation are provided for in the Respondent State's Constitution.²³ However, as was established in paragraph 79 above, the Respondent State has failed to operationalise its Constitutional Court to give effect to its citizens' right to be heard by enabling them to challenge the constitutionality of Presidential decrees. This has violated their right to participation in political affairs of their country directly and through their freely chosen representatives.
128. Consequently, the Court finds that the Respondent State also violated Article 1 of the Charter.

VIII. Reparations

129. The Court notes that in the present case, the Applicant does not seek pecuniary reparations because, according to him, even if it is present, real and continuous, the material harm caused by the violations, is not personal or direct, and that he has no standing to seek compensation on behalf of the Tunisian people.
130. However, the Applicant requests the Court to order the Respondent State to repeal all the decrees mentioned in paragraph 3 of this judgment in order to guarantee the human rights set out, by taking the following measures:
 - i. Adopt the necessary legislative and regulatory instruments to ensure the supremacy of the Constitution, including the speedy establishment of the Constitutional Court and the removal of all legislative, regulatory, political and realistic impediments hindering it;

22 *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin* (merits and reparations) ACtHPR, Application No 065/2019, Judgment of 2 December 2021, § 125;

23 See Articles 34, 35, 50, 60 and 139 of the Constitution (2014).

- ii. Pass laws that criminalize participation in, and support of, unconstitutional change of power;
- iii. Adopt laws that guarantee the inculcation of democratic culture among the people, especially young people;
- iv. Provide procedural avenues and effective solutions to remedy violations of the Constitution, pending the establishment of the Constitutional Court, such as obliging it to submit to the Court a report on judgment enforcement procedures and guarantees of non-repetition.

131. The Respondent State does not address the issue of reparations and only requests that the case be declared inadmissible and be dismissed on the merits.

132. Article 27(1) of the Protocol provides that:

If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation including the payment of fair compensation or reparation.

133. The Court recalls its earlier judgments and restates its position that, "to examine and assess Applications for reparation of prejudices resulting from human rights violations, it takes into account the principle according to which the State found guilty of an internationally wrongful act is required to make full reparation for the damage caused to the victim".²⁴

134. The Court also restates that reparation "... must, as far as possible, erase all the consequences of the wrongful act and restore the state which would presumably have existed if that act had not been committed."²⁵

135. The measures that a State must take to remedy a violation of human rights includes notably, restitution, compensation and rehabilitation of the victim, satisfaction and measures to ensure non-repetition of the violations taking into account the

²⁴ *Abubakari v Tanzania* (reparations) (2019) 3 AfCLR 33, § 19; *Thomas v Tanzania* (reparations) (2019) 3 AfCLR 28, § 11; *Rashidi v Tanzania* (merits and reparations) (2019) 3 AfCLR 1, § 19; *Ingabire Victoire Umuhoza v Rwanda* (reparations) (2018) 2 AfCLR 202, § 19.

²⁵ *Mohamed Abubakari v Tanzania* (reparations), § 20; *Alex Thomas v Tanzania* (reparations), § 12; *Umuhoza v Rwanda* (reparations), § 20; *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 118.

circumstances of each case.²⁶

136. In the instant case, the Court recalls its finding that Presidential Decrees Nos. 80, 109 and 117 of June 2021 suspended the work of Parliament and abrogated sections of the Constitution and thus has violated the right to be heard and the right of Tunisian citizens to political participation in the affairs of their own country contrary to Articles 7(1)(a) as read together with Article 27, and 13(1) of the Charter, respectively. The Court further recalls that the Respondent State in consequence of these violations has also violated its obligation under Article 1 of the Charter.
137. Consequently, the Court orders the Respondent State to repeal the presidential decrees in force, as a measure of restitution.
138. The Court also reiterates that the failure to operationalise the Constitutional Court constitutes a significant vacuum and dysfunction in the Respondent State's judicial system.
139. Accordingly, as a guarantee of non-repetition of the violations, the Court orders the Respondent State to put in place the Constitutional Court as an independent judicial body to contribute to the balance and stability of the Respondent State's judicial system.

IX. Request for provisional measures

140. The Court recalls that the Applicant filed the Application on 21 October 2021, together a request for provisional measures.
141. The Court further recalls that on 24 March 2022 it issued a Ruling to the effect that it would rule on the request for provisional measures together with the merits as both had substantially the same allegations and prayers.
142. In the light of this decision on the merits, the requested provisional measures are therefore rendered moot.

X. Costs

143. Neither party has made submissions on costs.

²⁶ *Mohamed Abubakari v Tanzania* (reparations), § 21; *Alex Thomas v Tanzania* (reparations), § 13; *Ingabire Victoire Umuhoya v Rwanda* (reparations), § 20.

- 144.** Rule 32(2) of the Rules provides that “[u]nless otherwise decided by the Court, each party shall bear its own costs, if any”.
- 145.** The Court notes that in the present case there is no reason to depart from this provision.
- 146.** Consequently, the Court decides that each Party shall bear its own costs.

XI. Operative part

147. For these reasons,
The Court

Unanimously,
On jurisdiction

- i. *Dismisses* the objections to its jurisdiction;
- ii. *Declares* that it has jurisdiction.

On admissibility

- iii. *Dismisses* the objection based on the failure to exhaust local remedies.
- iv. *Declares* the Application admissible.

On merits

- v. *Finds* that the Respondent State violated the Applicant’s right to be heard under Article 7(1)(a) of the Charter as read together with Article 26 of the Charter;
- vi. *Finds* that the Respondent State violated the Applicant’s right to participate in the conduct of public affairs in his country under Article 13(1) of the Charter;
- vii. *Finds* that, the Respondent State violated Article 1 of the Charter;

On reparations

- viii. *Orders* the Respondent State to repeal Presidential Decrees No 2021-117 of 22 September 2021, which includes Decrees Nos. 69, 80 and 109 of 26, 29 July, 24 August 2021, and Decrees Nos. 137 and 138 of 11 October 2021 and to return to constitutional democracy within two (2) years from the date of notification of this judgment.
- ix. *Orders* the Respondent State to take all measures necessary for the operationalisation of an independent Constitutional Court and remove all legal impediments thereto within two (2) years from the date of notification of this judgment.

On implementation and reporting

- x. *Orders* the Respondent State to report to the Court, within six (6) months from the date of notification of this Judgment, on the on the implementation of item (viii) and (ix) of this operative part and every six (6) months thereafter until the Court considers that there has been full implementation thereof.

On the request for provisional measures

- xi. *Finds* that the request for provisional measures is moot.

On costs

- xii. *Orders* that each Party shall bear its own costs.

Diarra & Ors v Mali (ruling) (2022) 6 AfCLR 443

Application 008/2018, *Fousseyni Diarra Salifou Coulibaly, Yacouba Sanogo, Issa Diakite, Kissima Bathily, Siriman Macalou, Abdoulaye Traore, Moctar Gueye, Awa Cisse, and Oumar Keita v Republic of Mali*

Ruling, 22 September 2022. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM and NTSEBEZA

Recused under Article 22: SACKO

The Applicants are all nationals of the Respondent State and former laboratory assistants employed by the Respondent State. The Applicants brought this Application, alleging that the Respondent State violated their human rights in relation to the process leading to their retrenchment. Upholding the Respondent State's objection, the Court held that the Applicants had not exhausted local remedies. Accordingly, the Court declared the Application inadmissible.

Admissibility (exhaustion of local remedies, 34-42)

I. The Parties

1. Mr. Fousseyni Diarra and nine (9) others¹ (hereinafter referred to as "the Applicants") are all Malian nationals and former laboratory assistants in the mineral testing laboratory (hereinafter referred to as "ANALABS Mali SARL"). They allege that their rights were violated in connection with the procedure in relation to their retrenchment.
2. The Application is filed against the Republic of Mali (hereinafter "the Respondent State"), which became a party to the African Charter on Human and Peoples' Rights (hereinafter "the Charter") on 21 October 1986 and to the Protocol on 20 June 2000. The Respondent State also deposited, on 19 February 2010, the Declaration provided for in Article 34(6) of the Protocol by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations (NGOs).

¹ Salifou Coulibaly, Yacouba Sanogo, Issa Diakite, Kissima Bathily, Siriman Macalou, Abdoulaye Traore, Moctar Gueye, Awa Cisse, Oumar Keita.

II. Subject of the Application

A. Facts of the matter

3. The Applicants allege that ANALABS Mali SARL specializes in testing for gold content through the use of chemicals. According to the Applicants, blood tests should be carried out periodically to monitor the blood lead levels of employees. They further aver that these blood tests were not carried out regularly as some employees had gone more than two years without being tested due to negligence on the part of the company's management. They also affirm that for this reason some former workers started to feel unwell due to lack of effective protection.
4. They further aver that they were retrenched on 29 January 2009, for economic reasons, without any support and without medical assistance, in violation of all the legal and regulatory provisions under the mines collective agreement.
5. Later, the Applicants sued ANALABS Mali SARL before the Kayes Labour Court on 13 February 2012. By Decision No 017 JGT 12 of 29 March 2012, the said Court ordered ANALABS Mali SARL to carry out the lead test or be liable to a penalty of Two Hundred Thousand (200,000) CFA francs per day of delay (see paragraph 37). This decision was confirmed by Judgment No 7 of 4 April 2013 rendered by the Social Division of the Kayes Appeal Court. The Applicants again filed a new case before the Kayes Appeal Court seeking to obtain payment of the provisional fine imposed by the aforementioned Judgment No 017 JGT 12 of 29 March 2012. In a penalty enforcement hearing, the President of the said Court, by Order No 9 dated 31 July 2013, granted their request and ordered ANALABS Mali SARL to pay them an amount of Eighty-Six Million Two Hundred Thousand CFA francs (86,200,000).
6. Following appeal by ANALABS MALI SARL, the Social Division of the Kayes Appeal Court, by its Judgment No 15 of 26 August 2013 set aside the said order on the ground that there was no need for the penalty to be paid, and declared that it lacked jurisdiction to rule on the request relating to the defreezing of assets submitted by the Company and referred it to the civil Judge of Kayes.

B. Alleged violations

7. The Applicants aver that the unjustified delay in the hearing of the

case constitutes a violation of their rights under Articles 7(1)² and 26 of the Charter, 2(3) and 14 of the International Covenant on Civil and Political Rights (the ICCPR).

8. The Applicants submit that the ANALABS Mali SARL refuses to execute the decision of the Court of Kayes ordering them to pay the Applicants an amount of Two Hundred Thousand CFA francs (200,000) per day of delay for not having undertaken the lead test. As the company did not comply, the amount of the fine is Seventy-Eight Million Six Hundred and Seventy-One Thousand Eight Hundred and Forty (78,671,840) CFA francs.

III. Summary of the Procedure before the Court

9. The Application was filed on 20 February 2018. On 9 August 2018, the Application and submissions on reparations were served on the Respondent State.
10. All pleadings were filed within the time limits set by the Court and duly notified to the other Party.
11. Pleadings were closed on 12 April 2019 and the Parties were duly notified.

IV. Prayers of the Parties

12. The Applicants pray the Court to:
 - i. Declare that it has jurisdiction;
 - ii. Declare the Application admissible and well-founded;
 - iii. Enforce court decisions and restore the rights of the former workers in question;
 - iv. Order the Respondent State to execute Decision No 017/JGT 12 of 29 March 2012 in accordance with *res judicata* or be fined Four Million (4,000,000) CFA FRANCS per day of delay to be paid to each worker;
 - v. Order Two Hundred Million (200,000,000 FCFA) to be paid as damages to the ten former workers for the harm caused;
 - vi. Pay a cash amount of Seventy-Eight Million Six Hundred and Seventy-One Thousand Eight Hundred and Forty (78,671,840 FCFA) to the Applicants under the authority of *res judicata*;
 - vii. Order an exit medical examination of the former workers in a neutral clinic at the expense of the Respondent State, the issuance of a medical certificate, as well as the lead tests;

2 Article 7(1)(d) of the Charter.

- viii. Order provisional enforcement of the decision to be taken on half of the rights.
- 13.** In their Reply, the Applicants pray the Court to order the Respondent State to take the following measures:
 - i. Bear the costs of the proceedings to the tune of Three Million (3,000,000) CFA francs;
 - ii. Pay the costs of the lawyer's round-trip transportation and accommodation to the tune of Four Million (4,000,000) CFA francs, that is, a total of Seven Million (7,000,000) CFA francs in respect of cost of proceedings, coverage and round-trip transportation;
- 14.** For its part, the Respondent State prays the Court to:
 - i. Declare the Application inadmissible in form and at most unfounded on the merits and dismiss the Applicants in all their prayers;
 - ii. Find that the Respondent State did not violate Article 7(1) of the Charter;
 - iii. Find that the Respondent State did not violate Article 26 of the Charter;
 - iv. Find that the Respondent State did not violate Article 2(3) of the International Covenant on Civil and Political Rights;
 - v. Find that the Respondent State did not violate Article 14 of the International Covenant on Civil and Political Rights;
 - vi. Declare that the Respondent State did not commit any prejudicial acts in relation to the Applicants and dismiss all their prayers;
 - vii. Declare that Judgment No 15 of 26 August 2013 of the Kayes Appeal overturning the said order has put an end to the Applicants' hopes insofar as it has become final, in the absence of the Applicants filing a cassation appeal against the said judgment;
 - viii. Find that the Applicants have not produced proof of prejudicial acts they suffered and the causal link of the prejudice,
 - ix. Dismiss the Applicants' other request as unfounded;
 - x. Afford the Respondent State the full benefit of its submissions.

V. Jurisdiction

- 15.** Under Article 3 of the Protocol:
 - 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
 - 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
- 16.** Rule 49(1) of the Rules provides: "[T]he Court shall conduct preliminary examination of its jurisdiction ... in accordance with

the Charter, the Protocol and these Rules “.³

17. The Court notes that the Respondent State does not raise any objection based on jurisdiction. Nevertheless, the Court must, on its own initiative, satisfy itself that it has the material, personal, temporal and territorial jurisdiction to hear the Application.

18. Having found no evidence on record that it lacks jurisdiction, the Court finds that it has:
 - i. Personal jurisdiction, insofar as the Respondent State is a party to the Protocol and has deposited the Declaration provided for in Article 34(6) of the Protocol, which allows individuals to bring cases directly before it, pursuant to Article 5(3) of the Protocol
 - ii. Material jurisdiction insofar as the Applicants allege violations of Articles 7(1) and 26 of the Charter, the right to be tried in a timely manner provided for in Articles 2(3) and 14 of the ICCPR,⁴ these being human rights instruments ratified by the Respondent State, which the Court can interpret and apply, in accordance with Article 3 of the Protocol
 - iii. Temporal jurisdiction, insofar as the alleged violations were committed after the entry into force of the above-mentioned instruments, in relation to the Respondent State.
 - iv. Territorial jurisdiction, insofar as the acts occurred in the territory of the Respondent State, a State Party to the Protocol.
19. Based the foregoing, the Court finds that it has jurisdiction to hear the present Application.

VI. Admissibility

20. Under Article 6(2) of the Protocol, “[t]he Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter.”
21. In accordance with Rule 50(1) of the Rules of Court,⁵ “[t]he The Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2)

3 Rule 39(1) of the Rules of Court of 2 June 2010.

4 The Respondent State became a Party to the ICCPR on 16 July 1974.

5 Rule 40 of the Rules of Court of 2 June 2010.

of the Protocol and these Rules”.

- 22.** Rule 50(2) of the Rules, which is essentially restates the provisions of Article 56 of the Charter, provides as follows:

Applications filed before the Court shall comply with all of the following conditions:

- a. Indicate their authors even if the latter request anonymity,
- b. Are compatible with the Constitutive Act of the African Union and with the Charter,
- c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union,
- d. Are not based exclusively on news disseminated through the mass media,
- e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
- f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date the Court is seized with the matter, and
- g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the Charter.

- 23.** The Respondent State raises an objection based non-exhaustion of local remedies. The Court will therefore examine this objection (a) before ruling, if necessary, (b) on the other admissibility requirements.

A. Objection based on non-exhaustion of local remedies

- 24.** The Respondent State submits that while the Applicants vaguely indicate the violations of their rights (only Articles 7(1) and 26 of the Charter and Articles 2(3) and 14 of the ICCPR and the measures and injunctions sought are cited), they do not provide evidence of the exhaustion of local remedies. It submits that the Applicants can in no way claim to have exhausted all local remedies as required by Rule 34(4) of the Rules of Court and that, consequently, the Court will not fail to find that the Applicants have violated the said Rule and will consequently declare the Application inadmissible in form.

- 25.** The Respondent State considers that it is constant that the provisional execution of the fine of Two Hundred Thousand (200,000) FCFA per day of delay, is of right because the judgment which ordered it is final. However, the Applicants have not proven that ANALABS Mali SARL and the Respondent State failed comply with the court decision, as the beneficiaries have made

- no attempt to enforce the judgment.
26. The Respondent State points out that, on the contrary, documents attached to the Application by the Applicants, namely, copy of service of a certificate of no contest, a copy of the certificate of no appeal, prove sufficiently that the latter voluntarily refrained from exercising the cassation appeal remedy against Judgment No 15 of 26 August 2013 of the Kayes Appeal Court setting aside Order No 9 of the President of the Labour Court of Kayes awarding them a provisional cash payment in the amount of Eighty-Six Million Two Hundred Thousand (86,200,000) FCFA.
 27. The Respondent State contends that the Applicants cannot deny that the Code of Civil Procedure of the Respondent State provided them with the cassation appeal remedy of appeal against the said judgment. It contends that the Applicants refrained from filing a cassation appeal against the judgment of the Kayes Appeal Court and that the Respondent State could not be blamed for this.
 28. The Respondent State submits that in reality, the former workers of ANALABS Mali SARL were only concerned with obtaining the payment of the fine imposed by the Tribunal, showing little interest in taking the lead test ordered by the Tribunal, contrary to what they would have this Court believe. Also, having voluntarily refrained from exhausting all the local remedies available to them under the Code of Civil Procedure of the Respondent State, the Applicants are ill-advised to bring their case before this Court.

29. The Applicants consider that once the rights of one or more nationals of a State signatory to the Charter are violated, it is for the Court to assess and establish the law, that there is indeed evidence that the rights of the Applicants have been blithely violated by the Respondent State and that there is clear and unambiguous evidence that it is the Respondent State that halted the implementation of a decision of the Kayes Court with the complicity of ANALABS to harm the former workers.
30. The Applicants consider that the Respondent State's arguments lacked legal basis insofar as the judgments of the Appeal Court are enforceable. This is especially so since a certificate of non-appeal was issued by the Registrar on 18 September 2013 and attached to the docket thereby proving sufficiently that ANALABS MALI SARL was convicted but never complied with the judgment.

Another certificate of non-appeal was issued on 19 May 2014 by the registrar of the Kayes Appeal Court showing that a certificate of no appeal was filed against the judgment within the legal time limits. The two certificates of non-appeal confirm that the Applicants made no effort to obtain the payment of the fine.

31. The Applicants contend that refraining from obtaining the payment of a fine imposed by a judgment is a matter for the Court to assess in terms of the admissibility of the case, hence the admissibility of the Applicants' Application. They further contend that: "[M]ultinational enterprises (MNEs) must respect the internationally recognized human rights of those affected by their activities, they must contribute to economic, environmental and social progress with a view to achieving sustainable development". They consider that the States must watch over the companies to ensure strict respect of laws and texts.
32. The Applicants reproach the Respondent State for its refusal to submit to court decisions that are favourable to them, in particular, Judgment No 017/JGT/12 of 12 March 2012 of the Kayes Court and confirmatory Judgment No 7 of 4 April 2013 of the Kayes Appeal Court, which ordered ANALABS Mali SARL to have its employees take the lead test or be liable for a fine of Two Hundred Thousand (200,000) CFA francs per day of delay.
33. They consider that States must ensure strict compliance with laws and regulations by companies and that the Respondent State must take responsibility for these grave human rights violations, that is, an injunction of a court decision.

34. The Court recalls that pursuant to Article 56(5) of the Charter and Rule 50(2)(e) of the Rules, the local remedies to be exhausted are ordinary judicial remedies unless the proceedings in respect of those remedies are unduly prolonged.
35. The Court underlines that the local remedies to be exhausted are those of a judicial nature, which must be available, that is, they must be available to the applicants without impediment, effective and satisfactory in the sense that they are "found satisfactory by

the complainant or are capable of redressing the complaint “.⁶

36. The question to be decided is whether there is an effective and satisfactory remedy available to the Applicants in the Respondent State’s judicial system.
37. The Court notes that following a summons served on ANALABS Mali SARL to appear before the Labour Court of Kayes, on 29 March 2012, the said Court, by Judgment No 17, dismissed the Applicants’ request for gratuity and ordered ANALABS Mali SARL to have the Applicants take a lead test or be liable for a fine of (200,000) CFA Francs for each day of delay, from the notification of the decision.
38. Subsequently, ANALBS filed a first appeal No 18/RG dated 24 May 2012 before the Social Chamber of the Court of Appeal of Kayes against Judgment No 17 of 29 March 2012. The said chamber, by Judgment No 7 of 4 April 2012 dismissed ANALABS Mali SARL’s appeal as unfounded and confirmed the judgment of the labour court in all its provisions.
39. Next, the Applicants again filed a new application with the Kayes Labour Court seeking payment of the provisional fine imposed by Judgment No 17 JGT 12 of 29 March 2012. The President of the said Kayes Labour Court, by Ordinance No 9 dated 31 July 2013, granted their request by ordering ANALABS Mali SARL to pay the Applicants the sum of Eighty-Six Million Two Hundred Thousand (86,200,000) CFA francs.
40. Later, by Appeal No 14 of 1 August 2013, ANALABS Mali SARL appealed Ordinance No 9 of 31 July 2013 issued by the President of the Kayes Labour Court. The Kayes Appeal Court, by its Judgment No 15 of 26 August 2013, set aside the said order on the ground that there was no need to pay the fine and declared that it lacked jurisdiction rule on the company’s request for defreezing of assets.
41. The Court notes that the Applicants had the possibility of filing a cassation appeal before the Supreme Court against Judgment No 15 of the Social Division of the Kayes Appeal Court rendered on 26 August 2013.⁷ In accordance with Article L217 of Act No 92-020 of 23 September 1992 of the Labour Code of the Respondent State: “The Supreme Court shall hear cassation appeals against final

6 *Lohé Issa Konaté v Burkina Faso*, Judgment (merits) (5 December 2014); 1 AfCLR 314, § 108.

7 See *Moussa Kanté and thirty-nine (39) others v Republic of Mali*. ACHPR, Application No 06/2019, Judgment of 25 June 2021§ 35; *Former SOMADEX workers v Republic of Mali*, ACtHPR, Application No 06/2018, Judgment of 2 December 2021, §54.

judgements and judgements of the Appeal Court. Appeals shall be lodged and heard in accordance with the forms and conditions laid down by the laws on the organization and procedure of the Supreme Court.” They submitted a certificate of non-appeal, which is proof that they had voluntarily abandoned this remedy. Moreover, the Appeal Court referred them back to the civil court to continue their action.

42. Based on the foregoing, the Court upholds the objection based on non-exhaustion of local remedies and finds that the Application does not meet the requirement of Articles 56(5) of the Charter and Rule 50(2)(e) of the Rules.⁸

B. Other admissibility requirements

43. Having found that the Application does not meet the requirement of Rule 50(2)(e) of the Rules, the Court need not rule on the admissibility requirements under Article 56(1), (2), (4), (6) and (7) of the Charter and Rule 50(2)(a), (b), (d), (f) and (g) of the Rules, insofar as the admissibility requirements are cumulative. Therefore, if one requirement is not met, the Application is inadmissible.⁹
44. In view of the foregoing, the Court declares the Application inadmissible.

VII. Costs

45. The Court notes that the Parties have each requested the Court to order the other Party to bear the costs. However, Rule 32(2) of the Rules¹⁰ provides as follows: “[u]nless otherwise decided by the Court, each party shall bear its own costs, if any “.
46. In view of the circumstances of this case, the Court decides that each Party shall bear its own costs.

8 Rule 46(5) of the Rules of Court of 2 June 2010.

9 *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (jurisdiction and admissibility) (21 March 2018), 2 AfCLR 246, § 63; *Rutabingwa Chrysanthé v Republic of Rwanda* (jurisdiction and admissibility) (11 May 2018), 2 AfCLR 361, § 48; *Collectif des anciens travailleurs ALS v Republic of Mali*, ACtHPR, Application No 042/2015, Judgment of 28 March 2019 (jurisdiction and admissibility), § 39.

10 Rule 30(2) of the Rules of Court of 2 June 2010.

VIII. Operative part

47. For these reasons,

The Court

Unanimously,

On jurisdiction

i. *Declares* that it has jurisdiction.

On admissibility

ii. *Upholds* the objection based on admissibility for non-exhaustion of local remedies;

iii. *Declares* the Application inadmissible.

On costs

iv. *Orders* that each Party shall bear its own costs.

Dibgolongo v Burkina Faso (ruling) (2022) 6 AfCLR 454

Application 013/2019, *Ulrich Sergio Dibgolongo v Burkina Faso*

Ruling, 22 September 2022. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

The Applicant, a citizen of the Respondent State, was tried, convicted, and sentenced to prison for banditry, illegal possession of firearms and theft. The Applicant brought this Application alleging that the proceedings before the domestic courts of the Respondent State violated his human rights. Upholding the objections of the Respondent State, the Court held that the Applicant had not exhausted available local remedies. The Court accordingly declared the Application inadmissible.

Jurisdiction (material jurisdiction, 21-23)

Admissibility (exhaustion of local remedies, 35-44)

I. The Parties

1. Ulrich Sergio Dibgolongo (hereinafter, “the Applicant”), is a national of Burkina Faso was sentenced to fifteen (15) years’ imprisonment for acts of banditry, illegal possession of firearms and theft. He alleges a violation of his rights to a fair trial during the proceedings before domestic courts.
2. The Application is filed against Burkina Faso (hereinafter, “the Respondent State”) which became a Party to the African Charter on Human and Peoples’ Rights (hereinafter, “the Charter”) on 21 October 1986 and to the Protocol to the Charter on the Establishment of an African Court on Human and Peoples’ Rights (hereinafter, “the Protocol”) on 25 January 2004. On 28 July 1998, the Respondent State deposited the declaration provided for in Article 34(6) of the Protocol (hereinafter “the Declaration”), by which it accepted the jurisdiction of the Court to receive applications from individuals and non-governmental organisations.

II. Subject of the Application

A. Facts of the matter

3. It emerges from the record that the Applicant was arrested in connection with an armed robbery incident that occurred on the night of 7 to 8 December 2014, which resulted in the death of one of the suspects in the armed robbery.
4. Following preliminary investigations, the Applicant was arraigned before the Correctional Chamber of the *Tribunal de Grande Instance* of Ouagadougou by the Prosecutor of Faso. At the hearing, he admitted having participated in the commission of the offence of theft.
5. By judgment No 120-1 of 2 March 2015, he was found guilty of the offences of banditry, illegal possession of firearms and theft and sentenced to fifteen (15) years of imprisonment including ten (10) years without parole.
6. The Applicant avers that on 5 March 2015 he appealed to the Correctional Chamber of the Ouagadougou Court of Appeal, which, by Judgment No 49 of 22 April 2016, upheld the judgment handed down by the Correctional Chamber of the Ouagadougou High Court.

B. Alleged violations

7. The Applicant alleges:
 - i. A violation of the right to a fair trial, protected by Article 7 of the Charter;
 - ii. A violation of the right to an effective remedy guaranteed by Article 8 of the Universal Declaration of Human Rights (UDHR);
 - iii. A violation of the right of access to the judge and to justice protected by Article 10 of the UDHR and Article 7 of the Charter;
 - iv. A violation of the obligation to state reasons in criminal proceedings as provided for in Article 6 *in fine* of Law No 010/93/ADP pertaining to the organisation of the judiciary in Burkina Faso;
 - v. A violation of the right to protection of the dignity of a person imprisoned as provided for in Article 10(1) of the International Covenant on Civil and Political Rights (ICCPR);
 - vi. A violation of the right to equality of arms, protected by Article 7 of the Charter;
 - vii. A violation of the adversarial principle, protected by Article 7 of the Charter;
 - viii. A violation of the principle of proportionality of punishment.

III. Summary of the Procedure before the Court

8. The Application was received at the Registry on 23 April 2019 and served on the Respondent State.
9. The Parties filed their submissions within the time limits prescribed by the Court.
10. Pleadings were closed on 30 June 2022 and the Parties were duly notified.

IV. Prayers of the Parties

11. The Applicant prays the Court to:
 - i. Order the President of the Republic to grant him a presidential pardon;
 - ii. Order the due and proper commutation of the fifteen (15)-year-prison sentence to a shorter prison term;
 - iii. Order parole;
 - iv. Order an out-of-court settlement;
 - v. Order financial compensation for the damage suffered as a result of the unfair court decisions against him.
12. The Respondent State prays the Court to:
 - i. Declare that it has partial jurisdiction to order the measures requested by the Applicant;
 - ii. Declare the Application inadmissible for failure to exhaust local remedies;
 - iii. Dismiss the Application as unfounded.

V. Jurisdiction

13. The Court notes that Article 3(1) of the Protocol provides as follows:
 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
14. Under Rule 49(1) of the Rules of Court, “The Court shall conduct preliminary examination of its jurisdiction and the admissibility of an Application in accordance with the Charter, the Protocol and these Rules “.
15. On the basis of the above-mentioned provisions, the Court must, in each application, conduct an assessment of its jurisdiction and

rule on objections thereto, if any.

16. The Court notes that the Respondent State raises an objection to the Court's material jurisdiction. The Court will, therefore, (a) first rule on this objection, before examining (b) the other aspects of its jurisdiction, if necessary.

A. Objection to material jurisdiction

17. In support of its objection, the Respondent State alleges that the Court lacks jurisdiction to grant the following measures: (i) a presidential pardon; (ii) the proper commutation of the fifteen (15) year prison sentence to a shorter term of imprisonment; and (iii) parole.
18. The Respondent State asserts that these measures fall within the discretionary prerogative powers of the President of the Republic and a function of the sovereignty of domestic courts.
19. The Applicant did not make any submission in relation to the Court's material jurisdiction.

20. The Court notes that under Article 3(1) of the Protocol, it has jurisdiction to hear "all cases brought before it insofar as they relate to alleged violations of the Charter, the Protocol and any other human rights instrument ratified by the Respondent State".
21. The Court considers that for it to have material jurisdiction, it is sufficient that the rights allegedly violated are protected by the Charter or by any other human rights instrument ratified by the State concerned.¹
22. The Court notes that the instant Application relates to allegations of violations of the rights protected by Articles 7 of the Charter, 8 and 10 of the UDHR, and 10(1) of the ICCPR.²
23. Based on the foregoing, the Court dismisses the objection to its material jurisdiction and finds that it has material jurisdiction to hear the instant Application.

1 *Franck David Omary and Others v United Republic of Tanzania* (28 March 2014) (Admissibility) 1 AfCLR 358, § 74; *Peter Joseph Chacha v United Republic of Tanzania* (28 March 2014) (Admissibility) 1 AfCLR 398, § 118.

2 The Respondent State ratified the Covenant on 4 January 1999.

B. Other aspects of jurisdiction

24. Noting that there is nothing on record indicating that there is a contest in respect of the other aspect of its jurisdiction, the Court finds that it has:
 - i. Personal jurisdiction, insofar as the Respondent State is a party to the Charter, the Protocol and has deposited the Declaration.
 - ii. Temporal jurisdiction, insofar as the alleged violations were committed, in relation to the Respondent State, after the entry into force of the instruments in question.
 - iii. Territorial jurisdiction, insofar as the facts of the matter and the alleged violations took place in the territory of the Respondent State.
25. Based on the foregoing, the Court finds that it has jurisdiction to consider the present Application.

VI. Admissibility

26. Article 6(2) of the Protocol provides that: “The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.
27. In accordance with Rule 50(1) of the Rules of Court, “ The Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules “.
28. Rule 50(2) of the Rules of Procedure, which in substance restates Article 56 of the Charter, provides:

Applications filed before the Court shall comply with all of the following conditions:

 - a. Indicate their authors even if the latter request anonymity;
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter;
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
 - d. Are not based exclusively on news disseminated through the mass media;
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 - f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter; and
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the

provisions of the Charter.

29. The Court notes that the Respondent State raises an objection based on non-exhaustion of local remedies. The Court will therefore rule on (a) this objection, before examining (b) the other aspects of admissibility, if necessary.

A. Objection based on non-exhaustion of local remedies

30. The Respondent State submits that the Application does not meet the requirement of exhaustion of local remedies, since the Applicant did not file a cassation appeal against the above-mentioned judgment of the Criminal Division of the Court of Appeal of Ouagadougou. According to the Respondent State, since the Applicant was assisted by counsel before the Correctional Chamber of the Court of Appeal, he cannot invoke the lack of respect for the right to appeal before the Cassation Court. The Respondent State further refutes the argument that the appeal in cassation is ineffective, a claim that the Applicant has not proved.
31. The Respondent State further contends that the Applicant did not exercise the remedy before the Constitutional Council which, since the promulgation of the constitutional law of 5 November 2015, can be seized by any citizen directly or through an exceptional mechanism based on unconstitutionality. The Respondent State submits that the said court has jurisdiction to hear allegations of violations of human rights as guaranteed by the Constitution and international legal instruments ratified by Burkina Faso.
32. Finally, the Respondent State submits that, before bringing his case before this Court, the Applicant did not address to the Burkinabe authorities either a request for conditional release or a request for a presidential pardon.

33. The Applicant, for his part, maintains that he was not aware of the remedy mentioned by the Respondent State, as he was not assisted by a lawyer “*in limine litis*”. He further avers that even if he had exercised it, the said remedy would have been unsuccessful in the current legal and judicial dispensation of the Respondent State.

34. The Court recalls that, in accordance with Article 56(5) of the Charter and Rule 50(2)(e) of the Rules of Court, applications must be made after the exhaustion of local remedies, if any, unless it is clear that the proceedings in respect of those remedies are being unduly prolonged.³
35. The Court underlines that the local remedies to be exhausted are those of a judicial nature.⁴ The remedy must be available, that is, they must be available to the applicant without hindrance, be effective and satisfactory in the sense that they are “found satisfactory by the complainant or is capable of redressing the complaint”.⁵
36. The Court notes that in the present case the Applicant did not file a cassation appeal. To justify this inaction, the Applicant advances two (2) arguments, namely ignorance of the cassation appeal remedy and the ineffectiveness of the said remedy.
37. With regard to ignorance for the cassation appeal remedy, the records show that the Applicant was assisted by counsel before the Criminal Division of the Court of Appeal. Article 251-13 of the Code of Criminal Procedure of Burkina Faso defines assistance as “the lawyer’s mission entailing the power and duty to advise the person arrested and to prepare his defence”.
38. The Court recalls the general principle of law that “ignorance of the law is not an excuse”. In any event, the Applicant cannot rightly rely on ignorance of the existence of such a remedy.
39. It emerges from the foregoing that the Applicant was given the necessary assistance which clearly enabled him to be apprised of the functioning of the national judicial system, including his right to lodge a cassation appeal. The argument that he did not have access to that remedy cannot therefore succeed in the present case.
40. With regard to the argument that a cassation appeal is ineffective, the Court recalls that the effectiveness of a remedy must be

3 *Lohé Issa Konaté v Republic of Faso* (merits) (5 December 2014) 1 AfCLR 314, § 77.

4 *Tanganyika Law Society, the Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania* (merits) (14 June 2013) 1 AfCLR 34, § 31.

5 *Norbert Zongo and Others v Burkina Faso* (merits) (5 December 2014) 1 AfCLR 219, § 68; See also *Konaté v Burkina Faso* (merits), § 108.

understood as its ability to remedy the situation complained of.⁶

41. In this respect, the Court recalls, with reference to its constant jurisprudence, that the cassation appeal is not an ineffective remedy since it is likely, in certain cases, to change the substance of the contested decision; and that without having exercised this remedy, one could not prejudge the outcome of the related proceedings.⁷
42. The Court observes that in the Burkina Faso judicial system, a cassation appeal is a remedy which seeks to have a final judgment or ruling set aside on the grounds of a breach of the law.⁸ Consequently, it is a remedy that can bring about a change in the Applicant's situation, on the merits of the case, if it finds violations of the law in relation to the way in which the case was handled by the court whose judgment is being challenged. As the Applicant did not exercise this remedy in the present case, he did not comply with the requirement of exhaustion of local remedies.
43. The Court therefore upholds the Respondent State's objection based on the Applicant's failure to exercise the cassation appeal remedy.
44. Having concluded that the remedy before the Court of Cassation was not exhausted, and without the need to examine the Respondent State's objection in relation to the remedy before the Constitutional Council, this Court finds that in the present case local remedies were not exhausted as required by Rule 50(2)(e) of the Rules.

B. Other conditions of admissibility

45. Having found that the Application does not meet the condition of Rule 50(2)(e) of the Rules, the Court does not have to rule on the admissibility conditions set out in Article 56(1), (2), (4), (6), and (7) of the Charter as restated in Rule 50(2)(a)(b)(d)(f) and (g) of

6 *Norbert Zongo and Others v Burkina Faso* (Preliminary Objections) (28 March 2014), 1 AfCLR 197, § 68.

7 *Moussa Kanté and Others v Republic of Mali*, ACtHPR, Application No 006/2019, Judgment of 25 June 2021 (jurisdiction and admissibility), §§ 30-36; *Komi Koutché v Republic of Benin*, ACtHPR, Application No 020/2019, Judgment of 25 June 2021 (jurisdiction and admissibility), §§ 91-94; *Sébastien Germain Ajavon v Republic of Benin*, ACtHPR, Application No 027/2020, Judgment of 2 December 2021 (jurisdiction and admissibility), §§ 72-83; *Norbert Zongo et al v Burkina Faso* (merits) (28 March 2014) 1 AfCLR 219, § 70.

8 Article 421 of the 1968 Code of Criminal Procedure.

the Rules, insofar as the admissibility conditions are cumulative.⁹ Therefore, if one condition is not met, the entire Application is inadmissible.

46. Accordingly, the Court declares the Application inadmissible and dismisses it.

VII. Costs

47. None of the Parties made any submissions on costs.

48. Rule 32(2) of the Rules¹⁰ provides that “[u]nless otherwise decided by the Court, each party shall bear its own costs, if any “.

49. Having regard to the above provision, the Court decides that each Party shall bear its own costs.

VIII. Operative part

50. For these reasons,

The Court

Unanimously,

On jurisdiction

- i. *Dismisses* the objection to its jurisdiction;
- ii. *Declares* that it has jurisdiction.

On admissibility

- iii. *Upholds* the objection based on non-exhaustion of local remedies;
- iv. *Declares* the Application inadmissible.

On costs

- v. *Orders* that each Party shall bear its own costs.

9 *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (jurisdiction and admissibility) (21 March 2018), 2 AfCLR 237, § 63; *Rutabingwa Chrysanthé v Republic of Rwanda* (jurisdiction and admissibility) (11 May 2018), 2 AfCLR 361, § 48; *Collectif des anciens travailleurs ALS v Republic of Mali*, ACTHPR, Application No 042/2015, Judgment of 28 March 2019 (jurisdiction and admissibility), § 39.

10 Rule 30(2) of the Rules of 2 June 2010.

Fundumu v Tanzania (ruling) (2022) 6 AfCLR 463

Application 016/2018, *Hussein Ally Fundumu v United Republic of Tanzania*

Ruling, 22 September 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA, SACKO and ADJEI

Recused under Article 22: ABOUD

The Applicant, a citizen of the Respondent State, was serving a 30-year prison term for armed robbery when he filed this Application. He alleged that the proceedings before the domestic courts, including his trial, conviction and unsuccessful appeal, were in violation of some of his Charter protected rights. In this ruling, the Court held that the Application was inadmissible because it was not filed within a reasonable time.

Jurisdiction (material jurisdiction, 22-26; temporal jurisdiction, 29-31)

Admissibility (exhaustion of local remedies, 47-49; filing within a reasonable time, 54-60)

I. The Parties

1. Hussein Ally Fundumu (hereinafter, “the Applicant”), is a national of the United Republic of Tanzania, who at the time of filing the Application, was serving a sentence of thirty (30) years imprisonment at Uyui Prison, Tabora Region, following a conviction for the offence of armed robbery. He alleges the violation of his rights during the proceedings in the domestic courts.
2. The Application is filed against the United Republic of Tanzania (hereinafter, “the Respondent State”), which became a Party to the African Charter on Human and Peoples’ Rights (hereinafter, “the Charter”) on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter, “the Declaration”), through which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration. The Court held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect, that is, one year after its deposit,

which is on 22 November 2020.¹

II. Subject of the Application

A. Facts of the matter

3. It emerges from the Application, that on 1 August 2004, in Misha village in the Tabora Region, the Applicant together with two others not before the Court allegedly stole a mattress, a bicycle, a bag of clothing and a *machete* belonging to Issa Khalfani and Asha Said. In the course of the robbery, the Applicant with his co-accused assaulted the victims with a *machete* wounding them badly and discharged a fire arm as they fled the scene of the crime. The assailants were arrested and charged with armed robbery and tried at the District Court of Tabora, on 26 May 2005. The Applicant was sentenced to thirty (30) years' imprisonment, while the other two co-accused were acquitted.
4. The Applicant being aggrieved by the decision of the District Court of Tabora, filed an appeal before the High Court of Tanzania at Tabora, which on 31 August 2007, dismissed the appeal for lack of merit and upheld the decision of the District Court on the ground that the Applicant was clearly identified.
5. The Applicant being also dissatisfied with the decision of the High Court of Tanzania sitting in Tabora, filed an appeal before the Court of Appeal of Tanzania at Tabora. On 18 June 2011 the Court of Appeal dismissed the appeal on the ground that the doctrine of recent possession was correctly applied and upheld the decision of the High Court of Tanzania.

B. Alleged violations

6. The Applicant alleges the violation of the following:
 - a. The right to freedom from discrimination guaranteed under Article 2 of the Charter.
 - b. The right to equal protection of the law guaranteed under Article 3(1) of the Charter by denying him legal representation and to have his cause heard.
 - c. The right to a fair trial under Article 7(1)(c) of the Charter read together with Article 10(2) of the Protocol.

¹ *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application No 004/2015. Judgment of 26 June 2020 (merits and reparations) §§ 37-39.

III. Summary of the Procedure before the Court

7. The Application was filed before the Court on 10 May 2018 and served on the Respondent State on 14 June 2018.
8. The Parties filed their pleadings on the merits after several extensions of time by the Court.
9. Pleadings were closed on 1 June 2021 and the Parties were duly notified.

IV. Prayers of the Parties

10. The Applicant prays the Court to:
 - a. Protect all rights violated by the Respondent.
 - b. Declare the Application admissible.
 - c. Order reparations for the violations of rights found.
 - d. Quash the sentence and set him free.
11. The Respondent State prays for the following measures and orders in respect of the Court's jurisdiction and the admissibility of the Application:
 - a. This honourable court is not vested with jurisdiction to adjudicate over this Application;
 - b. The Application has not met the admissibility requirements stipulated in Article 56(5) and (6) of the Charter, Article 6(2) of the Protocol and Rule 40(5) and (6) of the Rules of the Court;
 - c. The Application be declared inadmissible;
 - d. The Application be dismissed in accordance with Rule 38 of the Rules of Court; and
 - e. The costs of this Application be borne by the Applicant.
12. In its Response on the merits of the Application, the Respondent State prayed for the following measures and orders:
 - a. The Respondent State has not violated the rights of the Applicant provided under Articles 3(2) and 7(1)(c) of the Charter;
 - b. The Application be dismissed for lack of merit;
 - c. The Applicant should not be granted reparations;
 - d. The Applicant should continue to serve his sentence in prison;
 - e. The Applicant's prayers be dismissed; and
 - f. The costs of this Application be borne by the Applicant.

V. Jurisdiction

13. The Court observes that Article 3 of the Protocol provides as follows:

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
14. The Court further observes that pursuant to Rule 49(1) of the Rules, it “shall conduct a preliminary examination of its jurisdiction [...] in accordance with the Charter, the Protocol and these Rules.”²
15. In view of the foregoing, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.
16. In the present Application, the Court notes that the Respondent State has raised objections to the Court’s temporal and material jurisdiction.

A. Objection to material jurisdiction

17. The Respondent State raises objections to the Court’s material jurisdiction on the grounds that it will be sitting as a court of first instance and as a Court of Appeal, should it adjudicate over matters already finalised by the highest Court of Respondent State, the Court of Appeal of Tanzania and prays the Application be dismissed.
18. It avers that the jurisdiction of this Court is provided for under Article 3 of the Protocol and Rule 26 of the Rules of the Court, which accords the Court only jurisdiction to deal with cases or disputes concerning the application and interpretation of the Charter, the Protocol and any other relevant human rights instrument ratified by the State concerned. Hence, the Court is not afforded with unlimited jurisdiction.
19. The Respondent State further avers that it is cognisant of the provisions of Article 27(1) of the Protocol, however the prayers being sought by the Applicant go beyond the jurisdiction and mandate of this Court, since the Applicant is seeking to be released from the custody. It avers that the Court does not have the power to order for the release of a duly convicted person by the Respondent State.
20. The Applicant submits that the Court’s material jurisdiction is established since the alleged violations are enshrined under the provisions of the Charter, the Universal Declaration of Human

2 Rule 39(1) of the Rules of Court, 2 June 2010.

Rights (UDHR) and the Respondent State's Constitution. The Applicant alleges that the acts of the Respondent State amount to the violation of the rights to equal protection before the law, right to have one's cause heard and right to a fair trial.

21. The Applicant further states that the Court has jurisdiction to hear all cases submitted to it alleging violation of rights in the Charter. The Applicant further avers that this Application falls into that category as it alleges violation of Article 3(1), (2) of the Charter and relied on the Court's jurisprudence in support of this assertion.³

22. The Court recalls that under Article 3(1) of the Protocol, it has jurisdiction to examine any application submitted to it, provided that the rights of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.⁴ The Court in *Alex Thomas v Tanzania*⁵ and *Wilfred Onyango Nganyi and Others v Tanzania*⁶ held that the substance of the complaint must relate to rights guaranteed by the Charter or any other human rights instrument ratified by the State concerned. It is not necessary that the rights alleged to have been violated are specified in the Application.
23. With regard to this Court sitting as a court of first instance, the Court observes that the alleged violations relating to the proceedings before the domestic courts are of rights provided for in the Charter, namely: the right to freedom from discrimination, right to equality before the law, right to representation and having

3 *Thomas Mjengi vs Republic* [1992] TZHC 18 (23 June 1992), Criminal Appeal No 19 of 1990 (unreported) and *Powell v Alabama* (1932) 287 U.S 45.

4 See, for instance, *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application No 028/2015, Judgment of 26 June 2020 (merits and reparations), § 18.

5 *Alex Thomas v Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 45.

6 *Wilfred Onyango Nganyi and Others v Tanzania* (merits) (18 March 2016) 1 AfCLR 507, §§ 57-58.

his cause heard and right to a fair trial.⁷

24. Consequently, the claim that the Court would be sitting as a court of first instance is dismissed.
25. With regard to the Court sitting as an appellate court, this Court recalls, its established jurisprudence, “that it is not an appellate body with respect to decisions of national courts”.⁸ However “... this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned.” In this regard, therefore it would not be sitting as an appellate court, if it were to examine the allegations by the Applicant. This claim is therefore dismissed.
26. As a consequence of the foregoing, the Court dismisses the Respondent State’s objection and finds that it has material jurisdiction to consider the present Application.

B. Objection to temporal jurisdiction

27. The Respondent State avers that the alleged violations raised by the Applicant are not ongoing and that the Applicant is “serving a lawful sentence for the commission of an offence as provided by a valid statute and as per the evidence on record”.

28. The Applicant did not respond on this issue.

29. In respect of its temporal jurisdiction, the Court notes that the

⁷ *Kennedy Ivan v United Republic of Tanzania* (merits) (28 September 2017) 3 AfCLR 48, §§ 20-22; *Armand Guehi v Tanzania* (merits and reparations) § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35.

⁸ *Ernest Francis Mtingwi v Malawi* (jurisdiction), § 14.

relevant dates, in relation to the Respondent State, are those of entry into force of the Charter and the Protocol as well as the date of depositing the Declaration under Article 34(6) of the Protocol.

30. In the instant case, the Court notes that the violations alleged by the Applicant are based on the judgments of the High Court and Court of Appeal rendered on 31 August 2007 and 18 June 2011, respectively, that is, after the Respondent State ratified the Charter and the Protocol, and deposited the Declaration. Furthermore, the alleged effects of the violations are continuing, as the Applicant remains convicted and is serving the 30-year imprisonment term imposed upon him by the High Court of Tabora on 26 May 2005, on the basis of what he considers an unfair process.⁹
31. Consequently, the Court holds that it has temporal jurisdiction to examine this Application and dismisses the Respondent State's objection accordingly.

C. Other aspects of jurisdiction

32. The Court notes that its personal and territorial jurisdiction are not contested by the Respondent State. Nonetheless, in line with Rule 49(1) of the Rules¹⁰ it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.
33. In relation to its personal jurisdiction, the Court recalls as indicated in paragraph 2 of the Ruling, that the Respondent State is a party to the Protocol and deposited the Declaration under Article 34(6) of the Protocol with the Chairperson of the African Union Commission. Subsequently, on 21 November 2019, it deposited an instrument withdrawing its Declaration.
34. The Court recalls its jurisprudence that the withdrawal of the Declaration does not apply retroactively and only takes effect one (1) year after the notice of such withdrawal has been deposited, in this case, on 22 November 2020.¹¹ This Application having been filed before the Respondent State deposited its notice of the withdrawal, is thus not affected by it. Consequently, the Court holds that it has personal jurisdiction.

9 *Tanganyika Law Society and Legal and Human Rights Center v United Republic of Tanzania* (merits) (14 June 2013) 1 AfCLR, § 84; *African Commission on Human and Peoples' Rights v Kenya* (merits) (26 May 2017) 2 AfCLR, § 65; *Kennedy Ivan v United Republic of Tanzania* (merits and reparations) (28 March 2019), 3 AfCLR, § 29 (ii).

10 Rule 39(1) of the Rules of Court, 2 June 2010.

11 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACTHPR, Application No 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 35-39.

35. As for its territorial jurisdiction, the Court notes that the violations alleged by the Applicant happened within the territory of the Respondent State. In the circumstances, the Court holds that its territorial jurisdiction is established.
36. In light of all the above, the Court holds that it has jurisdiction to determine the present Application.

VI. Admissibility

37. Pursuant to Article 6(2) of the Protocol, “the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter.”
38. In line with Rule 50(1) of the Rules, “the Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules.”¹²
39. The Court notes that Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

Applications filed before the Court shall comply with all of the following conditions:

 - a. Indicate their authors even if the latter request anonymity;
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter;
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
 - d. Are not based exclusively on news disseminated through the mass media;
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 - f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter; and
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of African Union or the provisions of the Charter.
40. The Respondent State raises objections to the admissibility of the Application, based on non-exhaustion of local remedies and

12 Rule 40 of the Rules of Court, 2 June 2010.

failure to file the Application within a reasonable time.

A. Objection based on non-exhaustion of local remedies

41. The Respondent State avers that the Applicant has not exhausted domestic remedies in respect of the violations that he is raising before this Court and never made an attempt to exhaust the same from the domestic courts, which is contrary to Article 56(5) of the Charter and Rule 40(5)¹³ of the Rules of Court. The Respondent State cites the Court and African Commission on Human and Peoples' Rights' jurisprudence in support of its submissions that since these claims are being raised before the Court for the first time, they are inadmissible.¹⁴
42. The Respondent State avers that the Applicant never made any attempt to exhaust the available remedies and to give it the opportunity to address his alleged grievances. Therefore, it is improper for the Applicant, at this stage, to raise matters, which he could have addressed within the national criminal justice system of the Respondent State. Additionally, that the Respondent State did not prolong the proceedings within its judicial system.
43. The Respondent State submits that the Applicant was made aware of his right to appeal by the trial court. Furthermore, it avers that the practice in the prisons is that a new prisoner is informed of his right to appeal and asked whether he wishes to file notice of intention to appeal. Subsequently, the prison authority records the response of the prisoner and forwards all correspondences of the prisoner to the relevant appellate court as provided under Order 449 of the Prison Standing Orders.
44. The Respondent State further refers to the Court's decision in *Peter Joseph Chacha v United Republic of Tanzania*¹⁵ and prays this Court to hold the same view that "the exception to the requirement of exhaustion of local remedies does not apply in this present case."
45. The Respondent State reiterates that legal remedies were available to the Applicant but instead he slept on his rights. For these reasons, the Applicant has failed to comply with the

13 Rule 50(2)(e) of the Rules of Court, 25 September 2020.

14 *Urban Mkandawire v Republic of Malawi*, ACtHPR, Application No 003/2011, Judgment of 13 March 2011 (jurisdiction & admissibility), §§ 38.1-38.2; *Peter Joseph Chacha v United Republic of Tanzania*, ACtHPR, Application No 003/2012, Judgment of 28 March 2014 (jurisdiction & admissibility), §§ 142-145 and African Commission on Human and Peoples' Rights' decision in *Article 19 versus Eritrea*.

15 Application No003/2012 at paragraph 148.

admissibility requirement under Article 56(5) of the Charter and Rule 40(5) of the Rules of the Court, therefore this Application should be declared inadmissible and dismissed.

46. The Applicant did not respond to this objection.

47. The Court observes that pursuant to Article 56(5) of the Charter, whose requirements are mirrored in Rule 50(2)(e) of the Rules, any Application filed before it shall fulfil the requirement of exhaustion of local remedies. The rule of exhaustion of local remedies aims at providing States with the opportunity to deal with human rights violations within their jurisdictions before an international human rights body is called upon to determine the State's responsibility for the same.¹⁶
48. In the instant case, the Court notes that the Applicant's appeal before the Court of Appeal, which is the highest judicial organ of the Respondent State, was determined when that Court rendered its judgment on 18 June 2011. In light of this, the Court, considers therefore, that the Respondent State had the opportunity to address the alleged violations arising from the Applicant's trial and appeals.
49. Consequently, the Court holds that the Applicant has exhausted local remedies as envisaged under Article 56(5) of the Charter and Rule 50(2)(e) of the Rules and therefore, it dismisses the Respondent State's objection.

B. Objection based on the failure to file the Application within a reasonable time

50. The Respondent State avers that the judgment of the Court of Appeal was delivered on 18 June 2011, whereas this Application was filed in this Court on 10 May 2018, which is a difference of "seven (7) years and six (6) months" from the date when the domestic courts determined the matter.
51. The Respondent State further avers that Article 56(6) of the Charter requires an application to be submitted to the Court "within

16 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.

a reasonable time from the time local remedies are exhausted". Furthermore, Rule 40(6) of the Rules¹⁷ permits the Court to set the date as the commencement of the time limit within which it shall be seized with the matter. Although, the Rules of the Court do not specify or define what amounts to reasonable time, this Court has held on several occasions that it shall consider the reasonableness of time on a case-by-case basis as it did in its decisions in *Beneficiaries of the late Norbert Zongo and Other v Burkina Faso*, and in *Mohamed Abubakar v United Republic of Tanzania*. The Respondent State concludes that in the present application a period of "seven (7) years and six (6) months" does not fall within the parameters of reasonable time.

52. In summation, the Respondent State avers that the overall issue of admissibility is that all admissibility requirements provided by Article 56(1)-(7) of the Charter and Rule 40(1)-(7) of the Rules of Court have to be met for an application to be deemed admissible. It refers to the Court's decision in *Mariam Kouma & Ousmane Diabate v Mali* where this Court held that: "...according to Article 56 of the Charter, the conditions of admissibility are cumulative and, as such, when one of them is not fulfilled, the Application cannot be admissible." Hence the Respondent State calls upon this Court not to admit the Application.
53. The Applicant did not respond to this objection.

54. The Court notes that neither the Charter nor the Rules specify the time within which Applications must be filed, after exhaustion of local remedies. Article 56(6) of the Charter and Rule 50(2)(f) of the Rules merely provide that Applications must be filed "...within reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter".
55. From the record before the Court, the Applicant exhausted local remedies on 18 June 2011, when the Court of Appeal dismissed the Applicant's appeal before the Court of Appeal of Tanzania at Tabora in Criminal Appeal No 426 of 2007. The Applicant then

17 Rule 50(2)(f) of the Rules of Court, 25 September 2020.

filed his Application before the Court on 10 June 2018.

56. The Court recalls its jurisprudence that: "...the reasonableness of the time frame for seizure depends on the specific circumstances of the case...".¹⁸ Some of the circumstances that the Court has taken into consideration include: imprisonment, being lay without the benefit of legal assistance,¹⁹ indigence, illiteracy, the recent establishment of the Court and lack of awareness of the existence of the Court.²⁰
57. This Court has previously held that it is not enough for Applicants to simply plead, for example, that they were incarcerated, are lay or indigent, to justify their failure to file an application within a reasonable period of time.²¹ As the Court has previously pointed out, even for lay, incarcerated or indigent applicants there is a duty for them to demonstrate how their personal situation prevented them from filing their applications before this Court in a timely manner.
58. In the instant Application, the Court observes that the judgment of the Court of Appeal in Criminal Appeal No 462 of 2007 was delivered on 18 June 2011. The Court notes that a period of six (6) years, ten (10) months and twenty-two (22) days elapsed between 18 June 2011 and 10 May 2018 when the Applicant filed the Application before this Court. The issue for determination, therefore, is whether the period that the Applicant took to file the Application before the Court is reasonable.
59. The Court recalls that even though the Applicant was, at the material time, incarcerated and restricted in his movements, he has not provided the Court with any arguments or evidence to demonstrate that his personal situation prevented him from filing the Application in a timelier manner.
60. In view of the foregoing, the Court finds that the filing of the Application six (6) years, ten (10) months and twenty-two (22) days after exhaustion of local remedies is not a reasonable time

18 *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v Burkina Faso* (merits) (24 June 2014) 1 AfCLR 219, § 92. See also *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 73.

19 *Alex Thomas v Tanzania* (merits), § 73; *Christopher Jonas v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 54; *Amir Ramadhani v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 83.

20 *Amir Ramadhani v Tanzania* (merits) § 50; *Christopher Jonas v Tanzania* (merits), § 54.

21 *Layford Makene v United Republic of Tanzania*, ACtHPR, Application No 028/2017 Ruling of 2 December 2021 (admissibility), § 48; *Rajabu Yusuph v United Republic of Tanzania*, ACtHPR, Application No 036/2017 Ruling of 24 March 2022 (admissibility), § 65.

within the meaning of Article 56(6) of the Charter and Rule 50(2) (f) of the Rules. The Court therefore upholds the Respondent State's objection in this regard.

C. Other conditions of admissibility

61. Having found that the Application has not satisfied the condition in Rule 50(2)(f) of the Rules, the Court need not rule on the Application's compliance with the other admissibility conditions set out in Article 56(1), (2), (3), (4), and (7) of the Charter as restated in Rule 50(2)(a), (b), (c), (d) and (g) of the Rules, as these conditions are cumulative.²²
62. As a consequence of the foregoing, the Court declares the Application inadmissible.

VII. Costs

63. The Applicant did not make any submissions on costs.
64. The Respondent State prayed that costs be borne by the Applicant.

65. Pursuant to Rule 32(2) of the Rules of Court "[u]nless otherwise decided by the Court, each party shall bear its own costs".²³
66. In light of the above provision and the circumstances of the case, the Court decides that each Party shall bear its own costs.

VIII. Operative part

67. For these reasons,
The Court
Unanimously,
On jurisdiction
 - i. *Dismisses* the objections to its jurisdiction;

22 *Jean Claude Roger Gombert v Côte d'Ivoire* (jurisdiction and admissibility) (22 March 2018) 2 AfCLR 270 § 61; *Dexter Eddie Johnson v Republic of Ghana*, ACTHPR, Application No 016/2017, Ruling of 28 March 2019 (jurisdiction and admissibility), § 57.

23 Rule 30(2) of the Rules of Court, 2 June 2010.

- ii. *Declares* that it has jurisdiction.

On admissibility

- iii. *Dismisses* the objection based on non-exhaustion of local remedies;
- iv. *Upholds* the objection based on the failure to file the Application within a reasonable time;
- v. *Declares* the Application inadmissible.

On costs

- vi. *Orders* that each Party shall bear its own costs.

John v Tanzania (judgment) (2022) 6 AfCLR 477

Application 005/2018, *Joseph John v United Republic of Tanzania*

Judgment, 22 September 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA, SACKO and ADJEI

Recused under Article 22: ABOUD

The Applicant, a citizen of the Respondent State, was serving a 30-year prison term for rape. He alleged that his trial, conviction, and sentence before the domestic courts were all in violation of some of his human rights. Overruling objections raised by the Respondent State, the Court found that the State had violated some of the rights claimed by the Applicant. Accordingly, the Court awarded damages for moral prejudice, while dismissing some of the claims for damages by the Applicant.

Jurisdiction (material jurisdiction, 26-29)

Admissibility (filing within a reasonable time, 44-49)

Liberty (right to bail, 64-72)

Fair trial (free legal assistance, 76-83; trial within a reasonable time, 88-94)

Reparations (basis of, 101; onus to provide evidence for, 102; measures of, 103; currency of award, 105; material prejudice, 112-115; moral prejudice, 120-123; indirect victims, 128-130; non-pecuniary reparation, 133-135)

Dissenting Opinion: BENSAOULA

Procedure (Prerogative of Court to call for evidence, 3-5)

I. Parties

1. Mr Joseph John (hereinafter, “the Applicant”) is a national of the United Republic of Tanzania, who at the time of filing the Application, was incarcerated at Uyui Central Prison, Tabora Region, serving a sentence of thirty (30) years imprisonment following his conviction for the offence of rape of a seventeen-(17) year-old-girl. He alleges violation of his rights in relation to his trial, conviction, and sentencing.
2. The Respondent State, the United Republic of Tanzania, became a Party to the African Charter on Human and Peoples’ Rights (“Charter”) on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (“The Protocol”)

on 10 February 2006. Furthermore, on 29 March 2010, the Respondent State deposited the Declaration as prescribed under Article 34(6) of the Protocol, by virtue of which it accepted the jurisdiction of the African Court on Human and Peoples' Rights (hereinafter, "the Court") to receive applications from individuals and non-governmental organisations. On 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission, an instrument withdrawing the said Declaration. The Court has held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect, that is, one year after its deposit, which is on 22 November 2020.¹

II. Subject of the Application

A. Facts of the matter

3. It emerges from the Application that, on 24 August 2010, the Applicant was convicted of rape contrary to Section 130(1), 130(2)(e) and 131(1) of the Penal Code and sentenced to thirty (30) years imprisonment by the District Court of Kahama.
4. On 10 August 2011, the Applicant filed Criminal Appeal No 92 of 2011 at the High Court of Tabora appealing his conviction and sentence. On 14 August 2012, the High Court dismissed the appeal in its entirety and confirmed the sentence. On 22 August 2012, the Applicant consequently filed Criminal Appeal No 267 of 2012 at the Court of Appeal sitting at Tabora. On 24 September 2013, the Court of Appeal dismissed the appeal in its entirety and confirmed the sentence.

B. Alleged violations

5. The Applicant alleges that he was wrongly tried by the District Court of Kahama because, being under sixteen (16) years of age, he was a juvenile and as such he should have been tried in a juvenile court and not in a district court. He states that his trial before the District Court was therefore, a violation of Article 7(1) (d) of the Charter.

¹ *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application No 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.

6. The Applicant alleges that he was not represented by Counsel before the domestic courts, hence, this is a violation of Article 7(1) (c) of the Charter.
7. In the Reply, the Applicant alleges that the Respondent State violated his right under Article 7(1)(b) of the Charter. He states that, from the time of arrest to the conviction, he was never informed of his right to bail even though he was charged with a bailable offence.

III. Summary of the Procedure before the Court

8. The Application was filed on 19 February 2018. The Applicant was requested by the Registry to file copies of the record of the proceedings against him before the District Court, the High Court and the Court of Appeal and he did so on 22 October 2018. The Application was served on the Respondent State on 25 October 2018.
9. On 1 February 2019, the Court granted the Applicant legal aid and designated East Africa Law Society to represent him under the Court's *pro bono* legal aid scheme.
10. On 21 March 2019, after an extension of time, the Respondent State filed the Response to the Application and this was served on the Applicant on 28 March 2019, for the Reply.
11. On 13 December 2019, after an extension of time, the Applicant filed the Reply to the Respondent's Response and the submissions on reparations. The Applicant also filed together with the submissions on reparations, an affidavit sworn on 9 October 2019, in support of his claim wherein he restated the said submissions on reparations.
12. On 28 January 2020, the Reply to the Response was served on the Respondent State for information. On the same date, the Applicant's submissions on reparations were also served on the Respondent State for the Response thereto. On 8 February 2021, the Respondent State filed the Response to the Applicant's submissions on reparations, and this was served on the Applicant for a Reply thereto. Despite several reminders, the Applicant failed to file a Reply.
13. Pleadings were closed on 20 June 2022 and the Parties were duly notified.

IV. Prayers of the Parties

- 14.** The Applicant makes his prayers as follows:
- i. That the Applicant humbly prays this Honourable Court to restore justice where it was overlooked and quash both conviction and sentence meted on me which violated section 2 of Minimum Sentence Act No 1 of 1972 and order to (sic) my immediately release from the prison wall forthwith.
 - ii. That, the Applicant herein on my own behalf, I wish to be granted reparation pursuant to Article 27(1) of the Protocol of the Court.
 - iii. That, this Honourable Court be pleased to grant any other order or legal remedy that the Court may think fit and just to grant in the circumstance of my complaints.
- 15.** In the Reply, the Applicant further prays the Court to:
- i. Find the Application admissible
 - ii. Find that it has jurisdiction to hear the Application
 - iii. Find that the Respondent State violated Article 7(1)(b), (c) and (d) of the Charter
 - iv. Make an order to release the Applicant from prison
 - v. Order the Respondent to pay the Applicant reparations
 - vi. Issue any other order that the Court may deem fit and just to grant.
- 16.** The Respondent State prays the Court to order:
- a. That the African Court is not vested with jurisdiction to adjudicate the Application
 - b. That the Application has not met the admissibility requirements provided by Article 56(6) of the Charter, Article 6(2) of the Protocol and Rule 40(6) of the Rules
 - c. That the Application be declared inadmissible
 - d. That the Application be dismissed
 - e. That the Respondent has not violated the Applicant's rights under Article 7(1)(c) and Article 7(1)(d) of the Charter
 - f. That the Respondent has not violated any of the Applicant's rights under the African Charter on Human and Peoples' Rights.

V. Jurisdiction

- 17.** The Court observes that Article 3 of the Protocol provides as follows:
1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

18. Further, pursuant to Rule 49(1) of the Rules, “The Court shall conduct preliminary examination of its jurisdiction ... in accordance with the Charter, Protocol and these Rules.”
19. In view of the foregoing, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.
20. In the present Application, the Court notes that the Respondent State has raised an objection to its material jurisdiction.

A. Objection to material jurisdiction

21. The Respondent State has argued that this Court will be sitting as a court of first instance and an appellate criminal court should it adjudicate over the two issues elaborated below.
22. First, with regard to the alleged violation of Article 7(1)(c) of the Charter, the Respondent State submitted that:

The issue of being given counsel to defend was not raised in the trial court, the first appellate court and the Court of Appeal hence this court has no mandate to act neither as the court of first instance nor an appellate criminal court. Had the applicant had an issue with this matter, he could have informed the trial and appellate courts, which could have appropriately addressed the issue in accordance with Tanzanian criminal procedural laws. It additionally states that the Applicant was, further, given the right to counsel himself and his arguments were considered in the Court of Appeal.
23. Secondly, the Respondent State avers that the Court cannot adjudicate over Article 7(1)(d) of the Charter because:

...the Applicant did not dispute his age even when the Memorandum of Facts was read over to him during trial. It is further stated that, the issue regarding the age of the Applicant was never brought before the two domestic appellant Courts; thus, it is a new issue before this Honourable Court. Since this is the new issue before this Honourable Court, then this Court has no jurisdiction to determine this matter because by doing so it will be tantamount to converting this Honourable Court into an appellate criminal court.
24. It is the Applicant's contention that the Court should dismiss the objection on material jurisdiction. The Applicant asserts that the Court's jurisprudence clarifies that it is not precluded from examining whether procedures before national courts comply with international human rights that are outlined in the Charter and other pertinent human rights instruments to which the Respondent State is a party.
25. Accordingly, the Applicant avers that he is not asking the Court to sit as a court of first instance or an appellate court; rather he is invoking the Court's jurisdiction to determine if his claims amount to violations under the Charter.

26. The Court recalls that under Article 3(1) of the Protocol, it has jurisdiction to examine any application submitted to it, provided that the rights of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.²
27. The Court also recalls that, in accordance with its established case-law on the application of Article 7 of the Protocol, it is competent to examine relevant proceedings before domestic courts to determine whether they comply with the standards set out in the Charter or any other instrument ratified by the State concerned.³ Consequently, the objection that the Court would be sitting as a court of first instance is, dismissed.
28. The Court further recalls, its established jurisprudence, “that it is not an appellate body with respect to decisions of national courts.”⁴ However, “this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned.”⁵ In this regard, therefore it would not be sitting as an appellate court, if it were to examine the allegations by the Applicant. This objection is therefore, also dismissed.
29. As a consequence of the foregoing, the Court finds that it has material jurisdiction to consider the present Application.

B. Other aspects of jurisdiction

30. The Court notes that the Respondent State has not disputed its

2 *Diocles William v United Republic of Tanzania* (merits and reparations) (21 September 2018) 2 AfCLR 426, § 28; *Armand Guehi v Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application No 028/2015, Judgment of 26 June 2020 (merits and reparations), § 18.

3 *Ernest Francis Mtingwi v Malawi* (jurisdiction) (15 March 2013), 1 AfCLR 190, § 14; *Kennedy Ivan v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 26; *Armand Guehi v Tanzania* (merits and reparations), § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35.

4 *Ernest Francis Mtingwi v Malawi* (jurisdiction), § 14.

5 *Kennedy Ivan v Tanzania* (merits), § 26; *Armand Guehi v Tanzania* (merits and reparations), § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v Tanzania* (merits), § 35.

personal, temporal, and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules,⁶ it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

31. Regarding personal jurisdiction, the Court recalls, as indicated in paragraph 2 of this judgment that, on 21 November 2019, the Respondent State deposited the instrument of withdrawal of the Declaration under Article 34(6) of the Protocol. The Court has held that such withdrawal does not apply retroactively. Therefore, it has no bearing on matters pending before the Court prior to the deposit of the instrument withdrawing the Declaration or new cases filed before the withdrawal took effect, that is, one year after the notice of withdrawal was deposited; to be specific, 22 November 2020.⁷
32. Accordingly, this Application having been filed before the Respondent State deposited its notice of withdrawal of the Declaration, is not affected by the said withdrawal. Therefore, the Court concludes that it has personal jurisdiction over this Application.
33. The Court has temporal jurisdiction over this Application insofar as the alleged violations were committed after the Respondent State became a party to the Charter and the Protocol. Further, the alleged violations are continuing in nature because the Applicant is currently serving his sentence, which he considers unfair.⁸
34. The Court has territorial jurisdiction over this Application given that alleged violations occurred within the Respondent State's territory.
35. In light of all the above, this Court has jurisdiction to examine this Application.

VI. Admissibility

36. Pursuant to Article 6(2) of the Protocol, "The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter".
37. Rule 50(1) stipulates that, "The Court shall ascertain the admissibility of an Application filed before it in accordance with

6 Rule 39(1) of Rules of Court, 2 June 2010.

7 *Andrew Ambrose Cheusi v Tanzania* (merits and reparations), §§ 35-39. See also, *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562, § 67.

8 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (jurisdiction) (21 June 2013) 1 AfCLR 197, §§ 71-77.

Article 56 of the Charter, Article 6(2) of the Protocol and these Rules”.

38. Further, Rule 50(2), which restates, substantially Article 56 of the Charter, provides as follows:

Applications filed before the Court shall comply with all of the following conditions:

- a. Indicate their authors even if the latter requests anonymity;
- b. Are compatible with the Constitutive Act of the African Union and with the Charter;
- c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
- d. Are not based exclusively on news disseminated through the mass media;
- e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
- f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter; and
- g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the Charter.

39. The Court notes that the Respondent State has raised an objection to the admissibility of the Application, based on failure to file the Application within a reasonable time.

A. Objection based on the failure to file the Application within a reasonable time

- 40.** The Respondent State avers generally, that the Application is hopelessly time barred in contravention of Article 56(6) of the Charter, Article 6(2) of the Protocol and Rule 40(6) of the Rules of the Court.⁹
- 41.** The Applicant contends that the objection is unfounded and asserts that the period between the judgment of the Court of Appeal and when the Application was filed is a reasonable time.
- 42.** The Applicant states that, after the Court of Appeal delivered its judgment on 24 September 2013, he seized the Court on 8 December 2017, which means that, he took four (4) years and three (3) months after the said judgment to file the Application.

9 Rule 50(2)(f) of the Rules of Court, 25 September 2020.

The Applicant also claims that he is lay, indigent, and incarcerated such that the constant prison transfers, limited movement and limited access to information resulted in his cognisance of the Court only in 2017. He also claims that throughout the domestic judicial proceedings, he was not represented by Counsel and that, before seizing the Court he encountered challenges in securing the records of proceedings, which were crucial in drafting the Application.

43. The issue for determination is whether the time taken by the Applicant before bringing his Application before the Court is reasonable within the meaning of Article 56(6) of the Charter as read together with Rule 50(2)(f) of the Rules.
44. Pursuant to Article 56(6) of the Charter, as restated in Rule 50(2)(f) of the Rules, for an application to be admissible, it must be “submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter”. These provisions do not set a time limit within which it must be seized.
45. In the instant case, the Court notes that local remedies were exhausted on 24 September 2013 when the Court of Appeal sitting at Tabora rendered its judgment dismissing the Applicant’s appeal. The present Application was filed on 19 February 2018. Therefore, the Applicant seized the Court four (4) years, four (4) months and twenty-six (26) days after he exhausted local remedies. The issue to be determined is whether this period is reasonable within the meaning of Article 56(6) of the Charter as read together with Rule 50(2)(f) of the Rules.
46. The Court recalls its jurisprudence that: “...the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis.”¹⁰ Some of the circumstances that the Court has taken into consideration include: imprisonment, being lay without the

¹⁰ *The Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v Burkina Faso* (merits) (24 June 2014) 1 AfCLR 219, § 92. See also *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 73.

benefit of legal assistance,¹¹ indigence and lack of awareness of the existence of the Court,¹² Nevertheless, these circumstances must be proven.

47. Using the case-by-case approach, the Court has previously held that five (5) years, one (1) month and twelve (12) days,¹³ five (5) years, one (1) month and thirteen (13) days,¹⁴ four (4) years, nine (9) months and twenty-three (23) days,¹⁵ four (4) years, eight (8) months and thirty (30) days,¹⁶ was a reasonable time taken to file applications. These applications were filed by lay, indigent and incarcerated applicants.
48. The Applicant in the instant case is in a comparable situation to the applicants in the foregoing cases. It is clear from the record that he was self-represented during the proceedings before the domestic courts, he is lay and incarcerated and, therefore, with limited access to information. The Applicant was also self-represented when filing the Application. Furthermore, and regarding indigence, it was only after the Applicant filed this Application that, this Court granted him legal aid and designated Counsel to represent him in these proceedings. In view of the foregoing circumstances, the Court therefore, concludes that the period of four (4) years, four (4) months and twenty-six (26) days is a reasonable period for seizing the Court within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.
49. Therefore, the Court dismisses this objection to the admissibility of the Application.

B. Other conditions of admissibility

50. The Court notes that there is no contention regarding the compliance with the conditions set out in Rule 50(2)(a), (b), (c), (d), (e) and (g) of the Rules. Even so, the Court must satisfy itself that these conditions have been met.

11 *Alex Thomas v Tanzania* (merits), § 73; *Christopher Jonas v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 54; *Amir Ramadhani v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 83.

12 *Amir Ramadhani v Tanzania* (merits), § 50; *Christopher Jonas v Tanzania* (merits), § 54.

13 *Christopher Jonas v Tanzania* (merits), § 55.

14 *Amir Ramadhani v Tanzania* (merits), § 49.

15 *Andrew Ambrose Cheusi v Tanzania* (merits and reparations), § 71.

16 *Thobias Mangara Mango and Another v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 314, § 55.

51. The record shows that the Applicant has been clearly identified by name, in fulfilment of Rule 50(2)(a) of the Rules.
52. The Court also notes that the claims that were made by the Applicant seek to protect his rights guaranteed under the Charter. Furthermore, one of the objectives of the Constitutive Act of the African Union, as stated in Article 3(h) thereof, is the promotion and protection of human and peoples' rights. Additionally, the Application does not contain any claim or prayer that is incompatible with a provision of the said Act. Therefore, the Court considers that the Application is compatible with the Constitutive Act of the African Union and the Charter and holds that it meets the requirement of Rule 50(2)(b) of the Rules.
53. The language used in the Application is not disparaging or insulting to the Respondent State or its institutions in fulfilment of Rule 50(2)(c) of the Rules.
54. The Application is not based exclusively on news disseminated through mass media as it is founded on court documents from the municipal courts of the Respondent State in fulfilment with Rule 50(2)(d) of the Rules.
55. The condition set out in Rule 50(2)(e) of the Rules is that an application should be filed after exhaustion of local remedies. The rule on exhaustion of local remedies aims at providing States the opportunity to deal with human rights violations within their jurisdictions before an international human rights body is called upon to determine the State's responsibility for the same.¹⁷ The Court has held that, in so far as the criminal proceedings against an applicant have been determined by the highest appellate court, the Respondent State will be deemed to have had the opportunity to redress the violations alleged by the Applicant that arose from those proceedings.¹⁸
56. In the instant case, the Court notes that the Applicant's appeal before the Court of Appeal, the highest judicial organ of the Respondent State, was determined when that Court rendered its judgment on 24 September 2013. Therefore, the Respondent State had the opportunity to address the violations alleged by the Applicant arising from his trial and appeals. Consequently, the Application has complied with the requirement of exhaustion of local remedies under Rule 50(2)(e) of the Rules.

17 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.

18 *Mohamed Abubakari v United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, § 76.

57. Further, the Application does not concern a case which has already been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union in fulfilment of Rule 50(2)(g) of the Rules.
58. Therefore, the Court concludes that the Application meets all the admissibility conditions under Article 56 of the Charter as read together with Rule 50(2) of the Rules, hence, declares the Application admissible.

VII. Merits

59. The Applicant alleges that the Respondent State has violated his (a) right to bail, (b) right to free legal assistance, (c) right to be tried within a reasonable time, and (d) right to be tried before a juvenile court, as guaranteed under Article 7(1)(b), (c) and (d) of the Charter, respectively.

A. Alleged violation of the right to bail

60. The Applicant claims that the Respondent State violated his right under Article 7(1)(b) of the Charter when he was not informed of his right to bail yet the offence of rape was bailable.
61. The Respondent State claims that it became aware of the allegation after the Applicant filed the submissions on reparations and that this was an afterthought by the Applicant since it was raised in the submissions on reparations rather than in the main application. The Respondent State accordingly requests the Court not to entertain this claim.

62. The Court notes that, the fact that this allegation was raised in the Applicant's submissions on reparations rather than in the main application would not prevent it from considering the merits thereof. In such instances, what is important is for the Respondent State to have an opportunity to respond to the additional submissions. In the instant case, the record shows that the Respondent State was provided the opportunity to respond to the Applicant's submissions on reparations before pleadings were

closed. The Court also notes that the Respondent State did not specifically respond to this allegation, rather it focussed on the issue whether a claim on merits can be introduced in submissions on reparations.

63. The Court further notes that the applicable provision of the Respondent State's law when the Applicant was arrested was Section 148(5) of the Criminal Procedure Act (CPA).¹⁹ This provision contained a list of non-bailable offences and the offence of rape is not included thereunder, therefore, one charged with the offence of rape could in principle, be released on bail.
64. In this regard, the Court finds it pertinent that, the presumptive right to bail relates to Article 6 of the Charter which provides that:
Every individual shall have the right to liberty and to the security of [their] person. No one may be deprived of [their] freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.
65. The Court notes that the right to bail is an inbuilt element of the right to liberty in relation to arrested persons. The right to liberty demands that individuals accused of criminal offences should be released on bail if there are no reasons to keep them in custody pending trial.²⁰ Pertinently, Article 9(3) of the International Covenant on Civil and Political Rights (the ICCPR),²¹ provides that:
It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgments.
66. The question for determination is thus whether the Applicant in the instant case, the right to be informed of the right to bail in connection with his right under Article 6 of the Charter or any other provision thereof.
67. The Court observes that neither Article 6 nor any other provision of the Charter or of other international human rights instruments, expressly provide for an arrested person's right to be informed of the right to bail. Article 9(2) of the ICCPR only provides that, "at the time of arrest, arrested persons are entitled to be informed

19 The Criminal Procedure Act, 1985.

20 According to Principle 4 (i) of the Luanda Guidelines adopted by the African Commission on Human and Peoples' Rights, arrested persons shall be afforded "the right to apply for release on bail or bond pending investigation or questioning by an investigating authority and/or appearance in court." In addition, Principle 7(a) provides that, "All persons detained in police custody shall have a presumptive right to police bail or bond."

21 The Respondent State became a State Party to ICCPR on 11 June 1976.

of the reasons for their arrest and to be promptly notified of the charges levied against them". In this vein, the United Nations Human Rights Committee has pointed out that the right to be informed of the reasons of arrest or criminal charges is important to an arrested person particularly to "request a prompt decision on the lawfulness of his or her detention by a competent authority".²²

68. Article 14(3)(d) of the ICCPR also prescribes that accused persons have the right to be informed of the right to legal assistance. These provisions seek to enable arrested or accused persons to take the necessary steps to secure their release, including by exercising their right to bail or facilitating their right to legal representation for purposes of their defence.
69. Despite not being explicitly recognised in existing international human rights instruments, the Court is of the considered view that the right to bail should be construed broadly to include the right to be informed of the right to apply for bail. This is particularly important in circumstances where arrested persons are not represented by Counsel, have not been informed of their right to be represented by Counsel or have not been provided with the assistance of Counsel,²³ who would help them exercise their right to seek bail.
70. In the present Application, the Court notes that the record shows that the Applicant was self-represented when he was first arrested, when he was arraigned in Court and subsequently, throughout the domestic proceedings. This clearly deprived the Applicant of the opportunity to benefit from the advice of Counsel regarding the exercise of his pre-trial rights including seeking bail. In this circumstance, the provision of information on his right to bail was necessary and justified.
71. The Court notes in this regard, that there is no evidence on record showing that the Applicant was at any time, informed of his right to bail. Nor has the Respondent State disputed the Applicant's assertion that he was not informed of his right to bail. It is thus clear that, due to the Respondent State's failure to inform the Applicant of his right to bail, the Applicant was not able to exercise this right.

22 Communication No 248/1987, *G. Campbell v Jamaica* (Views adopted on 30 March 1992), § 6.3.

23 *Chrizostom Benyoma v United Republic of Tanzania*, ACtHPR, Application No 001/2016, Judgment of 30 September 2021 (merits and reparations) § 98.

72. The Court concludes that in the circumstances of this case, the Respondent State's omission to inform the Applicant of his right to bail constitutes a violation of the Applicant's rights under Article 6 of the Charter.

B. Alleged violation of the right to free legal assistance

73. The Applicant alleges that he was not represented by Counsel in the proceedings against him before the domestic courts, hence, the Respondent State violated Article 7(1)(c) of the Charter.
74. The Applicant argues that the domestic courts should have taken cognisance of the Applicant's serious charge and his inability to hire legal counsel to assist him during the domestic proceedings. Citing the Court's jurisprudence in *Diocles William v Tanzania*, the Applicant submits that it is unnecessary and unreasonable for the Respondent State to demand that the Applicant should have either raised the pertinent issue at the domestic courts or instituted new proceedings before the domestic courts regarding the lack of representation by Counsel.
75. The Respondent State contends that the right to legal representation is not an absolute right both in international law and Tanzanian law, which signifies that the right is progressively subjected to the availability of financial resources to enable the State to provide an accused person with free legal representation. Further the right to legal representation is subjected to two conditions namely, that the Applicant must request for legal representation of his choice and there should be available funds to support the Applicant's prayer for legal aid once granted.

76. According to Article 7(1)(c) of the Charter, the right to have one's cause heard includes "the right to defence, including the right to be defended by counsel of [their] choice."
77. The Court has interpreted Article 7(1)(c) of the Charter in light of Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR),²⁴ and determined that the right to defence

24 The Respondent State became a State Party to the ICCPR on 11 June 1976.

includes the right to be provided with free legal assistance.²⁵

78. The Court has also determined that where accused persons are charged with serious offences which carry heavy sentences and they are indigent, free legal assistance should be provided as of right, whether or not the accused persons request for it.²⁶
79. The Court observes that although he faced a serious charge of rape which carried a thirty-year minimum prison sentence, a heavy penalty, nothing on the record shows that, the Applicant was informed of the right to legal assistance or that should he be unable to pay for such assistance, it would be provided to him free of charge. The Court further notes that, the Respondent State did not refute the Applicant's indigence.
80. The Court has also previously held that, the obligation to provide free legal assistance to indigent persons facing serious charges which carry a heavy penalty is for both the trial and appellate stages.²⁷
81. The interest of justice ought to have been triggered and the Applicant provided legal assistance free of charge throughout the trial and appellate stages of the proceedings.
82. In view of this, the Respondent State's claim that the Applicant ought to have requested for free legal representation and that this would be availed depending on available resources, is unjustified.
83. The Court therefore finds that, by failing to provide the Applicant with free legal representation during the domestic proceedings the Respondent State violated Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR.

C. Alleged violation of the right to be tried within a reasonable time

84. The Applicant claims that the Respondent State violated his right to be tried within a reasonable time by an impartial court under Article 7(1)(d) of the Charter.
85. The Applicant asserts that after he was arrested, he remained in police custody for more than twenty-four (24) hours contrary to Section 32 of the Criminal Procedure Act.

25 *Alex Thomas v Tanzania* (merits), § 114; *Kijiji Isiaga v Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 72; *Kennedy Owino Onyachi and Another v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 104.

26 *Alex Thomas v Tanzania* (merits), § 123; *Kijiji Isiaga v Tanzania* (merits), § 78; *Kennedy Owino Onyachi and Another v Tanzania* (merits), §§ 104 and 106.

27 *Alex Thomas v Tanzania* (merits), § 124; *Wilfred Onyango Nganyo 9 Others v United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 507, §183.

86. The Applicant further claims that he was arrested on 26 June 2009 and arraigned in court on 29 June 2009 and that there were numerous occasions where the trial court called for unjustifiable adjournments contrary to Article 7(1)(d) of the Charter. He contends that, although the trial court adjourned the hearing severally due to non-availability of the prosecution's witnesses, the trial court did so without specifying this as the reason for the adjournments.
87. The Respondent State submits that the Applicant was prosecuted within one (1) year, which is a reasonable time, given the nature of the offence and the circumstances of the case. Furthermore, the Respondent State claims that during the hearing, each party had an opportunity for cross-examination.

88. Article 7(1)(d) of the Charter stipulates that the right to have one's cause heard comprises "the right to be tried within a reasonable time by an impartial court or tribunal."
89. The Court refers to its decision in *Wilfred Onyango and 9 others v Tanzania*, where it held that "...there is no standard period that is considered reasonable for a court to dispose of a matter. In determining whether time is reasonable or not, each case must be treated on its own merits".²⁸
90. The Court considers the length of domestic proceedings and assesses the Applicant's conduct and the due diligence of the Respondent State in finalising the proceedings.²⁹ The Court has emphasised that "there rests a special duty upon authorities of domestic courts to ensure that all those who play a role in the proceedings do their utmost to avoid any unnecessary delay."³⁰
91. The Court notes that the Applicant was arrested on 26 June 2009, a Friday and arraigned in Court on Monday, 29 June 2009. The Court notes that the Respondent State's law required that an arrested person charged with an offence other than one punishable by death should be arraigned in court either "twenty

28 *Wilfred Onyango Nganyi & 9 others v Tanzania* (merits), §135.

29 *Ibid*, §§ 134 & 136.

30 *Ibid*, § 153.

four hours after he was so taken into custody” or “as soon as practicable”.³¹ The Court finds that in view of the Applicant having been arrested on a Friday and charged with the serious offence of rape, his arraignment in Court on the Monday immediately following his arrest, was in compliance with this legal provision.

92. With regard to the conclusion of the trial proceedings, the Applicant was arraigned before the District Court on 29 June 2009, That court rendered its judgment and sentence on 24 August 2010. The trial therefore took one (1) year, one (1) month and twenty-six (26) days. Furthermore, the High Court took one (1) year and four (4) days to determine his first appeal and the Court of Appeal took one (1) year, one (1) month and two (2) days to determine his second appeal.
93. The Court further finds that although the trial was adjourned severally due to non-availability of some prosecution witnesses, on the whole, in view of the nature of the offence, the period of one (1) year, one (1) month and twenty-six (26) days that the trial court took to finalise the trial is reasonable. The Court finds similarly, that, the time taken by the High Court, that is one (1) year and four (4) days to determine the first appeal and by the Court of Appeal, that is one (1) year, one (1) month and two (2) days to determine his second appeal is reasonable.
94. The Court, therefore, finds that the Respondent State did not violate the Applicant's rights in relation to Article 7(1)(d) of the Charter.

D. Alleged violation of the right to be tried before a juvenile court

95. The Applicant states that he was tried by the District Court of Kahama instead of a juvenile court as he alleges to have been under sixteen (16) years old in 2009.
96. The Respondent State submits that the Applicant was properly tried by the District Court because the records of proceedings at the Court of Appeal reveal that at the time the Applicant was

31 Section 32(1) of the Criminal Procedure Act, 1985 which was the applicable provision at the time, states that: When any person has been taken into custody without a warrant for an offence other than an offence punishable with death, the officer in charge of the police station to which he is brought may, in any case, and shall if it does not appear practicable to bring him before an appropriate court within twenty-four hours after he was so taken into custody, inquire into the case and, unless the offence appears to that officer to be of a serious nature, release the person on his executing a bond with or without sureties, for a reasonable amount to appear before a court at a time and place to be named in the bond; but where he is retained in custody he shall be brought before a court as soon as practicable.

charged, he was twenty (20) years old.

97. The Court notes that on 29 June 2009, the Applicant was charged with the offence of rape committed on various dates between “early June and 26 June 2009”. The Court further notes that the age of majority in the Respondent State when the Applicant committed the offence and as at 29 June 2009 when he was arraigned before the District Court, was eighteen (18) years.³² This is also the age of majority under Article 2 of the African Charter on the Rights and Welfare of the Child, which provides that: “...a child means every human being below the age of 18 years”.³³
98. The Court notes that the record shows that at the time of the commission of the offence and his arrest, the Applicant was twenty (20) years old. Furthermore, the Applicant never contested his age during the trial nor raised it as a ground of appeal before both the High Court and the Court of Appeal. He raised a ground of appeal relating only to the age of the victim of the offence, that her age at the time of the commission of the offence had not been conclusively determined or proven by the Prosecution.
99. Since the Applicant had reached the age of majority at the time of the commission of the offence, of his arrest and subsequent arraignment before the District Court of Kahama, the claim that he ought to have been tried before a juvenile court is unfounded and is therefore dismissed.

32 The Age of Majority Act Cap. 431 of the Laws sets the age of majority at eighteen years; Furthermore, with regard to criminal responsibility, Section 15 of the Penal Code (which was applicable at the material time with regard to the Applicant) provides that:

- (1) A person under the age of ten years is not criminally responsible for any act or omission.
- (2) A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission, he had capacity to know that he ought not to do the act or make the omission.
- (3) A male person under the age of twelve years is presumed to be incapable of having sexual intercourse.
- (4) Any person under the age of twelve years who commits an act or omission which is unlawful shall be dealt with under the Law of the Child Act.

33 The Respondent State became a Party to this Charter on 9 May 2003.

VIII. Reparations

100. The Court notes that Article 27(1) of the Protocol stipulates that “[i]f the Court finds that there has been violation of a human or peoples’ right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.”
101. As it has consistently held, the Court considers that, for reparations to be granted, the Respondent State should first be internationally responsible for the wrongful act. Second, causation should be established between the wrongful act and the alleged prejudice. Furthermore, and where it is granted, reparation should cover the full damage suffered.
102. The Court reiterates that the onus is on the Applicant to provide evidence to justify his prayers, particularly for material damages.³⁴ With regard to moral damages, the Court has held that the requirement of proof is not strict³⁵ since it is presumed that there is prejudice caused when violations are established.³⁶
103. The Court also restates that the measures that a State could take to remedy a violation of human rights can include restitution, compensation and rehabilitation of the victim, as well as measures to ensure non-repetition of the violations, taking into account the circumstances of each case.³⁷
104. In the instant case, the Court has established that the Respondent State violated the Applicant’s right under Article 6 of the Charter by failing to inform him of his right to bail. The Court has also established that the Respondent State violated the Applicant’s right to defence under Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR by failing to provide him with free legal assistance during his trial and appeals in the

34 *Kennedy Gihana and others v Rwanda* (merits and reparations) (28 November 2019) 3 AfCLR 655, § 139; See also *Reverend Christopher R. Mtikila v Tanzania* (reparations), § 40; *Lohé Issa Konaté v Burkina Faso* (reparations), § 15(d); and *Kalebi Elisamehe v Tanzania* (merits and reparations), § 97.

35 *Norbert Zongo and Others v Burkina Faso* (reparations), § 55. See also *Kalebi Elisamehe v Tanzania* (merits and reparations), § 97.

36 *Ally Rajabu and Others v United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 539, § 136; *Armand Guehi v Tanzania* (merits and reparations), § 55; *Lucien Ikili Rashidi v United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 13, § 119; *Norbert Zongo and Others v Burkina Faso* (reparations), § 55; and *Kalebi Elisamehe v Tanzania* (merits and reparations), § 97.

37 *Ingabire Victoire Umuhoza v Republic of Rwanda* (reparations) (7 December 2018) 2 AfCLR 202, § 20. See also *Kalebi Elisamehe v Tanzania*, ACtHPR, Application 028/2015, Judgment of 26 June 2020 (merits and reparations), § 96.

domestic courts.

105. The Court notes that the Applicant's claims for pecuniary reparations are made in United States Dollars. In its earlier decisions, the Court has held that, as a general principle, damages should be awarded, where possible, in the currency in which loss was incurred.³⁸ In the present case, the Court will apply this standard and monetary reparations, if any, will be assessed in Tanzanian Shillings.
106. It is against these findings that the Court will consider the Applicant's prayers for reparation.

A. Pecuniary reparations

107. The Applicant seeks pecuniary reparations for material prejudice due to loss of income, disruption of his life plan and expenses incurred by his family related to his trial and while in prison. He also seeks reparations for moral prejudice due to the violations established.

i. Material prejudice

108. The Applicant claims that his imprisonment led to loss of income and disruption of his life plan. The Applicant claims that he was earning at least Five Hundred Thousand Tanzanian Shillings per month (TZS 500,000) from construction activities like building houses, and personally managing farming activities like growing maize, groundnuts, tomatoes, onions and rice at Kahama. Further, the Applicant claims that "his businesses have collapsed as there is no one capable of running those businesses." Furthermore, all his future plans were disrupted because he lost everything that he had acquired. Consequently, the Applicant prays for payment of material damages in the amount of United States Dollars Fifteen Thousand Dollars (USD 15,000) for loss of income.
109. The Applicant also claims that his imprisonment has financially affected his family because he was the sole provider for the family. The prison conditions impacted his health, therefore, his family had to send funds for medication. Further, his family had to cater for the expenses during the trial to attend the court hearings.
110. The Respondent State submits that the Applicant's claims are unsubstantiated as the Applicant did not tender evidence proving

38 See *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 120; *Ingabire Victoire Umuhoza v Republic of Rwanda* (reparations), § 45.

that he was involved in construction and farming activities and managed a business, hence earning TZS 500,000 per month.

111. Citing the decision in *Lucien Ikili v Tanzania*, the Respondent State argues further that, the Applicant failed to provide any evidence to support his monetary claims and as such, his claim for material prejudice lacks merit.

112. The Court notes that for reparations for material prejudice to be granted, there must be a causal link between the violation established by the Court and the prejudice caused and there should be a specification of the nature of the prejudice and proof thereof.³⁹
113. The Court notes that the Applicant has not established the link between the violation(s) established and his alleged loss of income and the loss incurred by his family in providing for his medication while in prison and catering for expenses to attend his court hearings. Rather, the Applicant's claims are directly linked to his conviction, sentencing and incarceration, which this Court did not find unlawful.⁴⁰
114. Furthermore, the Court notes that on 13 December 2019, the Applicant filed an affidavit that he swore on 9 October 2019, being a mere restatement of his submissions on reparations. The Court finds that the affidavit does not suffice to establish his claim.
115. The Court, consequently, dismisses the Applicant's claims for reparations for material prejudice.

ii. Moral prejudice

116. The Applicant seeks reparations for moral prejudice he suffered and for that allegedly suffered by indirect victims, due to the violations established.

39 *Kijiji Isiaga v Tanzania* (reparations), § 20.

40 *Armand Guehi v Tanzania* (merits and reparations), § 18; *Christopher Jonas v United Republic of Tanzania*, ACtHPR, Application No 011/2015. Judgment of 25 September 2020 (reparations), § 20.

a. Moral prejudice suffered by the Applicant

117. The Applicant claims that the ten (10) years he has spent in prison have caused trauma and complete disruption of his private life. Further, his conviction caused embarrassment and lowered his social standing in his family and the community owing to his association with a grave offence. Furthermore, the Applicant alleges that his health deteriorated significantly over the years he has served his prison term. In addition, his incarceration separated him from his family, in particular, he lost direct contact with his relatives when he was transferred to Gereza Mollo at Sumbawanga.
118. Consequently, the Applicant prays the Court to grant him Thirty Thousand Dollars (USD 30,000) in moral damages for the range of mental and physical health conditions he has suffered while serving ten (10) years in prison.
119. The Respondent State submits that there is no proof demonstrating that the Applicant suffered from mental anguish, hence, the claims of emotional harm are unjustifiable. Further, the Respondent State argues that for the Applicant to prove that he suffered emotional harm, a medical certificate ought to have been tendered as evidence.

120. The Court recalls its established case-law where it has held that moral prejudice is presumed in cases of human rights violations, and the quantum of damages in this respect is assessed based on equity, considering the circumstances of the case.⁴¹ The Court has thus adopted the practice of granting a lump sum in such instances.⁴²
121. The Court has established that the Applicant's rights under Article 6 of the Charter and under Article 7(1)(c) of the Charter as read

41 *Norbert Zongo and Others v Burkina Faso* (reparations), § 55; *Ingabire Victoire Umuhoza v Rwanda* (reparations), § 59; *Christopher Jonas v Tanzania* (reparations), § 23.

42 *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 119; *Minani Evarist v United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 402, §§ 84-85; *Armand Guehi v Tanzania* (merits and reparations), § 177; *Christopher Jonas v Tanzania* (reparations), § 24.

together with Article 14(3)(d) of the ICCPR have been violated. The Applicant is entitled to moral damages because there is a presumption that the Applicant has suffered some form of moral prejudice due to the said violations.⁴³

122. The Court notes that the violations established relate to the guarantees of a fair trial that should have been observed during the domestic proceedings involving the Applicant. The record shows that the Applicant's conviction was based on the fact that he had raped a minor and therefore the violations established did not relate to the outcome of the proceedings. The Court further notes, that there were no extenuating circumstances in this case.⁴⁴
123. Therefore, in view of these circumstances and exercising its discretion in equity, the Court awards the Applicant the amount of Six Hundred Thousand Tanzanian Shillings (TZS 600,000) for moral prejudice he suffered in relation to the violations established.

b. Moral prejudice suffered by the alleged indirect victims

124. The Applicant prays the Court to consider the following as indirect victims who have also suffered moral prejudice due to the violations against him: his parents, John Luzwiro and Moshi Masanja, and siblings, Hamis John, Perpeture John, Charles John, Faustine John, Leonard John and Innocent John).
125. The Applicant alleges that his imprisonment has been emotionally draining and induced social stigma on the indirect victims. Further, the imprisonment and the trials disrupted their day-to-day lives. They had to travel on numerous occasions to attend the hearings and to visit him at Uyui Central Prison. In addition, the Applicant claims that since he was the family's sole provider at the time of arrest, the indirect victims suffered tremendous stress as they lacked a stable income. Consequently, the Applicant prays for Five Thousand United States Dollars (USD 5,000) for each indirect victim.
126. The Respondent State refutes the Applicant's claim for moral damages for the indirect victims as the allegations and computation of figures have not been backed by evidence. The Respondent State argues that the Applicant failed to substantiate the relationship between him and the alleged indirect victims.

43 *Andrew Ambrose Cheusi v Tanzania* (merits and reparations), §151.

44 *Minani Evarist v Tanzania* (merits and reparations), § 90; *Anaclet Paulo v United Republic of Tanzania* (merits and reparations) (21 September 2018) 2 AfCLR 446, § 111; *Christopher Jonas v Tanzania* (reparations), § 25.

In this regard, the Respondent State cites *Lucien Ikili v United Republic of Tanzania*, which held that indirect victims must prove their relation to the Applicant to be entitled to damages. Therefore, the Respondent State submits that the Applicant failed to tender birth certificates as evidence of such relationship “or any other document showing level of dependency or previous record of dependency of the alleged indirect victims to the Applicant.”

127. The Respondent State also argues that the Applicant has not proven the causal link between lack of representation and suffering endured by the indirect victims, hence, the indirect victims are not entitled to any reparations.

128. The Court notes that with regard to indirect victims, as a general rule, moral prejudice is presumed with respect to spouses, parents and children and reparation is granted only when there is evidence of spousal relations, or filiation with an applicant. For other categories of indirect victims, proof of filiation and moral prejudice suffered is required.⁴⁵
129. The Applicant did not tender any evidence proving filiation with the alleged indirect victims.
130. Consequently, the Court dismisses this prayer for reparations for the alleged indirect victims.

B. Non-pecuniary reparations

131. The Applicant prays the Court to set aside his conviction and sentence and restore his liberty, taking into account the time he has served in jail. Release from prison, the Applicant claims, is the second-best measure in the circumstances since the Court cannot restore him to his position before incarceration. Further, citing *Alex Thomas v Tanzania*, the Applicant argues that the most appropriate form of remedy for violation of fair trial guarantees includes release from prison.

⁴⁵ *Norbert Zongo and others v Burkina Faso* (reparations), § 54; and *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 135; *Léon Mugesera v Rwanda* ACtHPR, Application No 012/2017, Judgment of 27 November 2020 (merits and reparations), § 148.

- 132.** The Respondent State submits that restitution only applies where other forms of damages such as compensation are either irrelevant or insufficient. Further, the Respondent State avers that the Applicant has not proven that he suffered harm or damages due to the alleged violations.

- 133.** Regarding the prayer to set aside his conviction and sentence, the Court notes that it has not determined whether the conviction and sentence of the Applicant was warranted or not.⁴⁶ The Court is rather concerned with whether the procedures in the national courts comply with the provisions of human rights instruments ratified by the Respondent State.
- 134.** With regard to the Applicant's prayer to be released from prison, the Court has established that it would make such an order, "if an Applicant sufficiently demonstrates or if the Court by itself establishes from its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and that his continued detention would occasion a miscarriage of justice."⁴⁷
- 135.** In the instant case, the Court recalls that it has found that the Respondent State violated the Applicant's right to liberty and a fair trial by failing to inform him of right to bail and provide him with free legal assistance. The Court considers that the nature of the violation(s) in the instant case do not reveal any circumstance that the Applicant's imprisonment a miscarriage of justice or an arbitrary decision. The Applicant has also failed to elaborate on specific and compelling circumstances to justify the order for his release.⁴⁸
- 136.** In view of the foregoing, this prayer is dismissed.

46 *Stephen John Rutakikirwa v United Republic of Tanzania*, ACTHPR, Application No 013/2016. Judgment of 24 March 2022 (merits and reparations), § 88.

47 *Minani Evarist v Tanzania* (merits and reparations), § 82; See also *Jibu Amir (Mussa) and another v Tanzania* (merits and reparations), § 96; *Mgosi Mwita Makungu v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 550, § 84.

48 *Jibu Amir (Mussa) and another v Tanzania* (merits and reparations), § 97; *Kalebi Elisamehe v Tanzania* (merits and reparations), § 112; and *Minani Evarist v Tanzania* (merits and reparations), § 82.

IX. Costs

137. Rule 32(2) of the Rules of Court stipulate that, “Unless otherwise decided by the Court, each party shall bear its own costs, if any”.⁴⁹
138. The Applicant prays the Court to grant him compensation for “transport and stationary costs: postage, printing and photocopying to the tune of Five Hundred Dollars (USD 500).”
139. The Respondent State submits that this claim for compensation is unfounded, thus, the Court should dismiss it.

140. The Court reiterates its jurisprudence that reparations may include legal costs and other costs incurred in the international proceedings.⁵⁰ Further, it is up to the Applicant to provide justifications for the sums claimed.
141. The Court considers that transport costs incurred for travel within Tanzania, and stationary costs fall under the “categories of expenses that will be supported in the Legal Aid Policy of the Court.”⁵¹ Since East Africa Law Society represented the Applicant on a *pro bono* basis, the sums claimed are unjustified and hence, the prayer is dismissed.
142. Consequently, the Court holds that each Party shall bear their own costs.

X. Operative part

143. For these reasons,

The Court

Unanimously,

On jurisdiction

- i. *Dismisses* the objection to its jurisdiction;
- ii. *Declares* that it has jurisdiction.

49 Rule 30(2) of the Rules of Court, 2 June 2010.

50 *Reverend Christopher R. Mtikila v Tanzania* (reparations), § 39; *Armand Guehi v Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 188.

51 *Mohamed Abubakari v United Republic of Tanzania* (reparations) (4 July 2019) 3 AfCLR 334, § 90.

On admissibility

- iii. *Dismisses* the objection to the admissibility of the Application;
- iv. *Declares* that the Application is admissible.

On merits

- v. *Finds* that the Respondent State has not violated the Applicant's right to be tried within a reasonable time under Article 7(1)(d) of the Charter.
- vi. *Dismisses* the allegation that the Applicant should have been tried before the juvenile court.
- vii. *Finds* that the Respondent has violated the Applicant's right under Article 6 of the Charter by failing to inform him of his right to bail.
- viii. *Finds* that the Respondent State has violated the Applicant's right to defence under Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the International Covenant on Civil and Political Rights, for failure to provide the Applicant free legal assistance.

On pecuniary reparations

- ix. *Dismisses* the Applicant's prayer for damages for material prejudice that he and the alleged indirect victims allegedly suffered;

By a majority of Nine (9) for, and One (1) against, Justice Chafika Bensaoula dissenting,

- x. *Dismisses* the Applicant's prayer for damages for moral prejudice suffered by the alleged indirect victims.

Unanimously,

- xi. *Grants* the Applicant's prayer for reparations for the moral prejudice as a result of the violations found and awards him the sum of Six Hundred Thousand Tanzanian Shillings (TZS 600,000).
- xii. *Orders* the Respondent State to pay the amount set out under (xi) above, tax free, as fair compensation, within six (6) months from the date of notification of judgment, failure of which, it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Bank of Tanzania throughout the period of delayed payment until the accrued amount is fully paid.

On non-pecuniary reparations

- xiii. *Dismisses* the Applicant's prayer for setting aside of his conviction and sentence and his release from prison.

On implementation and reporting

- xiv. *Orders* the Respondent State to submit to it within six (6) months from the date of notification of this judgment, a report on the status of implementation of the orders set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On costs

- xv. *Dismisses* the Applicant's prayer for reimbursement of legal fees, costs and other expenses incurred in the proceedings before this Court.
- xvi. *Orders* that each Party shall bear its own costs.

Dissenting Opinion: BENSAOULA

1. I do not agree with the finding of the Court in its judgment referred to above and the grounds for dismissing the Applicant's request for reparation in respect of non-pecuniary damage suffered by the indirect victims. Indeed, the Court dismissed the request for reparation on the ground that the Applicant did not prove his relationship with the alleged victims.
2. It is for this reason that I make this Opinion which restates my consistent position as regards the issue of evidence not filed by the parties, especially the Applicant. It is my position that the Court must always compel the parties to file documents in support of the alleged violation of rights, instead of simply dismissing the request without first trying to use its power to have the parties file the documents.
3. Indeed, Rule 51, of the Rules of Court clearly states that "[T]he Court may, during the course of the proceedings and at any other time the Court deems it appropriate, call upon the parties to file any pertinent document or to provide any relevant explanation. The Court shall formally take note of any failure to comply".
4. Moreover, Rule 55(1) clearly states that "The Court may, of its own accord or at the request of a party, obtain any evidence which in its opinion may provide clarification of the facts of a case..."
5. I am of the view that a reading of the two above-mentioned articles leaves no doubt as to their meaning. The Court has the

prerogative to request for any document relevant to the resolution of the dispute! Therefore, although the exercise of this prerogative is at the discretion of the judges, the Court must in no way choose to exercise it against the interest of justice! As its fundamental goal is to protect human rights and people's rights, which often brings to the fore poor, illiterate and ignorant applicants, the Court must always make decisions based on grounds that are beyond reproach.

6. The fact that the Applicant is represented by a lawyer cannot be sufficient ground for the Court to discard its power to compel the parties to file relevant documents. This is because the lawyer, whether out of bad faith or good faith, or for any other reasons, may not do so, in which case, the Court, in all circumstances, must lean towards the interests of the Applicant as a victim rather than focus on his lawyer.
7. Moreover, the neutrality of a judge cannot find a basis on such a negative attitude of the Court, because the most important consideration is to render a well-reasoned judgment that not only sets the parties at rest but is also convincing.
8. All that it takes to uphold the judge's neutrality and the adversarial principle is to notify documents received to the other parties!
9. The grounds of the aforementioned judgment would have been more substantial and convincing if, first, the Applicant had been compelled to file the documents and, second, in the event that he failed to comply with the order, if the court had simply referred to his failure to comply, which would have strengthened the grounds of the judgment considerably.

Koutché v Benin (ruling) (2022) 6 AfCLR 507

Application 013/2020, *Komi Koutché v Republic of Benin*

Ruling, 22 September 2022. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

The Applicant, a citizen of the Respondent State, brought this Application alleging that his indictment by a cabinet report without having been heard, the dismissal of his constitutional challenge by the Constitutional Court of the Respondent State and his trial by a special tribunal were all in violation of some of his human rights. Upholding the objection by the Respondent State, the Court held that the Applicant had not exhausted local remedies before bringing the Application. Accordingly, the Court declared the Application inadmissible.

Jurisdiction (material jurisdiction, 23-27)

Admissibility (exhaustion of local remedies, 38-44)

I. The Parties

1. Komi Koutché (hereinafter, “the Applicant”), is a national of Benin, residing in the United States of America. He alleges a violation of his rights in connection with criminal proceedings before the Court of Repression of Economic Offences and Terrorism (CRIET) in Benin.
2. The Republic of Benin (hereinafter, “the Respondent State”) became a party to the African Charter on Human and Peoples’ Rights (hereinafter, “the Charter”) on 21 October 1986 and to the Protocol to the Charter on the Establishment of an African Human Rights Court (hereinafter, “the Protocol”) on 22 August 2014. The Respondent State also deposited, on 8 February 2016, the Declaration provided for in Article 34(6) of the said Protocol by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations (hereinafter, “the Declaration”). On 25 March 2020, the Respondent State deposited with the African Union Commission the instrument of withdrawal of the said Declaration. The Court has ruled that this withdrawal has no bearing on pending cases and on new cases filed before the entry into force of the withdrawal, that is, one year after its deposit, which is on

26 March 2021.¹

II. Subject of the Application

A. Facts of the matter

3. It emerges from the Application that at the Cabinet Meetings of 28 June and 2 August 2017, two audit reports, one on the management of the cotton sector and the other, on the management of the National Microfinance Fund (FNM) were made public. The Applicant avers that his name was cited extensively in the said reports. On that occasion, the Attorney General was instructed to initiate proceedings against him.
4. The Applicant avers that he was surprised to learn of these facts in the media, whereas he was never approached by any auditing committee which, according to the applicable principles in the matter, must comply with the principle of adversarial proceedings. He states that he accordingly brought the matter before the Constitutional Court on 11 August 2017 to find a violation of the Constitution, in particular with regard to his rights.
5. He contends that by Decision DCC 18-256 rendered on 6 December 2018, the Constitutional Court of the Respondent State dismissed his request for a declaration that Cabinet Statement² of 2 August 2017 in its section³ entitled “*Organizational, accounting and financial audit mission of the National Microfinance Fund (MNF) for the financial years 2013 to 2016*”⁴ is unconstitutional for violation of his right to defence.
6. According to the Applicant, the decision of the Constitutional Court underpins all the grievances and prejudices that he suffered to the extent that all the acts taken against him, in particular, the issuance of the international arrest warrant, the extradition request, the withdrawal of his passport, the refusal to issue a tax

1 *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No 003/2020, Order of 5 May 2020 (provisional measures), §§ 4-5 and corrigendum of 29 July 2020.

2 Cabinet Minutes No 27/2017/PR/SGG/CM/OJ/ORD.

3 Point 2.7.1.

4 The Constitutional Court had, in fact, held that “the fact that Cabinet instructed the Minister of Justice to initiate legal proceedings against the Applicant does not in itself constitute a decision that engages, either administratively or judicially, the responsibility of the person concerned; consequently, it cannot validly be argued, at this stage, that there has been a violation of the right to a defence; consequently, there ground to say that there is no violation of the Constitution”.

receipt as well as the criminal proceedings initiated against him were based on the audit.

B. Alleged violations

7. The Applicant alleges a violation of his right to have his cause heard, in particular,
 - i. The right to be presumed innocent, protected by Article 7(1)(b) of the Charter;
 - ii. The right to a defence, protected by Article 7(1)(c) of the Charter
 - iii. The right to be tried by an impartial tribunal, protected by Article 7(1)(d) of the Charter
8. The Applicant further alleges a violation of the obligation to guarantee the independence of the courts, in this case, the Constitutional Court of the Respondent State, as guaranteed by Article 26 of the Charter.

III. Summary of the Procedure before the Court

9. On 25 March 2020, the Application was filed together with a request for provisional measures. They were served on the Respondent State on 27 March 2020, for its observations on the request for provisional measures within five (5) days and its Response on the merits within sixty (60) days, all from the date of receipt of the notification.
10. The Respondent State did not file its response to the request for provisional measures. On 2 April 2020, the Court issued a ruling dismissing the requested provisional measures.⁵
11. The Respondent State filed its Response on the merits within the time prescribed by the Court. By a letter received at the Registry on 31 May 2021, the Applicant stated that he did not intend to file a Reply to the Respondent State's Response.
12. Pleadings were closed on 20 August 2022 and the Parties were duly notified.

5 The Applicant sought a stay of execution of the judgment of 25 September 2019 of the Investigating Committee of the Court of Repression of Economic Offenses and Terrorism (CRIET) which referred him to the Criminal Division of the said CRIET, pending consideration of the merits of the case.

IV. Prayers of the Parties

13. In the Application, the Applicant prays the Court to:
 - i. Find that the Respondent State violated Articles 7 and 26 of the Charter;
 - ii. Find that the Constitutional Court of the Respondent State is neither independent nor impartial;
 - iii. Find that the Respondent State violated Articles 6 and 7 of the Charter, Articles 8 and 10 of the Universal Declaration of Human Rights (UDHR);
14. As regards reparations, the Applicant requests that the Court order:
 - i. The annulment of the Decision DCC 18-256 of 6 December 2018 as well as the entire procedure initiated against him based on the audit report, more precisely the one before the CRIET;
 - ii. That the sum of Two Billion Two Hundred and Ninety Million Two Hundred and Eleven Thousand Eight Hundred and Ninety-Eight (2,290,211,898) CFA francs, be paid to him as damages.
15. For its part, the Respondent State prays the Court to:
 - i. Find and declare that it lacks jurisdiction;
 - ii. Find and declare the Application is inadmissible;
 - iii. Find that the requests are unfounded and dismiss the action.

V. Jurisdiction

16. The Court notes that Article 3 of the Protocol reads as follows:
 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
17. Under Rule 49(1) of the Rules of Court⁶ “The Court shall ascertain its jurisdiction and the admissibility of an Application in accordance with the Charter, the Protocol and these Rules”.
18. Based on the above-mentioned provisions, the Court must, in each application, ascertain its jurisdiction and rule on objections to its jurisdiction, if any.
19. The Court notes that the Respondent State raises an objection to its material jurisdiction. The Court will rule on the said objection before considering, if necessary, the other aspects of its jurisdiction.

6 Rule 39(1) of the Rules of Court, 2 June 2010.

A. Objection to material jurisdiction

20. The Respondent State contends that the Court lacks material jurisdiction insofar as it is not an appellate court. It submits in this connection that the Applicant is seeking review by this Court of the decisions rendered by the Constitutional Court of the Respondent State.
21. The Respondent State notes that in *Alex Thomas v United Republic of Tanzania*, *Ernest Francis Mtingwi v Republic of Malawi* and *Lohé Issa Konaté v Burkina Faso*, the Court held that it was not an appellate court in relation to domestic courts. It further submits that the Economic Court of West African States Court of Justice took the same position in *Jamal Olivier Kane v State of Mali*.
22. The Applicant did not file a reply to this objection.

23. The Court notes that pursuant to Article 3(1) of the Protocol, it has jurisdiction over “all cases and disputes submitted to it concerning the interpretation and application of the Charter, the [...] Protocol and any other relevant human rights instrument ratified by the States concerned”.
24. The Court underlines that its material jurisdiction is subject to the Applicant’s allegation of violations of human rights protected by the Charter or by any other human rights instrument ratified by the Respondent State.⁷
25. In the present case, the Court notes that the Applicant alleges a violation of the right to a fair trial, in particular, the right to the presumption of innocence, the right to defence and the right to be tried by an impartial court, protected by Article 7(1)(b)(c) and (d) of the Charter. He also alleges a violation of the obligation to guarantee the independence of the courts, guaranteed by the Charter, an instrument ratified by the Respondent State.
26. Furthermore, the Court notes, in line with its jurisprudence that it is not an appellate court in relation to the decisions rendered

⁷ Sébastien Germain Marie *Aïkoué Ajavon v Republic of Benin*, ACTHPR, Application No 027/2020, Judgment of 2 December 2021, § 37; *Laurent Métongnon et al v Republic of Benin*, ACTHPR, Application No 031/2018, Judgment of 24 March 2022, § 29.

by domestic courts. However, “that does not preclude it from assessing whether domestic proceedings were conducted in accordance with international standards set out in the Charter and other international human rights instruments ratified by the State concerned”.⁸

27. Based on the foregoing, the Court dismisses the Respondent State’s objection and declares that it has material jurisdiction to hear the instant Application.

B. Other aspects of jurisdiction

28. The Court notes that no objection has been raised to its personal, temporal and territorial jurisdiction.
29. Having established that nothing on the record indicates that it lacks jurisdiction, the Court concludes that it has:
 - i. Personal jurisdiction, in so far as the Respondent State is a party to the Charter, the Protocol and has deposited the Declaration. The Court recalls, as indicated in paragraph 2 of this Ruling, that on 25 March 2020 the Respondent State deposited the instrument of withdrawal of the Declaration. In this regard, the Court reiterates its position that the withdrawal of the Declaration has no retroactive effect and has no bearing on cases pending prior to the deposition of the instrument of withdrawal or on new cases brought before the Court before the withdrawal took effect. Given that such a withdrawal of the Declaration takes effect one year after the deposition of the instrument of withdrawal, in this case on 26 March 2021, it does not, therefore, have any impact on the present Application, filed on 25 March 2020.
 - ii. Temporal jurisdiction, insofar as the alleged violations were committed after the entry into force of the above-mentioned instruments, in relation to the Respondent State.
 - iii. Territorial jurisdiction, insofar as the facts of the case and the alleged violations took place in the territory of the Respondent State.
30. Consequently, the Court finds that it has jurisdiction to hear the present Application.

8 *Laurent Métongnon et al v Republic of Benin*, ACTHPR, Application No 031/2018, Judgment of 24 March 2022, § 29.

VI. Admissibility

31. Under Article 6(2) of the Protocol: “[T]he Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.
32. In accordance with Rule 50(1) of the Rules⁹ “The Court shall proceed to an examination of admissibility (...) in accordance with Article 56 of the Charter and Article 6(2) of the Protocol and the (...) Rules of Court”.
33. Rule 50(2) of the Rules, which restates the provisions of Article 56 of the Charter, reads as follows
Applications filed before the Court shall comply with all of the following conditions:
 - a. Indicate their authors even if the latter request anonymity;
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter;
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
 - d. Are not based exclusively on news disseminated through the mass media;
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 - f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter, and;
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the Charter.
34. The Court notes that the Respondent State has raised two objections to admissibility, one based on the non-exhaustion of local remedies and the second, on the fact that the Application was not filed within a reasonable time.

A. Objection based on non-exhaustion of local remedies

35. The Respondent State submits that the Applicant did not exhaust local remedies. It notes in this regard that the Applicant should have raised, “in substance”, the complaints he raises before this Court before domestic courts.

9 Rule 39 of the Rules of Court, 2 June 2010.

36. The Respondent State contends, that in relation to the alleged violation of the right to defence, the Constitutional Court stated that the review of the alleged failure to comply with the adversarial principle in the preparation of the report is the responsibility of the competent authority.
37. The Applicant did not file a reply to this objection.

38. The Court notes that, in accordance with Article 56(5) of the Charter and Rule 50(2)(e) of the Rules of Court, applications must be filed after the exhaustion of local remedies, if any, unless it is clear that the proceedings in respect of such remedies are being unduly prolonged.
39. The Court notes that the local remedies to be exhausted are those of a judicial nature, which must be available, that is, they must be accessible to the applicant without hindrance, effective and satisfactory in the sense that they are found adequate by the complainant or are capable of redressing the complaint.¹⁰
40. The Court also observes that the exhaustion of local remedies implies not only that the Applicant initiates local remedies, but also that he awaits the outcome thereof.¹¹ In the same vein, the Court notes that in order to determine whether the requirement of exhaustion of local remedies has been met, it is necessary that the domestic proceedings to which the Applicant was a party should have been completed at the time the Application was filed with the Court.¹²
41. The Court also emphasises that the requirement to exhaust local remedies is assessed, in principle, as at the date on which the

10 *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo, Blaise Iboulo and Mouvement burkinabè des droits de l'homme et des peuples v Burkina Faso*, Judgment (merits) (5 December 2014), 1 AfCLR 219, § 68; *Ibid. Konaté v Burkina Faso* (merits), § 108; *Sébastien Germain Marie Ajavon v Republic of Benin*, ACTHPR, Application No 027/2020, § 73.

11 *Sébastien Germain Marie Ajavon v Republic of Benin*, ACTHPR, Application No 027/2020, § 74; *Yacouba Traoré v Republic of Mali*, ACTHPR, Application No 010/2018, Judgment of 25 September 2020, § 41.

12 *Komi Koutché v Republic of Benin*, ACTHPR, Application No 020/2019, Judgment of 25 June 2021, § 61; *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*, ACTHPR, Application No 027/2020, § 74.

proceedings are instituted before it.¹³

42. The Court notes that on 23 April 2019, the Applicant filed an Application before it against the Respondent State. The said Application, which was based on the same facts¹⁴ and same alleged violations¹⁵ as those in the present Application, gave rise to the ruling of 25 June 2021 which declared the Application inadmissible for non-exhaustion of local remedies.
43. The Court considers that there are no circumstances in the present case that could lead to a different decision, in relation to the same facts and the same alleged violations, especially as the Applicant does not demonstrate, once again, that he exhausted local remedies in respect of the present Application.
44. Accordingly, the Court upholds the Respondent State's objection and holds that the Applicant did not exhaust local remedies.

B. Objection based on the failure to file the Application within a reasonable time.

45. Having found that the present Application does not satisfy the requirement of Article 56(5) of the Charter and Rule 50(2)(f) of the Rules of Court, and having regard to the cumulative nature of the admissibility requirements,¹⁶ the Court considers it superfluous to rule on the objection to admissibility based on the fact that the Application was not filed within a reasonable time, as well as on the other admissibility requirements in relation to the Application.

13 *Yacouba Traoré v Republic of Mali*, ACTHPR, Application No 010/2018, Judgment of 25 September 2020, § 41.

14 The facts arise from two audit reports on the management of the cotton sector and the National Microfinance Fund (FNM), on the basis of which criminal proceedings were instituted against the Applicant. The latter appealed to the Constitutional Court for violation of the adversarial principle and violation of the right to defence, see in this regard *Komi Koutché v Republic of Benin*, ACTHPR, Application 020/2019, Judgment of 25 June 2021, § 4-12.

15 The alleged violations are: violation of the right to be tried by an impartial court and of the obligation to guarantee the independence of the courts, in relation to the Constitutional Court of the Respondent State, *Komi Koutché v Republic of Benin*, ACTHPR, Application 020/2019, Judgment of 25 June 2021 § 13-i; violation of the right to a defence, in relation to the audit reports that led to the proceedings against the Applicant before the CRIET, *Idem*, §13-v and § 44-47; violation of the right to the presumption of innocence, in relation to the proceedings before the CRIET, *Idem*, § 13-v.

16 *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (jurisdiction and admissibility) (21 March 2018), 2 AfCLR 246, § 63; *Rutabingwa Chrysanthé v Republic of Rwanda* (Jurisdiction and Admissibility) (11 May 2018), 2 AfCLR 361, § 48; *Collectif des anciens travailleurs ALS v Republic of Mali* (Jurisdiction and Admissibility) (28 March 2019), 3 AfCLR 73, § 39.

46. Accordingly, the Court declares the Application inadmissible and dismisses it.

VII. Costs

47. Each party requests that the other be ordered to pay the costs of the proceedings.

48. Rule 32(2) of the Rules provides that “[u]nless otherwise decided by the Court, each party shall bear its own costs, if any “.
49. In view of this provision, the Court decides that each Party shall bear its own costs.

VIII. Operative part

50. For these reasons,
The Court
Unanimously,
On jurisdiction

- i. *Dismisses* the objection to its jurisdiction;
- ii. *Declares* that it has jurisdiction.

On admissibility

- iii. *Upholds* the objection based on non-exhaustion of local remedies;
- iv. *Declares* the Application inadmissible.

On costs

- v. *Orders* that each Party shall bear its own costs.

Mabomba & Ors v Tanzania (ruling) (2022) 6 AfCLR 517

Application 017/2017, *Abdallah Sospeter Mabomba, Hussein Kyamba Nyawaya, Daniel Ngulu and Nyigini Alex v United Republic of Tanzania*

Ruling, 22 September 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA, SACKO and ADJEI

Recused under Article 22: ABOUD

The Applicants, all citizens of the Respondent State, were tried, convicted, and sentenced to 30 years imprisonment for armed robbery and gang rape by the national courts. They brought this Application, alleging that the proceedings before the national courts violated some of their Charter protected rights. Upholding one of the objections raised by the Respondent State, the Court held that the Application was not filed within a reasonable time. The Court therefore declared the Application inadmissible.

Jurisdiction (material jurisdiction, 21-22; temporal jurisdiction, 26-28)

Admissibility (exhaustion of local remedies, 41-43; filing within a reasonable time, 48-55)

I. The Parties

1. Abdallah Sospeter Mabomba, Hussein Kyamba Nyawaya, Daniel Ngulu and Nyigini Alex (hereinafter referred to as “the Applicants”), are nationals of the United Republic of Tanzania, who at the time of filing the Application, were incarcerated at Uyui Central Prison in the Tabora region, serving a term of thirty (30) years’ imprisonment having been convicted of armed robbery and gang rape. They challenge the conduct of the proceedings in the domestic courts.
2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as “the Respondent State”), which became a Party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration provided for under Article 34(6) of the Protocol (hereinafter referred to as “the Declaration”), by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited with the Chairperson of the African

Union Commission, an instrument withdrawing its Declaration. The Court held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect, that is, one year after its deposit, which is on 22 November 2020.¹

II. Subject matter of the Application

A. Facts of the matter

3. It emerges from the records, that, on 27 December 1999, the Applicants robbed a shop attendant at gun point of Tanzania Shillings one hundred and sixty thousand (TZS 160,000) as he went to open the shop. In the course of the robbery, the Applicants instructed the shop attendant to call out for the shop owner who lived adjacent to the shop, which he did. In response to the call, the shop owner and his wife opened the door to their house. At that point, the shop owner was assaulted with an iron bar which led him to fall on the floor. As he lay on the floor, the Applicants led his wife outside the house and gang raped her.
4. On 16 February 2001, the Applicants were jointly charged together with others not before this Court with two offences, namely: armed robbery and gang rape at the District Court of Musoma. They were convicted of both offences on 16 July 2002 and sentenced to thirty (30) years imprisonment for armed robbery as well as life imprisonment for gang rape, to be served concurrently. The Applicants appealed the decision to the High Court of Tanzania sitting at Mwanza which, on 2 July 2004, upheld the decision of the District Court. They further appealed to the Court of Appeal, which dismissed their appeal in its entirety on 16 March 2007.

B. Alleged violations

5. The Applicants allege the violation of the following:
 - i. The right to be equal before the law and equal protection of the Court protected under Article 3(1) and (2) of the Charter;
 - ii. The right to a fair trial protected under Article 7(1) of the Charter;
 - iii. The right to defence protected under Article 7(1)(c) of the Charter.

¹ *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application No 004/2015, Judgment of 26 June 2020 (merits and reparations) §§ 37-39.

III. Summary of the Procedure before the Court

6. The Application was filed on 13 June 2017. On 10 August 2017, the Applicants filed a request for joinder of Applications and pleadings with Application No 010/2016, *Hamad Mohamed Lyambaka v United Republic of Tanzania*.
7. On 9 February 2018, the Court dismissed Applicant's request for joinder on the ground that pleadings had been closed in Application No 010/2016, *Hamad Mohamed Lyambaka v United Republic of Tanzania*, and thus a joinder would occasion a delay in determining Application No 010/2016.²
8. On 12 February 2018, the Application was served on the Respondent State, which filed its response on 17 August 2018.
9. The Parties filed their pleadings on the merits and reparations of the Application, having benefited from several extensions of time.
10. Pleadings were closed on 27 July 2022 and the Parties were notified thereof.

IV. Prayers of the Parties

11. The Applicants pray the Court to “restore the justice where it was overlooked and quash both the conviction and sentence imposed on them and set them free” as well as “grant them any other order it deems fit.”
12. With respect to jurisdiction and admissibility, the Respondent State prays the Court to find:
 1. That the Honourable African Court on Human and Peoples' Rights is not vested with jurisdiction to adjudicate over this Application;
 2. That the Application has not met the admissibility requirements stipulated under Rule 40(5) of the Rules of Court or Article 56 and Article 6(2) of the Protocol;
 3. That the Application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules and Article 6(2) of the Protocol;
 4. That the Application be declared inadmissible;
 5. That the Application be dismissed in accordance to Rule 38 of the Rules of Court;
 6. That the costs of this Application be borne by the Applicants.
13. With respect to the merits of the Application, the Respondent State prays the Court to find:
 1. That the Government of the United Republic of Tanzania did not

2 The Court delivered the Ruling in Application No 010/2016 on 25 September 2020.

violate the rights of the Applicants provided under Article 3(2) of the African Charter on Human and Peoples' Rights;

2. That the Government of the United Republic of Tanzania did not violate the rights of the Applicants provided under Article 7(1)(c) of the African Charter on Human and Peoples' Rights;
3. That the Application be dismissed for lack of merit;
4. That the Applicants not be granted reparations;
5. That the Applicants continue to serve their sentence;
6. That the Applicants' prayers be dismissed;
7. That the costs of this Application be borne by the Applicants.

V. Jurisdiction

14. The Court observes that Article 3 of the Protocol provides as follows:
 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
15. In accordance with Rule 49(1) of the Rules, "[t]he Court shall conduct preliminary examination of its jurisdiction ... in accordance with the Charter, the Protocol and these Rules."
16. On the basis of the above-cited provisions, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.
17. The Respondent State objects to the material and temporal jurisdiction of the Court.

A. Objection to material jurisdiction

18. The Respondent State submits that this Court does not have jurisdiction to hear this Application as it raises issues of fact and law, which had been determined with finality by its Court of Appeal. The Respondent State avers that, through this Application, this Court is being asked to act as an appellate court.
19. Relying on Rule 26 of the Rules and the Ruling in the case of *Ernest Francis Mtingwi v Republic of Malawi*, the Respondent State also avers that this Court lacks jurisdiction to quash the conviction, set aside sentences and order the release of the Applicants from prison as these decisions were upheld by its highest court.

20. The Applicants aver that the Court has jurisdiction to determine this Application “in accordance with Articles 3 and 27 of the Protocol.” Furthermore, that the Court’s jurisdiction extends to examining whether the procedures undertaken in the national courts are in conformity with the Charter.

21. The Court recalls, as it has consistently held, that pursuant to Article 3(1) of the Protocol, it has jurisdiction to consider any Application filed before it provided that the latter alleges the violation of rights guaranteed in the Charter, the Protocol or any other human rights instruments ratified by the Respondent State.
22. The Court further reiterates that, while it does not exercise appellate jurisdiction with respect to decisions of domestic courts, it is empowered by provisions of Article 3(1) of the Protocol to ensure the observance of the obligations undertaken under the Charter and any other human rights instruments ratified by the Respondent State.
23. From the foregoing, the Court finds that it has material jurisdiction to hear the Application.

B. Objection to temporal jurisdiction

24. According to the Respondent State, the alleged violations are not on-going as the Applicants are serving a lawful sentence for the commission of an offence provided for by statute. Therefore, it contends that the Court lacks the temporal jurisdiction to consider this Application.
25. The Applicants did not file a reply to this objection.

26. The Court notes that the alleged violations in this case are based on the alleged denial of the right to a fair trial in the national courts, which occurred between 2001 and 2007. In this regard, the alleged violations occurred after the Respondent State had

ratified the Charter and the Protocol but prior to the deposit of the Declaration on 29 March 2010. However, the alleged violations continued thereafter since the Applicants are still serving sentences based on convictions from procedures in the national courts that they consider to be unfair.³

27. The Court underscores, in accordance with the principle of non-retroactivity, that it cannot consider allegations of human rights violations that occurred before the Respondent State's obligations were triggered unless the violations are continuing in nature as is the case herein, indicated in the preceding paragraph.
28. Consequently, the Court dismisses the objection to its temporal jurisdiction and holds that it has temporal jurisdiction.

C. Other aspects of jurisdiction

29. The Court notes, with respect to its personal jurisdiction that, as earlier stated in this Judgment, the Respondent State is a party to the Protocol and on 29 March 2010, it deposited with the African Union Commission, the Declaration made under Article 34(6) of the Protocol. Subsequently, on 21 November 2019, it deposited an instrument withdrawing its Declaration.
30. The Court recalls its jurisprudence that, the withdrawal of a Declaration does not apply retroactively and only takes effect one (1) year after the notice of such withdrawal has been deposited, in this case, on 22 November 2020. This Application having been filed before the Respondent State deposited its notice of withdrawal, is thus not affected by it. Consequently, the Court finds that it has personal jurisdiction.
31. The Court also notes that it has territorial jurisdiction given that the alleged violations occurred in the Respondent State's territory.
32. In light of the foregoing, the Court holds that it has jurisdiction to hear this Application.

VI. Admissibility

33. In terms of Article 6(2) of the Protocol, "the Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter."

3 *Jebra Kambole v United Republic of Tanzania*, ACtHPR, Application No 018/2018, Judgment of 15 July 2020 (merits and reparations) § 24; *Dismas Bunyerere v United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 702 § 28(ii); *Norbert Zongo and Others v Burkina Faso* (preliminary objections) (25 June 2013) 1 AfCLR 197 §§ 71-77.

34. Pursuant to Rule 50(1) of the Rules, “[t]he Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules.”
35. Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:
Applications filed before the Court shall comply with all the following conditions:
- a. Indicate their authors even though the latter requests anonymity;
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter;
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
 - d. Are not based exclusively on news disseminated through the mass media;
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 - f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter; and
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of African Union or the provisions of the Charter.
36. The Respondent State raises two objections to the admissibility of the Application in relation to exhaustion of local remedies and on the requirement to file applications within a reasonable time after exhaustion of local remedies.

A. Objection based on non-exhaustion of local remedies

37. The Respondent State contends that the Application was prematurely filed at the Court as the Applicants did not file a constitutional petition in the High Court alleging the violations of their rights.
38. The Respondent State further alleges that the Applicants could have applied for review of the Court of Appeal’s judgment in accordance with Part IIIB, Rule 66 of the Tanzanian Court of Appeal Rules, 2009.
39. Lastly, the Respondent State argues that the local remedies were available to the Applicants and were not unduly prolonged.

40. The Applicants aver that the Application should be found admissible in accordance with Articles 5(3), 6(1) and (2) of the Protocol.

41. The Court notes pursuant to Article 56(5) of the Charter, whose provisions are restated in Rule 50(2)(e) of the Rules, that, any application filed before it, has to fulfil the requirement of exhaustion of local remedies. The rule of exhaustion of local remedies aims at providing States the opportunity to deal with human rights violations within their jurisdictions before an international human rights body is called upon to determine the State's responsibility for the same.⁴
42. This Court has also stated in a number of cases involving the Respondent State that the remedies of filing a constitutional petition in the High Court and use of the review procedure in the Tanzanian judicial system are extraordinary remedies that an Applicant is not required to exhaust prior to seising this Court.⁵
43. In the instant case, the Court notes from the record, that the Applicants having been convicted at the District Court of Musoma on 16 July 2002, filed an appeal against their conviction and sentence to the High Court at Mwanza challenging the fairness of the proceedings, and the appeal was dismissed on 2 July 2004. The Applicants then appealed before the Court of Appeal of Tanzania, the highest judicial organ of the Respondent State, and on 16 March 2007, the Court of Appeal upheld the judgment of the High Court. Therefore, the Applicants exhausted all the available domestic remedies.

4 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9 §§ 93-94.

5 See *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465 § 65; *Mohamed Abubakari v United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599 §§ 66-70; *Christopher Jonas v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101 § 44.

44. For this reason, the Court dismisses the objection based on non-exhaustion of local remedies.
45. Objection based on failure to file the Application within a reasonable time
46. The Respondent State contends that the Court of Appeal delivered its judgment on 16 March 2007 while the Applicants seised the Court on 13 July 2017. In addition, the Respondent State alludes to the fact that it deposited its Article 34(6) Declaration on 29 March 2010 and therefore, the Applicants filed their case, “seven (7) years and four (4) months” later.
47. According to the Respondent State even though the Charter does not set a time limit for seizure of the Court by applicants, the Court has held that it would consider what is reasonable on a case-by-case basis. The Respondent State argues that the Court should not consider the Application to have been filed within a reasonable time as the lapse of “seven (7) years and four (4) months” is unreasonable.
48. The Applicants did not reply to this objection.

49. The Court notes that Rule 50(2)(f) of the Rules which in substance restates the contents of Article 56(6) of the Charter, requires an Application to be filed within: “a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter.”
50. The Court recalls its jurisprudence, that: “...the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis.”⁶ Some of the circumstances that the Court has taken into consideration include: imprisonment, being lay without the benefit of legal assistance,⁷ indigence, illiteracy, lack of awareness of the

6 *Norbert Zongo v Burkina Faso* (merits), *op. cit* § 92. See also *Alex Thomas v Tanzania* (merits) *op. cit* § 73.

7 *Alex Thomas v Tanzania* (merits), *op. cit* § 73; *Christopher Jonas v Tanzania* (merits) *op. cit.* § 54; *Amir Ramadhani v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344 § 83.

existence of the Court, intimidation and fear of reprisals⁸ and the use of extraordinary remedies.⁹

51. The Court observes that, the reckoning of time within which to assess reasonableness in filing the Application should have been the date when the Court of Appeal rendered its judgment that is on 16 March 2007. However, in the instant case, the actual starting date for computing the time is 29 March 2010 when the Respondent State filed its Declaration because that is when individuals could seise the Court with cases against the Respondent State. Given that the Application was filed on 13 June 2017, the time to be assessed is seven (7) years, two (2) months and fifteen (15) days. The issue for determination is whether such time is reasonable within the meaning of Article 56(6) of the Charter and Rule 50(2) (f) of the Rules.
52. In this respect, the Court has held in particular that failure to file an application within a reasonable time due to indigence and incarceration must be proved and cannot be justified by blanket assertions or assumptions.
53. The Court has held¹⁰ that, a period of five (5) years and four (4) months was an unreasonable lapse of time before the filing of an application. The Court reasoned that while the applicants were incarcerated and therefore restricted in their movements, they had not asserted or provided any proof that they were illiterate, lay, or had no knowledge of the existence of the Court.¹¹
54. In the instant case, the Applicants did not make any submissions as regards their filing of the Application within a reasonable time. Conversely, the Respondent State submits that the Applicants did not seise the Court within a reasonable time.
55. Against these submissions, the Court observes that while it emerges from the record that the Applicants were incarcerated, there is no proof that their incarceration constituted an impediment to the timely filing of the Application. As such, the Applicants have not justified as to why it took them seven (7) years, two (2) months and fifteen (15) days to file the Application. In the absence of

8 *Association Pour le progress et la Defense des droit des Femmes Maliennes and the Institute for Human Rights and Development in Africa v Republic of Mali* (merits) (11 May 2018) 2 AfCLR 380 § 54.

9 *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477 § 56; *Werema Wangoko v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520, § 49 *Alfred Agbes Woyome v Republic of Ghana* (merits and reparations) (28 June 2019) 3 AfCLR 235 §§ 83-86.

10 *Godfred Anthony and another v United Republic of Tanzania* (26 September 2019) (Admissibility) 3 AfCLR 470 § 48.

11 *Ibid.*

clear and compelling justification for the above-mentioned lapse of time, the Court finds that the Application was not filed within a reasonable time in the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.

56. The Court therefore upholds the Respondent State's objection based on failure to file the Application within a reasonable time.

B. Other conditions of admissibility

57. The Court having found that the Application does not satisfy Rule 50(2)(f) of the Rules, does not need to rule on the admissibility requirements set out in Article 56(1), (2), (3), (4) and (7) of the Charter reflected in Rule 50(2)(a), (b), (c), (d) and (g) of the Rules,¹² as the admissibility requirements are cumulative.¹³
58. In view of the foregoing, the Court declares the Application inadmissible and dismisses it.

VII. Costs

59. The Respondent State prayed the Court for costs to be borne by the Applicants. The Applicants did not reply to this prayer.

60. The Court notes that Rule 32(2) of its Rules provides that "[unless otherwise decided by the Court, each party shall bear its own costs, if any.]"
61. The Court does not see any reason to depart from the above Rule and thus orders that each Party bears its own costs.

12 *Ibid.*

13 *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (jurisdiction and admissibility) (21 March 2018), 2 AfCLR 237 § 63; *Rutabingwa Chrysanthé v Republic of Rwanda* (jurisdiction and admissibility) (11 May 2018), 2 AfCLR 361 § 48; *Collectif des Anciens Travailleurs du Laboratoire ALS v Republic of Mali* (jurisdiction and admissibility) (28 March 2019) 3 AfCLR 73 § 39.

VIII. Operative part

62. For these reasons,

The Court

Unanimously,

On jurisdiction

- i. *Dismisses* the objections to its jurisdiction;
- ii. *Declares* that it has jurisdiction;

On admissibility

- iii. *Dismisses* the objection based on non-exhaustion of local remedies;
- iv. *Upholds* the objection that the Application was not filed within a reasonable time.
- v. *Declares* that the Application is inadmissible and dismisses it.

On costs

- vi. *Orders* that each Party shall bear its own costs.

Machera v Tanzania (judgment) (2022) 6 AfCLR 529

Application 035/2017, *Sijaona Chacha Machera v United Republic of Tanzania*

Judgment, 22 September 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant, a citizen of the Respondent State and a schoolteacher, was tried, convicted, and sentenced to a term in prison for a sexual offence against a 12 year old student. His appeal at the national level, against his conviction and sentence, was unsuccessful. He brought this Application alleging that his trial, conviction, and sentence by the national courts violated some of his Charter protected rights. The Court found that the Respondent State had not violated any of the rights claimed and dismissed the Application.

Jurisdiction (material jurisdiction, 28; personal jurisdiction, 28)

Admissibility (exhaustion of local remedies, 38)

Fair trial (right to be heard, 79)

Procedure (onus of proof, 82)

I. The Parties

1. Sijaona Chacha Machera (hereinafter “the Applicant”) is a national of Tanzania and a schoolteacher, who, at the time of filing the Application, was serving a thirty (30) year prison sentence at Butimba Central Prison, Mwanza Region, having been convicted for committing an unnatural offence against his twelve (12) year old student. He alleges the violation of his right to a fair trial in the domestic courts.
2. The Application is filed against the United Republic of Tanzania (hereinafter “the Respondent State”), which became a Party to the African Charter on Human and Peoples’ Rights (hereinafter “the Charter”) on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration provided for under Article 34(6) of the Protocol (hereinafter “the Declaration”), by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission an instrument

withdrawing its Declaration. The Court has held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect, that is, one year after its deposit, which is on 22 November 2020.¹

II. Subject of the Application

A. Facts of the matter

3. It emerges from the records, that on 8 August 2007, the Applicant allegedly asked one of his students, a boy aged twelve (12) years, to his home. The Applicant was supposedly going to inflict a punishment on the student by whipping him with a cane for getting a number of exercises wrong. However, the Applicant then allegedly proceeded to undress himself and the student and had carnal knowledge of him against the order of nature.
4. The Applicant was charged on 13 August 2007 for having committed an offence against the order of nature, contrary to Section 154(a) of the Respondent State's Penal Code.
5. The Applicant was arraigned before the District Court of Musoma at Mwanza on 4 October 2007, in Criminal Case No 276/2007 and was convicted and sentenced to thirty (30) years in prison on 21 May 2008.
6. The Applicant filed on 17 February 2009 an appeal before the High Court sitting at Mwanza, being Criminal Appeal No 31/2009, and on 5 August 2011 this appeal was dismissed.
7. The Applicant filed a further appeal to the Court of Appeal of Tanzania sitting at Mwanza, being Criminal Appeal No 223/2011.² In its judgment of 30 July 2013, the Court of Appeal dismissed this appeal in its entirety.
8. The Applicant filed on 23 September 2013 an Application for Review of the Court of Appeal's decision, under Criminal Application No 17/2013. On 22 August 2017, the Court of Appeal dismissed the Application for Review for lack of merit.

1 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application No 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.

2 The record does not show on what date the Applicant filed his appeal to the Court of Appeal.

B. Alleged violations

9. In the Application, in addition to alleging that the Respondent State has violated its obligations under Article 1 of the Charter, the Applicant alleges that the Respondent State violated his rights, namely:
 - i. The right to non-discrimination, protected by Article 2 of the Charter;
 - ii. The right to equality before the law and equal protection of the law, protected by Article 3 of the Charter;
 - iii. The right to life, protected under Article 4 of the Charter;
 - iv. The right to the respect of the dignity inherent in a human being and prohibition of slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment, protected under Article 5 of the Charter;
 - v. The right to liberty and security, protected by Article 6 of the Charter;
 - vi. The right to have his cause heard, protected by Article 7(1) of the Charter;
 - vii. The right to receive information, guaranteed under Article 9(1) of the Charter.
10. The Applicant also alleges that his rights protected in Article 12 (equality of human beings), Article 13 (equality before the law), Article 15 (right to personal freedom), Article 23 (right to just remuneration), Article 24 (right to own property) and Article 107B (independence of the judiciary) of the Constitution of the Respondent State were violated.
11. In the submissions on reparations, the Applicant further alleges the violation by the Respondent State of Article 3 (right to equality before the law and equal protection of the law), Article 5 (respect of dignity), Article 7 (right to a fair trial), Article 8 (right to freedom of conscience and religion), Article 9 (right to information and freedom of expression), Article 14 (right to property), Article 15 (right to work), Article 16 (right to health), Article 17 (right to education), Article 18 (protection of the family and vulnerable groups), Article 19 (right of all peoples to equality and rights) and Article 26 (state duty to guarantee independence of the courts and establish national human rights institutions) of the Charter.

III. Summary of the Procedure before the Court

12. The Application was filed on 8 November 2017.
13. On 22 February 2018, the Registry sent a notification to the Applicant requesting him to file a detailed claim for reparations.
14. On 7 May 2018, the Applicant filed his claims for reparations.
15. The Application together with the Applicant's submissions on Reparations were served on the Respondent State on 6 September 2018.
16. The Parties filed their pleadings on merits and reparations within the time stipulated by the Court.
17. Pleadings were closed on 19 July 2022 and the Parties were duly notified.

IV. Prayers of the Parties

18. In the Application, the Applicant prays for the following:
 - i. That the Court restores justice where it was overlooked by quashing his charge and sentence and release him from prison.
 - ii. That the Court grants other orders and reliefs that it may deem fit and just in the circumstances of the Applicant.
19. In his submissions on reparations, the Applicant prays for the Court to order as follows:
 - i. That the Respondent State pays the Applicant his salary and annual salary increments for the period between 24 May 2008 and the end of his contract;
 - ii. That the Respondent State pays the Applicant his unpaid basic wages together with a 25% interest.
 - iii. That the Respondent State compensates the Applicant with a total of 900.000.000 TZS for physical pain, psychological trauma, loss of earnings and his family's hardship for his loss of income.
20. The Applicant further prays the Court to order the Respondent State to supply him with his employment documents, including his contract of service, the letter terminating his employment, minutes of the meeting in which the decision to terminate his employment was made, his pay slip and any other document relating to his employment.
21. In its Response, with regard to jurisdiction and admissibility of the Application, the Respondent State prays the Court to order the following measures:
 - i. That the Honourable African Court on Human and Peoples' Rights is not vested with jurisdiction to adjudicate this Application.
 - ii. That the Application be declared inadmissible.
 - iii. That the Application be dismissed.

22. With regard to the merits of the Application, the Respondent State prays the Court to order the following measures:
 - i. That the Respondent State has not violated the Applicant's rights provided under Articles 1, 2, 3, 4, 5, 6, 7(1) and 9(1) of the Charter;
 - ii. That the Respondent State has not violated any of the Applicant's rights under the Charter or the Constitution of the United Republic of Tanzania.
23. In Response to the Applicant's submissions on reparations, the Respondent State prays for declarations and orders of the Court as follows:
 - i. A declaration that the Applicant is not amenable to reparations;
 - ii. A declaration that the Applicant's trial by the national courts of the Government of Tanzania leading to the conviction and sentencing of the Applicant was lawful and in accordance with the national laws, the Charter and other relevant international instruments;
 - iii. A declaration that the Applicant's Application for reparation is unfounded and devoid of merit for failure to meet the tests enshrined in the principles and prerequisites of reparations;
 - iv. An order for dismissal of the Application for reparations with costs;
 - v. Any other order or relief that the Court deems fit and just to grant.

V. Jurisdiction

24. The Court observes that Article 3 of the Protocol provides as follows:
 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
25. The Court further observes that pursuant to Rule 49(1) of the Rules, it "shall conduct a preliminary examination of its jurisdiction [...] in accordance with the Charter, the Protocol and these Rules."³
26. In view of the foregoing, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.
27. In the present Application, the Court notes that the Respondent State has prayed, without providing further details, that the Court grants the order that it is not vested with the jurisdiction to adjudicate on this matter.

3 Rule 39(1), Rules of Court, 2 June 2010.

- 28.** Having conducted an examination of its jurisdiction, and noting that nothing on the record indicates otherwise, the Court holds that:
- i. It has material jurisdiction because the Application alleges violations of Article 1, 2, 3, 4, 5, 6, 7(1) and 9(1) of the Charter which the Respondent State has ratified, and the Court has the power to interpret and apply the Charter in accordance with Article 3(1) of the Protocol.
 - ii. It has personal jurisdiction, given that the Respondent State is a party to the Protocol and had deposited the Declaration under Article 34(6) thereof, which enabled the Applicant to access the Court in terms of Article 5(3) of the Protocol. In reference to paragraph 2 of this judgment, the Court recalls that it has held that the withdrawal of the Declaration does not have any retroactive effect and it also has no bearing on matters pending prior to the filing of the instrument withdrawing the Declaration, or on new cases filed before the withdrawal takes effect.⁴ This Application having been filed before the Respondent State deposited its notice of withdrawal is thus not affected by it.
 - iii. It has temporal jurisdiction given that the alleged violations took place after ratification of the Charter, the Protocol and depositing of the Declaration by the Respondent State. Furthermore, the alleged violations are continuing since the Applicant remains convicted on the basis of what he considers an unfair process.⁵
 - iv. It has territorial jurisdiction given that the facts on which the alleged violations are based occurred on the territory of the Respondent State.
- 29.** In light of the above, the Court holds that it has jurisdiction to determine the present Application.

VI. Admissibility

- 30.** Pursuant to Article 6(2) of the Protocol, “The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.
- 31.** In line with Rule 50(1) of the Rules,⁶ “the Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules.”

4 *Andrew Ambrose Cheusi v United Republic of Tanzania*, §§ 35-39.

5 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197 §§ 71-77.

6 Rule 40 of the Rules of Court, 2 June 2010.

The Court notes that Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

Applications filed before the Court shall comply with all of the following conditions:

- a. Indicate their authors even if the latter request anonymity;
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter;
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
 - d. Are not based exclusively on news disseminated through the mass media;
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 - f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter; and
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of African Union or the provisions of the Charter.
- 32.** The Respondent State has, without providing further details, prayed that the Court finds the Application inadmissible. Nonetheless, in accordance with Rule 49(1) of the Rules, the Court shall still ascertain the admissibility of the Application in accordance with the Charter, the Protocol and the Rules.
 - 33.** From the record, the Court notes that, the Applicant has been clearly identified by name in fulfilment of Rule 50(2)(a) of the Rules.
 - 34.** The Court notes that the claims made by the Applicant seek to protect his rights guaranteed by the Charter. It also notes that one of the objectives of the Constitutive Act of the African Union as stipulated under Article 3(h), is to promote and protect human and peoples' rights. The Court, therefore, holds that the Application is compatible with the Constitutive Act of the African Union and the Charter and thus meets the requirements of Rule 50(2)(b) of the Rules.
 - 35.** The language used in the Application is not disparaging or insulting to the Respondent State or its institutions in fulfilment of Rule 50(2)(c) of the Rules.
 - 36.** The Application is not based exclusively on news disseminated through mass media as it is founded on court documents from the domestic courts of the Respondent State in fulfilment of Rule

50(2)(d) of the Rules.

37. With regard to the exhaustion of local remedies, the Court notes that the Applicant has had his case determined by three domestic courts, namely, the District Court of Musoma at Mwanza in Criminal Case No 276/2007, the High Court sitting at Mwanza in Criminal Appeal No 31/2009 and the Court of Appeal of Tanzania, the highest judicial authority in the Respondent State, in Criminal Appeal No 223/2011 and Criminal Application No 17/2013 wherein an Application for Review of the decision of the Court of Appeal was dismissed. The Court therefore finds that the Applicant has exhausted local remedies in compliance with Rule 50(2)(e) of the Rules.
38. The Court observes that the final decision of the Court of Appeal of Tanzania, that is Criminal Application No 17/2013 to review the Court of Appeal's decision, was delivered on 22 August 2017 and the Applicant filed his Application before this Court on 8 November 2017. The Court finds a period of 2 months and 17 days that was taken before submitting his Application before this Court was reasonable and therefore the requirement in Rule 50(2)(f) of the Rules has been met.
39. Further, the Application does not concern a case which has already been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter, in compliance with Rule 50(2)(g).
40. The Court, therefore, dismisses the Respondent State's objection to the admissibility of the Application and finds that all the admissibility conditions have been met and that this Application is admissible.

VII. Merits

41. The Court notes that the Applicant alleges the violation of Articles 12, 13, 15, 23, 24 and 107B of the Constitution of the Respondent State. Nonetheless, the Court has previously held that in determining whether the State has complied with the Charter or any other human rights instrument it has ratified, it does not apply the domestic law in making this assessment.⁷ The Court will therefore not apply the provisions of the Respondent State's Constitution cited by the Applicant.

⁷ *Mohamed Abubakari v Tanzania* (merits) § 28; *Kennedy Owino Onyachi and another v Tanzania* (merits) § 39.

42. The Court further notes that the Applicant alleges that the manner in which the Respondent State's domestic courts determined his case was in error of both the law and facts and as a result, his rights as guaranteed in Articles 1, 2, 3, 4, 5, 6, 7(1) and 9(1) of the Charter were violated.
43. The Court considers, however, that although the Applicant alleges violations of various rights under the Charter, at the core of his Application is the alleged violation of the right to have his cause heard, protected under Article 7(1) of the Charter. The Court will, therefore, first, consider the alleged violation of Article 7(1) of the Charter, before addressing the other human rights that were allegedly violated.

A. Alleged violation of the right to have one's cause heard

44. The Court observes that from the details of the Application, the Applicant essentially has four grievances against the domestic courts whose actions or omissions he claims violated his right to be heard as protected under Article 7(1) of the Charter. These grievances are:
 - i. That the Court of Appeal erred by its failure to find fault in the actions of the trial court which the Applicant alleges sentenced him before convicting him.
 - ii. That the Court of Appeal erred by its failure to take note that the trial court erroneously admitted the evidence of PW1 who testified without taking an oath.
 - iii. That the Court of Appeal erred in law and in fact by failure to find fault in what he alleges is the trial court's illegal admission of Exhibit P1 and P2 as evidence as well as the testimony of PW6.
 - iv. That the Court of Appeal misdirected itself by failing to consider his allegation that the trial court did not facilitate the attendance of defence witnesses.
45. The Court will proceed to examine these four (4) grievances in light of Article 7(1) of the Charter.

i. Allegation relating to his sentencing without conviction

46. The Applicant claims that the Court of Appeal erred in law and in fact by its failure to find that entering of the judgment and sentencing by the trial court before convicting him first had occasioned him an injustice and was contrary to Rule 66(1)(a) of the Court of Appeal Rules.

47. He further claims that in the absence of the said conviction, the subsequent decisions of the High Court and the Court of Appeal “had no legs to stand on” and were prepared illegally, contrary to Rule 66(1)(e) of the Court of Appeal Rules.

48. The Respondent State submits that Criminal Appeal No 31 of 2009, Criminal Appeal No 223 of 2011 and Criminal Application No 17 of 2013 were dismissed for want of merit. Further, that the Court of Appeal was correct in holding that the Applicant was lawfully convicted by the trial court and that the conviction followed establishment of proof beyond reasonable doubt that the Applicant committed the offence with which he was charged.
49. The Respondent State further states that the Court of Appeal was correct in holding that the Applicant was convicted by the trial court and that the conviction was consequent upon proof beyond doubt. It is the Respondent State’s position that there was therefore no miscarriage of justice as alleged by the Applicant.

50. The Court observes from the Applicant’s submissions that he was aggrieved by the alleged fact that the trial court did not “convict” him before passing the sentence against him and this omission made his judgment incomplete and occasioned him an injustice. However, from the record before this Court, the Court of Appeal in its judgment in Criminal Application No 17 of 2013, which is the decision that according to the Applicant violated his rights under Article 7(1) of the Charter for failure to take note of the omission to convict him before his sentencing, held as follows:
The Court’s decision [which is] the subject matter of this review at its introductory part clearly indicates that the applicant was convicted by the District Court of Musoma [...] It is thus apparent that the applicant was convicted by the trial court and such conviction was consequent

upon proof beyond doubts of the offence with which the applicant was charged.⁸

51. Furthermore, this Court notes from the record of proceedings in the trial court that the said record indicates that on 21 March 2008, the trial magistrate held as follows:
In the instant case, prosecution has proved the case beyond reasonable doubt and I hereby hold that the accused is guilty of the offence he stands charged unnatural offence [sic] c/s154(1)(a) of the Penal Code, Cap 16 (R.E 2002).⁹
52. Further to the above, this Court notes from the record that the Applicant was on the same day that he was convicted, allowed to address the trial court on mitigating circumstances before his subsequent sentencing which took place on 21 May 2008. In view of this, the Court finds that the Applicant's assertion that he was not convicted before he was sentenced is unfounded.
53. Therefore, his allegation that his right to be heard, guaranteed under Article 7(1) of the Charter, was violated, is dismissed.

ii. Allegation that evidence was given without taking oath

54. The Applicant faults the Court of Appeal's Review decision as having erred in law and in fact for its failure to note that the trial court erroneously admitted the evidence of PW1 who testified without taking an oath. As a result, this violated his rights under Article 7(1) of the Charter

55. The Respondent State disputes the allegation by the Applicant and claims that the Court of Appeal was correct by not entertaining the second ground of the application for review raised by the Applicant, because by doing so the Court would have to re-evaluate the evidence adduced by PW1. This, according to the Respondent State, would have been unlawful because in review, the Court of Appeal does not sit to re-evaluate the evidence all over again. Further, the Respondent State "states that, PW1 being a child of 12 years, his evidence was taken after a *voire*

8 At p 11-12 of the judgment in Criminal Application No 17/2013.

9 At p 12 of the of the Record of Appeal in Criminal Appeal No 223/2011.

dire test, conducted on him as per section 127(2) of the Evidence Act, Cap 6 of the laws of Tanzania”.

56. The Court notes that the Applicant asserts that the Court of Appeal, in Criminal Application No 17 of 2013, failed to note that the trial court erroneously admitted the evidence of PW1 who testified without taking an oath as required under Section 127(2) of the Evidence Act.
57. The Court further notes that the said Section 127(2) of the Evidence Act provides as follows:

Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth.
58. From the above provision, the Court observes that a trial court is permitted to receive evidence from a child of tender years without the child taking an oath or being affirmed where the court forms the opinion that the child has sufficient intelligence to justify reception of the child’s evidence and the child understands the duty to speak the truth.
59. From the record before this Court, it is evident that, as noted by the High Court in Criminal Appeal No 31/2009, the District Court assessed the credibility of PW1, a child aged twelve (12) years. The trial court held as follows:

I have assessed the victim (PW1) in terms of intelligence and duty of speaking the truth, his veracity, knowledge of the facts, trustworthiness and came to the conclusion that he is a reliable witness. He has testified while shedding tears the truth that the said offence was committed against him by the accused.
60. This Court also notes that the High Court further observed that “the evidence of PW1 was well assessed by the trial magistrate who correctly found the same was corroborated by the evidence of PW2 to PW6 and that of DW2”. In addition, the Court of Appeal in Criminal Appeal No 223/2011 observed that even though the evidence of PW1 was recorded without an oath, his testimony was corroborated by other witnesses. The Court of Appeal thus

concluded: “Surely, in the midst of all the above evidence there is nothing for us in this second appeal to fault the courts below.”

61. Further to the above, in the Review decision by the Court of Appeal in Criminal Application 17/2013, the court declined to re-assess the evidence adduced by PW1 and noted that the alleged grounds for review (which include the challenge on the testimony of PW1) did not fall within the grounds for review outlined in Rule 66(1) of the Court of Appeal Rules. Additionally, the Court of Appeal held: “... we are not ready to sit on our own decision for the court’s decision is clear that it considered the evidence by all the witnesses...and came to a finding that the witnesses were credible and there was nothing to fault the courts below”.¹⁰
62. From the above, this Court finds that the trial court, the High Court and the Court of Appeal (twice) did take note and addressed the Applicant’s challenge of the testimony of PW1.
63. The Court, therefore, dismisses the allegations of the Applicant and finds that his right to be heard, protected under Article 7(1) of the Charter, has not been violated.

iii. Allegation relating to the admission of exhibits and testimony

64. The Applicant claims that the Court of Appeal erred in law and in fact by failure to find fault in what he alleges was the trial court’s illegal admission of Exhibit P1 and P2 as evidence as well as the testimony of PW6.

65. The Respondent State disputes the allegation of the Applicant. It submits that the allegation that Exhibit P1 and P2 as well as the evidence of PW6 were admitted illegally does not fall in any of the grounds for review under Rule 66(1) of the Court of Appeal Rule. Hence, the Court of appeal was correct in dismissing the said allegations.

10 At p 13 of the judgment in Criminal Application 17/2013.

66. The Court takes note that the Applicant, without providing any details, alleges that the Court of Appeal in Criminal Application No 17/2013 failed to take note that the trial court had admitted Exhibit P1 and P2 illegally. Despite this general allegation, from the record, this Court notes that the Court of Appeal, in Criminal Appeal No 223/2011 noted that the Applicant was challenging the credibility of Exhibit P1 which was a letter from PW1 to his mother.¹¹
67. The Court of Appeal further noted that the Applicant had not challenged the credibility of Exhibit P1 in his first appeal at the High Court and found: "It is too late in the day to take issue with the letter at this stage because in practice we do not deal with matters that were never raised and considered by the courts below".¹²
68. Further to the above, in the Review decision in Criminal Application No 17/2013, the Court of Appeal held: "...the Court's decision is clear that it considered the evidence by all the witnesses and the letter at pages 3 to 6 of the judgment and came to a finding that the witnesses were credible and there was nothing to fault the courts below. We, for the above reason, do not accept the invitation to re-assess the evidence and admissibility of exhibits at this stage for to do so is tantamount to sitting on appeal on our own decision".¹³
69. In light of all the above, this Court finds that both the High Court and Court of Appeal (twice) sufficiently addressed the issue of admission of exhibits in the Applicant's case as well as the evidence by PW6. Nothing done by the domestic courts in this regard warrants the intervention of this Court. The Court therefore finds the Applicant's assertion that the Court of Appeal did not take note of illegal admission of the said evidence to be without merit and therefore dismisses the Applicant's allegation that his right to be heard, protected under Article 7(1) of the Charter, was violated.

11 At p 5 of the judgment in Criminal Appeal No 223/2011.

12 At p 5 of the judgment in Criminal Appeal No 223/2011.

13 At p 13 of the judgement in Criminal Application No 17/2013.

iv. Allegation relating to the attendance of defence witnesses

70. The Applicant alleges that the trial court did not assist with the attendance of defence witnesses. He claims that the Court of Appeal misdirected itself for failure to consider these allegations. This according to him was a violation of Article 7(1) of the Charter.

71. The Respondent State challenges the allegation of the Applicant. It submits that the allegation that the trial court failed to assist the attendance of the Applicant's witness was an afterthought in the Application for Review since such allegation was never raised by the Applicant in the appeal.
72. Further to the above, the Respondent State claims that although the Applicant had indicated to the trial court that he intended to call five witnesses, after DW2 testified, the Applicant requested to close his case, but the court allowed him more time to call the three witnesses. Further that on 25 April 2008 the Applicant informed the trial court that he had no witnesses and also did not move the court to issue summons to his intended witnesses.

73. The Court takes note of the Applicant's allegation that the Court of Appeal misdirected itself for failure to consider that the trial court did not assist the attendance of defence witnesses.
74. The Court notes that from the Record of Appeal in Criminal Appeal No 223/2011,¹⁴ that on 18 March 2008 the Applicant requested to close his defence after two defence witnesses had testified. The prosecution did not object to this, noting that the accused person (the Applicant) had made this prayer willingly.

14 At p 35 of the Record of Appeal in Criminal Appeal No 223/2011.

- 75.** It also emerges from the record before this Court that the Applicant did not raise the abovementioned allegation as a ground of appeal at the High Court in Criminal Appeal No 31/2009 and at the Court of Appeal in Criminal Appeal No 223/2011. The Applicant raised this issue as a ground of appeal for the first time in his Application for Review of the decision of the Court of Appeal in Criminal Application No 17/2013.
- 76.** The Court of Appeal in the Review decision in Criminal Application 17/2013, noted as follows:
- Parts (ii) and (iii) of ground 8 of review [sic] need not detain us. They concern the trial magistrate's failure to issue summons to compel the applicant's witness (then defence witness) to attend court [...] In the first place the court's decision does not show that such grounds were raised before it. They are new issues being raised at this stage which is improper [...] The Court's decision in *Ghati Mwita vs. The Republic* is an authority that a party is not allowed to raise a new matter at this stage. These grounds are without basis. They also fail.¹⁵
- 77.** In view of the above, this Court finds that the Court of Appeal did indeed consider the Applicant's allegation that the trial court did not facilitate attendance of defence witnesses. It is the Court's position that nothing on the record and in the finding of the Court of Appeal as re-stated above reveals that the Court of Appeal misdirected itself as alleged by the Applicant. To the contrary, the Applicant presented two defence witnesses and voluntarily requested the trial court to allow the defence to close its case. For these reasons, this Court finds that Applicant's allegation is unfounded and therefore finds that the Respondent State has not violated the Applicant's right to be heard guaranteed under Article 7(1) of the Charter.
- 78.** The Court, having found that none of the Applicant's four main allegations in the Application regarding violation of his right to be heard under Article 7(1) of the Charter has been established, finds that the Respondent State has not violated Article 7(1) of the Charter.

B. Allegation relating to the violation of other human rights

- 79.** The Applicant also alleges that the Respondent State's violated his rights as guaranteed in Articles 1, 2, 3, 4, 5, 6, and 9(1) of the Charter.

¹⁵ At p 14 of the judgment in Criminal Application 17/2013.

- 80.** The Respondent State disputes the Applicant's allegation and submits that the Applicant is put to strict proof thereof. The Respondent State asserts that from its submissions it is evident that it has not violated the Applicant's rights provided under Article 1, 2, 3, 4, 5, 6 and 9(1) of the Charter.

- 81.** The Court notes that the Applicant has not made specific submissions nor provided evidence that the Respondent State violated its obligations under the Charter (Article 1 of the Charter), that he was discriminated against (Article 2 of the Charter), that he was not treated equally before the law or did not enjoy equal protection of the law (Article 3 of the Charter), that his right to life was infringed (Article 4 of the Charter), that his right to dignity was violated (Article 5 of the Charter), that his right to liberty and security of the person was violated (Article 6 of the Charter), or that his right to receive information was violated (Article 9(1) of the Charter).
- 82.** In these circumstances, the Court finds that there is no basis to find a violation and therefore holds that the Respondent State did not violate Articles 1, 2, 3, 4, 5, 6 and 9(1) of the Charter.

VIII. Reparations

- 83.** The Applicant's prayers for reparations are reflected in paragraphs 18-20 above while the Respondent State's prayers in response to the Applicant's submissions on reparations are reflected in paragraph 23 above.

84. Article 27(1) of the Protocol provides that “If the Court finds that there has been violation of a human or peoples’ rights it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.”
85. Having found that the Respondent State has not violated any of the Applicant’s rights, the Court dismisses the Applicant’s prayers for reparations.

IX. Costs

86. The Applicant did not make any submissions on costs.
87. The Respondent State prayed that costs be borne by the Applicant.

88. The Court notes that Rule 32(2)¹⁶ of the Rules of Court provides that: “unless otherwise decided by the Court, each party shall bear its own costs, if any”.
89. The Court decides that in view of this provision each party shall bear its own costs.

X. Operative part

90. For these reasons,
The Court
Unanimously,
On jurisdiction

- i. *Dismisses* the objection to its jurisdiction.
- ii. *Declares* that it has jurisdiction.

On admissibility

- iii. *Dismisses* the objection to the admissibility of the Application.
- iv. *Declares* the Application admissible.

On merits

- v. *Finds* that the Respondent State has not violated Articles 1, 2, 3, 4, 5, 6, 7(1) and 9(1) of the Charter.

16 Rule 30(2) of the Rules of Court, 2 June 2010.

On reparations

vi. *Dismisses* the prayers for reparations.

On costs

vii. *Orders* that each Party shall bear its own costs.

Marwa v Tanzania (ruling) (2022) 6 AfCLR 548

Application 021/2017, *John Martin Marwa v United Republic of Tanzania*
Ruling, 22 September 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSOUOLA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant, a citizen of the Respondent State, was serving a 30 year prison term when he filed this Application. He had been tried, convicted and sentenced for the rape of an 18 year old student. The Applicant brought this Application, alleging that the proceedings before the national courts violated some of his Charter protected rights. Upholding one of the objections raised by the Respondent State, the Court held that the Application was not filed within a reasonable time. The Court therefore declared the Application inadmissible.

Procedure (conditions for default ruling, 17-20)

Admissibility (filing within a reasonable time, 34-43)

Dissenting Opinion: BENSOUOLA

Admissibility (filing within a reasonable time, 3, 9-11)

I. The Parties

1. John Martin Marwa (hereinafter, “the Applicant”) is a national of Tanzania and a schoolteacher by profession, who, at the time of filing the Application, was incarcerated at Uyui Central Prison, Tabora Region, serving a sentence of thirty (30) years’ imprisonment having been convicted of the offence of rape of an eighteen (18) year-old student. He alleges the violation of his right to a fair trial in the domestic courts.
2. The Application is filed against the United Republic of Tanzania (hereinafter, “the Respondent State”), which became a Party to the African Charter on Human and Peoples’ Rights (hereinafter, “the Charter”) on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration provided for under Article 34(6) of the Protocol (hereinafter, “the Declaration”), by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission an instrument

withdrawing its Declaration. The Court has held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect, that is, one year after its deposit, which is on 22 November 2020.¹

II. Subject of the Application

A. Facts of the matter

3. It emerges from the records before the Court that the Applicant allegedly instructed a secondary school student to accompany him at night in going after a number of students who were outside the school compound. On their way back, the Applicant allegedly attacked the student and started to rape her. The student eventually managed to escape and run back to the school, after which she reported the incident to the police.
4. The Applicant was subsequently arrested and charged before the District Court of Nzega, in Criminal Case No 198/2005, with the offence of rape. He was convicted and sentenced to 30 years' imprisonment on 13 April 2006.
5. The Applicant filed a criminal appeal, No 56/2006, which was dismissed by the Resident Magistrate's Court (Extended Jurisdiction) sitting at Tabora on 14 December 2007.
6. The Applicant filed a further appeal to the Court of Appeal of Tanzania sitting at Tabora, being Criminal Appeal No 22/2008. In its judgment of 22 June 2011, the Court of Appeal dismissed the appeal in its entirety and the Applicant was ordered to pay compensation to the victim amounting to five hundred thousand Tanzanian Shillings (TZS 500,000).

B. Alleged violations

7. The Applicant alleges that the Respondent State violated his rights, notably:
 - i. The right not to be discriminated against, protected under Article 2 of the Charter;
 - ii. The right to equality before the law and equal protection of the law, protected by Article 3(1) and (2) of the Charter; and

¹ *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACTHPR, Application No 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.

- iii. The right to have his cause heard, protected under Article 7(1) of the Charter.

III. Summary of the Procedure before the Court

8. The Application was filed on 4 July 2017 and on 26 July 2017, the Court requested the Applicant to submit a copy of the Judgment in Criminal Appeal No 22 of 2008 of the Court of Appeal of Tanzania sitting at Tabora. After the submission of the copy of the Judgment by the Applicant, the Court served the Application on the Respondent State on 13 August 2018.
9. On 13 August 2018, the Court also requested the Applicant to file his submissions on reparations. The Applicant did not file his submissions on reparations despite several reminders.
10. On 27 September 2018, the Respondent State submitted a list of names and addresses of its legal representatives.
11. The Court sent the Respondent State a reminder on 20 December 2018 to file its response to the Application and *suo moto* granted an extension of 30 days for the Respondent State to file a response.
12. On 21 January 2019, the Respondent State requested the Court for a six-month extension of time to file its Response. On 19 February 2019, the Court granted a last extension of time of four months within which the Respondent State was to file its Response to the Application in accordance with the Rules of Court. The Respondent State's attention was also drawn to the provisions of Rule 55 of the Rules of Court on decisions in default.²
13. Pleadings were closed on 30 September 2021 and the parties were duly notified.

IV. Prayers of the Parties

14. The Applicant prays that this Court restores justice where it was overlooked, quash both the conviction and the sentence of 30 years' imprisonment imposed upon him and order his release from prison. He further prays the Court to grant any other orders that may be appropriate in the circumstances of his case.
15. The Respondent State did not make any prayers.

2 Rule 63 of the Rules of Court, 25 September 2020.

V. On the default of the Respondent State

16. Rule 63(1) of the Rules of Court³ provides that:
Whenever a party does not appear before the Court, or fails to defend its case within the period prescribed by the Court, the Court may, on the Application of the other party, or on its own motion, enter judgment in default after it has satisfied itself that the defaulting party has been duly served with the Application and all other documents pertinent to the proceedings.
17. The Court notes that Rule 63(1) sets out three requirements for a Ruling in default and these are: (i) the notification of the defaulting party; (ii) the default of one of the Parties; and (iii) application by the other party or the Court on its own motion.
18. On the first requirement, the Court notes that the Registry notified all the pleadings submitted by the Applicant to the Respondent State.
19. With respect to the second requirement, the Court notes that the Respondent State was granted sixty (60) days to file its Response, however, it failed to do so. The Court also granted two extensions of time within which to file a response, on 20 December 2018 and on 19 February 2019 respectively, and in the notification of the last extension of time, the Court drew the Respondent State's attention to the provisions of Rule 55 of the former Rules of Court on decisions in default.⁴ Despite the said extensions of time, the Respondent State did not file a response. The Court thus finds that the Respondent State has defaulted in appearing and defending the case.
20. Finally, with respect to the last requirement, the Court notes that the Rules empower it to issue a decision in default either *suo motu* or on request of the other party. In the present case, the Applicant having not requested for a decision in default, the Court will proceed to issue the decision *suo motu* for the purpose of ensuring proper administration of justice.⁵
21. The requirements having thus been fulfilled, the Court finds that it may rule in default pursuant to Rule 63(1) of the Rules of Court.

3 Rule 55 of the Rules of Court, 2 June 2010.

4 Rule 63 of the Rules of Court, 25 September 2020.

5 *Fidele Mulindahabi v Rwanda*, ACtHPR, Application No 010/2017, Ruling of 26 June 2020 (jurisdiction and admissibility) §§ 27-32. *Fidele Mulindahabi v Rwanda*, ACtHPR, Application No 011/2017, Ruling of 26 June 2020 (jurisdiction and admissibility) §§ 20-25.

VI. Jurisdiction

- 22.** The Court observes that Article 3 of the Protocol provides as follows:
1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
- 23.** The Court further observes that pursuant to Rule 49(1) of the Rules, it “shall conduct a preliminary examination of its jurisdiction [...] in accordance with the Charter, the Protocol and these Rules.”
- 24.** Having found that its jurisdiction is not in contention, the Court finds that it has:
- i. Material jurisdiction, insofar as the Application alleges violations of Article 2 and 7 of the Charter which the Respondent State has ratified, and the Court has the power to interpret and apply the Charter in accordance with Article 3(1) of the Protocol.
 - ii. Personal jurisdiction, given that the Respondent State is a party to the Protocol and had deposited the Declaration under Article 34(6) thereof, which enabled the Applicant to access the Court under Article 5(3) of the Protocol. In reference to paragraph 2 of this ruling, the Court recalls that it has held that the withdrawal of the Declaration does not have any retroactive effect and it also has no bearing on matters pending prior to the filing of the instrument withdrawing the Declaration, or on new cases filed before the withdrawal takes effect.⁶ This Application having been filed before the Respondent State deposited its notice of withdrawal is thus not affected by it.
 - iii. Temporal jurisdiction given that the alleged violations took place after ratification of the Charter, the Protocol and depositing of the Declaration by the Respondent State. Furthermore, the alleged violations are continuing since the Applicant remains convicted on the basis of what he considers an unfair process.⁷
 - iv. Territorial jurisdiction, given that the facts on which the alleged violations are based occurred on the territory of the Respondent State.

⁶ *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application No 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 35-39.

⁷ *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197 §§ 71-77.

25. From the foregoing considerations, the Court finds that it has jurisdiction to consider the instant Application.

VII. Admissibility

26. Pursuant to Article 6(2) of the Protocol, “The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.
27. In line with Rule 50(1) of the Rules, “the Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules.”
28. The Court notes that Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:
- Applications filed before the Court shall comply with all of the following conditions:
- a. Indicate their authors even if the latter request anonymity;
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter;
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
 - d. Are not based exclusively on news disseminated through the mass media;
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 - f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter; and
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of African Union or the provisions of the Charter.
29. From the records, the Court notes that, the Applicant has been clearly identified by name in fulfilment of Rule 50(2)(a) of the Rules.
30. The Court notes that the claims made by the Applicant seek to protect his rights guaranteed by the Charter. It also notes that one of the objectives of the Constitutive Act of the African Union as stipulated under Article 3(h), is to promote and protect human and peoples’ rights. The Application also does not contain any claim or prayer that is incompatible with a provision of the Act. The Court, therefore, holds that the Application is compatible with

the Constitutive Act of the African Union and the Charter and thus meets the requirements of Rule 50(2)(b) of the Rules.

31. The language used in the Application is not disparaging or insulting to the Respondent State or its institutions in fulfilment of Rule 50(2)(c) of the Rules.
32. The Application is not based exclusively on news disseminated through mass media as it is founded on court documents from the domestic courts of the Respondent State in fulfilment of Rule 50(2)(d) of the Rules.
33. With regard to the exhaustion of local remedies, the Court notes that the Applicant has had his case determined by three domestic courts, namely the District Court of Nzega on 13 April 2006, the Resident Magistrate's Court (Extended Jurisdiction) sitting at Tabora on 14 December 2007, and the Court of Appeal of Tanzania on 22 June 2011, the latter being the highest judicial authority in the Respondent State. The Court, therefore, holds that the Applicant exhausted the available local remedies.
34. As to whether the instant Application was filed within a reasonable time, the Court notes that Article 56(6) of the Charter and Rule 50(2)(f) of the Rules provide that Applications must be filed "...within reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter".
35. The Court in the case of *Norbert Zongo and Others v Burkina Faso* held that "...the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis."⁸
36. From the record, the Applicant exhausted local remedies on 22 June 2011, being the date the Court of Appeal delivered its judgment on his appeal. The Applicant then filed the instant Application on 4 July 2017.
37. The Court has to, therefore, assess whether the period running from 22 June 2011 to 4 July 2017 when the Applicant seized this Court, that is, six (6) years and twelve (12) days is reasonable in terms of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.
38. To determine whether an Application has been filed within a reasonable time, the Court has previously taken into consideration the personal circumstances of applicants, including whether they

8 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (preliminary objections) (2013) 1 AfCLR 197 § 121.

- are lay, indigent or incarcerated.⁹
39. Importantly, the Court has confirmed that it is not enough for applicants to simply plead that they were incarcerated, are lay or indigent, for example, to justify their failure to file an Application within a reasonable period of time.¹⁰
 40. As the Court has previously pointed out, even for lay, incarcerated or indigent litigants there is a duty to demonstrate how their personal situation prevented them from filing their Applications in a more timely manner. It was because of the foregoing that the Court concluded that an Application filed after five (5) years and eleven (11) months was not filed within a reasonable time.¹¹ The Court reached the same conclusion in respect of an Application filed after five (5) years and four (4) months.¹² In yet another case, the Court found that the period of six (6) years, three (3) months and fifteen (15) days was also not a reasonable period of time within the meaning of Article 56(5) of the Charter.¹³
 41. In the present case, although the Applicant is incarcerated, he has not adduced evidence on the basis of which the Court could conclude that his personal situation inhibited him from filing the Application in a more timely manner. He simply asserted that the Court should find his Application admissible in accordance with Article 6(2) of the Court's Protocol but provided no justification why it took him six (6) years and twelve (12) days to file the Application.
 42. In the absence of any justification by the Applicant for the lapse of six (6) years and twelve (12) days before the filing of the Application, the Court finds that this Application was not filed within a reasonable time within the meaning of Article 56(6) of the Charter as restated in Rule 50(2)(f) of the Rules.
 43. The Court recalls that, the admissibility requirements of an Application filed before it are cumulative, such that if one condition

9 *Christopher Jonas v United Republic of Tanzania* (merits) (28 September 2017), 2 AfCLR 101 § 54; *Amiri Ramadhani v United Republic of Tanzania* (merits) (2018) 2 AfCLR 344 § 50.; *Armand Guehi v Tanzania* § 56; *Werema Wangoko v United Republic of Tanzania* (merits and reparations) (7 December 2018), 2 AfCLR 520 § 49.

10 *Layford Makene v United Republic of Tanzania*, ACTHPR, Application No 028/2017 Ruling of 2 December 2021 (admissibility), § 48.

11 *Hamad Mohamed Lyambaka v United Republic of Tanzania*, ACTHPR, Application No 010/2016. Ruling of 25 September 2020 (admissibility) § 50.

12 *Godfred Anthony and another v United Republic of Tanzania*, ACTHPR, Application No 015/2015. Ruling of 26 September 2019 (admissibility) § 48.

13 *Chananja Luchagula v United Republic of Tanzania*, ACTHPR, Application No 039/2016. Ruling of 25 September 2020 (admissibility) §§ 57-60.

is not fulfilled then the Application becomes inadmissible.¹⁴ In the present case, since the Application has failed to fulfil the requirement under Article 56(6) of the Charter which is restated in Rule 50(2)(f) of the Rules, the Court, therefore, finds that the Application is inadmissible and dismisses it.

VIII. Costs

44. The Applicant and the Respondent State did not make any submissions on costs.

45. The Court notes that Rule 32(2) of the Rules of Court provides that: “[u]nless otherwise decided by the Court, each party shall bear its own costs, if any”.¹⁵
46. The Court finds that there is nothing in the instant case warranting it to depart from this provision.
47. Consequently, the Court orders that each Party shall bear its own costs.

IX. Operative part

48. For these reasons,

The Court

On jurisdiction

Unanimously,

- i. *Declares* that it has jurisdiction.

On admissibility

By a majority of Nine (9) for, and One (1) against, Justice Chafika BENSALOULA dissenting,

- ii. *Finds* that the Application was not filed within a reasonable time;
- iii. *Declares* that the Application is inadmissible.

14 *Jean Claude Roger Gombert v Côte d'Ivoire* (jurisdiction and admissibility) (22 March 2018) 2 AfCLR 270 § 61; *Dexter Eddie Johnson v Republic of Ghana*, ACtHPR, Application No 016/2017, Ruling of 28 March 2019 (jurisdiction and admissibility), § 57.

15 Rule 30(2) of the Rules of Court, 2 June 2010.

On costs

Unanimously,

- iv. Orders that each Party shall bear its own costs.

Dissenting Opinion: BENSAOULA

1. I do not agree with the finding of the Court in its judgment referred to above and the grounds for declaring the application inadmissible for having been filed beyond reasonable time.
2. I write this dissenting opinion because I am convinced that the Court should have declared the Application admissible based on the same facts on which it relied to declare it inadmissible and others which it did not raise but which have nevertheless set the precedent.
3. Indeed, in its judgment on preliminary objections in the case of *“Beneficiaries of the late Norbert Zongo and others” v Burkina Faso* rendered on 21 June 2013, the Court, with regard to the reasonable time for seizure, expressly stated that “the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis”.
4. This “case-by-case” principle with respect to reasonable time has been applied by the Court in numerous cases, including:
 - The judgment of 2 December 2021 in *Sadik Marwa Kisase v United Republic of Tanzania*, in which the Court dismissed the objection raised by the Respondent State regarding reasonable time on the ground that the Applicant, who was in detention, had no legal representation in the domestic courts or before this Court (paragraphs 51 and 52) and consequently considered 16 months as reasonable.
 - The *Christopher Jonas v United Republic of Tanzania* judgment of 28 September 2017 and *Amiri Ramadhani v United Republic of Tanzania*, in which the Court, having taken into account the fact that the Applicants were in prison, restricted in their movement, layman in law, indigent, did not have access to information, were not assisted by a lawyer during the trial, were illiterate and were not acquainted with the existence of the Court, held that 5 years and one month was reasonable time.
 - Finally, in its judgment in Application No 013/2016, *Stephen John*

Rutakikirwa v United Republic of Tanzania of 24 March 2022, delivered on the same day, the Court reiterated this principle in paragraphs 45 and 48 when it declared the Application filed within 4 years and 4 months reasonable, on the ground that the Applicant was incarcerated, restricted in his movements with limited access to information and was not provided legal assistance!

5. In the judgment which is the subject of this opinion, it is clear from the facts, which no one disputes, especially as the judgment was delivered by default in respect of the Respondent State, that the Applicant, who had been in prison custody well before his conviction, was sentenced to 30 years' imprisonment on 13 April 2006. His conviction was confirmed by judgment of 14 December 2007. The Applicant appealed the judgment of 14 December 2007 before the Appeal Court which dismissed the said appeal 22 June 2011.
6. It is clear from the decisions handed down by domestic courts that the Applicant was not represented throughout the proceedings until the final confirmation of his conviction and, incidentally, not even before the Appeal Court. The Court has held in many judgments that these particulars in themselves constitute a violation, and given the gravity of the facts and the length of the sentence, the Applicant had the right to be provided a lawyer (judgments in *Diocles William v United Republic of Tanzania* of 21 September 2018, *Kennedy Owino Onyachi and others v United Republic of Tanzania* of 28 September 2009 and *Alex Thomas v United Republic of Tanzania* of 28 September 2017).
7. There is a contradiction on the part of the Court which, in certain judgments, considered that "the personal situation of the applicants", in particular, the fact that they are lay people in law, indigent and incarcerated, are sufficient grounds to grant rather long time limits (4 years 8 months and 4 days in the case of *Thobias Mango v Republic of Tanzania*, judgment of 11 May 2018, 5 years 1 month and 12 days in the case of *Christopher Jonas v United Republic of Tanzania*, judgment of 28 September 2017 and 5 years 1 month 1 week and 6 days in the case of *Amiri Ramadhani v United Republic of Tanzania*, judgment of 11 May, 2018). However, in the instant judgment and others, the Court has ruled to the contrary, having declared, despite the presence of the aforementioned facts, that the applicants are required to show how their "personal situation" prevented them from filing their application within a shorter period of time! These judgments include the case of *Hamad Mohamed Lyambaka v Republic of Tanzania*, judgment of 25 September 2020 (5 years

and 11 months) the case of *Godfred Anthony and others v United Republic of Tanzania*, judgment of 26 September 2019 (5 years and 4 months), the case of *Chananja Luchagula v Republic of Tanzania*, judgment of 25 September 2020 (6 years 3 months and 15 days).

8. At no point in these previous judgments did the Court demonstrate what more it expected from a detained Applicant in relation to “the personal situation”, which led to contradictory grounds in judgments in respect of the same Respondent State in relation to Applications filed on more or less similar dates against decisions rendered on similar dates!
9. Although the absence of a defence counsel is an essential fact that the Court should always take into consideration, especially for Applicants who are in custody and sentenced to long prison terms, the Court, in assigning reasonable time as a ground, should also take into account whether or not the Applicant was acquainted with the existence of the Court.
10. Indeed, while in some of its judgments, the Court took into consideration this particular and declared that the incarcerated Applicant was restricted in his movements and did not have access to information so that he was unaware of the existence of the Court (*Thobias Mango* and, *Amiri Ramadanani* judgments cited above and the *Christopher Jonas* judgment rendered on 28 September 2017), in other judgments and against the same Respondent State, for applicants in prison, it did not take this particular into account, as in the case of the instant judgment.
11. The Court also considered in many judgments the length of time between the deposition of the Declaration and the filing of the Application and the delivery of the last domestic decision to assess reasonable time, considering it as “an element which proves that the Applicant was not acquainted with the Court, since the Court was in its early stages of activity”.
12. In the *Thobias Mango* and *Amiri Ramadanani* judgments, among others, the Court clearly stated that between the date of depositing the Declaration in 2010 and the last decision rendered by the domestic courts in 2013, the Court was still in its formative stage and that it could not take into consideration the said period, insisting that it was in the phase of completing its harmonization process, so that it would have taken time for the applicant to be apprised of the existence of the Court and its rules of procedure (*Thobias* judgment of 11 May 2018, para 55) *Ramadanani* judgment of 11 May 2015, para 50).
13. In the present case the Appeal Court rendered its decision in June 2011, which makes the aforementioned precedent

applicable, especially since the Respondent State is the same and that therefore the Declaration was made in 2010. It follows that between 2010 and 2013, the Applicant could not have known the Court, hence the need to reduce by 3 years the time taken by the Applicant to initiate his action in July 2017, which would reduce the time of his referral to 4 years.

14. In the *Marwa Kisase* case cited above against the same Respondent State (paragraph 52 of the said judgment), the Court did state that “[...] the Applicant has been incarcerated, did not have legal representation during the proceedings before domestic courts and is self-represented before this Court. Most notably, the facts of the case occurred between 2007 and 2013, which is in the early years of the Court’s operation when members of the general public, let alone persons in the situation of the Applicant in the present case, could not necessarily be presumed to have sufficient awareness of requirements governing proceedings before this Court. Finally, the Respondent State filed its Declaration in 2010. In such circumstances, this Court considers that the period of time that it took the Applicant to file the case should be considered reasonable”.
15. Applying this finding in the *Marwa* judgment to the judgment which is the subject of this dissenting opinion would not only have been fair and logical but would also have led to the Application being declared admissible, since it would have been based on the same facts and particulars.
16. It is my case, in view of this state of affairs, that the Court should, especially in relation to the same Respondent State and Applicants who are incarcerated and sentenced to heavy penalties, take into account all the particulars that would determine whether or not an application is admissible, instead of cherry-picking. It is my view, without exaggerating, that this would render the grounds for the judgment expeditious and leave readers of our judgments and Applicants of the same Respondent State in similar situations completely baffled.

Mornah v Benin & Ors (judgment) (2022) 6 AfCLR 561

Application 028/2018, *Bernard Anbataayela Mornah v Republic of Benin, Burkina Faso, Republic of Côte d'Ivoire, Republic of Ghana, Republic of Mali, Republic of Malawi, United Republic of Tanzania and Republic of Tunisia, Sahrawi Arab Democratic Republic and Republic of Mauritius (Interveners)*

Judgment, 22 September 2022. Done in Arabic, English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, MENGUE, MUKAMULISA, BENSALOULA, ANUKAM and NTSEBEZA

Recused under Article 22: ABOUD, BEN ACHOUR, CHIZUMILA and SACKO

The Applicant, a citizen of the Republic of Ghana, brought this Application alleging that the Respondent States violated the human rights of the people of the Sahrawi Arab Democratic Republic by failing to safeguard their territorial integrity and independence. The Sahrawi Arab Democratic Republic and the Republic of Mauritius successfully applied to join as interveners in the matter. The Court held that the Respondents States had not violated the rights of the Sahrawi people and accordingly dismissed the request for reparations.

Procedure (conditions for default judgment, 46-50)

Jurisdiction (material jurisdiction, 64-66, 78-87, 90-93; personal jurisdiction, 117-123; temporal jurisdiction, 128-131; territorial jurisdiction, 146-157)

International law (sovereignty, 65; legal personality, 82, status of the African Court, 98; basis of international responsibility, 304)

Admissibility (identity of applicant, 168-169; compatibility with AU Constitutive Act, 175-179; not based exclusively on mass media news, 185-187, exhaustion of local remedies, 203-211; filing within a reasonable time, 217-221; issues previously settled by the parties, 228-233)

Self-determination (denial as trigger for other violations, 286; indirect violation, 287-288; special place in Africa, 290-292; scope in the Charter, 295; nature of state obligations, 297-299; erga omnes status, 298; link to ownership of territory, 301; states responsibilities, 305, 307-322)

Separate Opinion: TCHIKAYA

Jurisdiction (separability of contentious issues, 15-16)

I. The Parties

1. Bernard Anbataayela Mornah (hereinafter referred to as “the Applicant”) is a Ghanaian national and the National Chairman of the Convention People’s Party, a political party registered in Ghana. The Applicant alleges violations of human rights of the Sahrawi people as a result of the failure of the Respondent States to safeguard the territorial integrity and independence of the Sahrawi Arab Democratic Republic.
2. The Application is filed against the Republic of Benin, Burkina Faso, the Republic of Côte d’Ivoire, the Republic of Ghana, the Republic of Mali, the Republic of Malawi, the United Republic of Tanzania and the Republic of Tunisia (hereinafter referred to as “the Respondent States”).
3. The Respondent States became Parties to the African Charter on Human and Peoples’ Rights (hereinafter “the Charter”) on various dates as follows: Benin, 21 October 1986; Burkina Faso, 21 October 1986; Côte d’Ivoire, 31 March 1992; Ghana, 1 March 1989; Mali, 21 October 1986; Malawi 17 November 1989; Tanzania, 21 October 1986; and Tunisia, 21 October 1986.
4. The Respondent States all became Parties to the Protocol as follows: Benin, 22 August 2014; Burkina Faso, 25 January 2004; Côte d’Ivoire, 25 January 2004; Ghana, 25 January 2004; Mali, 25 January 2004; Malawi, 9 September 2008; Tanzania, 10 February 2006; Tunisia, 21 August 2007.
5. All the Respondent States deposited the Declaration under Article 34(6) of the Protocol permitting individuals and Non-governmental Organisations to bring cases against them before the Court (hereinafter “the Declaration”) as follows: Benin, 8 February 2016; Burkina Faso, 28 July 1998; Côte d’Ivoire, 23 July 2013; Tanzania, 29 March 2010; Ghana, 10 March 2011; Malawi, 9 October 2008; Mali, 19 February 2010; and Tunisia, 2 June 2017.
6. The following Respondent States deposited instruments withdrawing the aforementioned Declaration with the Chairperson of the African Union Commission: Tanzania on 21 November 2019, Benin on 25 March 2020 and Côte d’Ivoire, on 29 April 2020, respectively. The Court held that the withdrawal had no bearing on pending cases and new cases filed before the withdrawal

came into effect, that is, on 22 November 2020,¹ 26 March 2021² and 30 April 2021,³ respectively, for these States.

7. The Sahrawi Arab Democratic Republic (hereinafter “the SADR” or “Western Sahara”) and the Republic of Mauritius filed applications to intervene in the proceedings on 23 June and 31 August 2020, respectively, on the basis that they have an interest in the matter. On 25 September 2020, the Court issued orders granting both the SADR and leave to intervene.

II. Subject of the Application

A. Facts of the matter

8. The Applicant alleges that the subject of his Application relates to violations of the human rights of the Sahrawi people as a result of the erosion of the sovereignty, territorial integrity and independence of Western Sahara, due to the continued occupation of its territory by the Kingdom of Morocco.
9. The Applicant states that the territory known as Western Sahara was colonised by Spain until 1976. After Spain’s departure in February 1976, according to the Applicant, Morocco and Mauritania occupied Western Sahara but were met with resistance from the Sahrawi people. As a result, Mauritania relinquished its claim to any part of Western Sahara. The Applicant argues that Morocco, still remains in occupation of the territory of the SADR.
10. The Applicant elaborates that in 1984, the SADR was admitted as a member of the Organisation of African Unity (hereinafter referred to as “the OAU”) and subsequently became a founding Member of the African Union (hereinafter referred to as “the AU”). In protest against SADR’s admission as a Member of the OAU, Morocco left the Organisation in the same year.
11. The Applicant further states that in 1992, a UN-supervised referendum on independence of the SADR was promised but it was aborted when Morocco objected to the proposed electoral

1 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACTHPR, Application No 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.

2 *Houngue Éric Noudehouenou v Republic of Benin*, ACTHPR, Application No 003/2020, Order of 5 May 2020 (provisional measures), §§ 4-5 and corrigendum of 29 July 2020.

3 *Suy Bi Gohoré Émile and Others v Republic of Côte d’Ivoire*, ACTHPR, Application No044/2019, Judgment of 15 July 2020 (merits and reparations), § 67; *Ingabire Victoire Umuhoza v Republic of Rwanda* (Jurisdiction) (3 July 2016) 1 AfCLR 562, § 69.

register, which it alleged was biased in favour of secession. The Applicant alleges that Morocco occupies the part of Western Sahara that harbours one of the world's richest fisheries stock, abundant phosphate rock mines and oil reserves which it has been exploiting to the detriment of the Sahrawi people.

12. The Applicant also alleges that in 2017, Morocco applied for membership to join the AU and was admitted. The Applicant avers that Morocco's admission to the AU was not based on a unanimous decision.
13. According to the Applicant, notwithstanding its admission to the AU, Morocco has not shown any intention of giving up its occupation of the Western Sahara. Furthermore, although the SADR has been recognised by the AU as the legitimate government in exile and no less than eighty-four (84) countries have accorded it diplomatic recognition, parts of Western Sahara remain occupied by Morocco.
14. The Applicant contends that the unconditional admission of Morocco to the AU also contradicts the established practice with regard to admission of members to the AU and its predecessor, the OAU. He recalls that apart from condemning illegal and unconstitutional change of governments, the OAU and AU have in the past refused to admit colonial powers as members. In this regard, the Applicant refers as examples, the OAU's refusal to admit South Africa during the Apartheid regime and more recently, AU's suspension from its membership, of Côte d'Ivoire, Niger, Burkina Faso and Egypt based on the unconstitutional removal of regimes by coup leaders.

B. Alleged violations

15. According to the Applicant, the admission of Morocco to the AU is inconsistent with the objectives and principles of the Union enshrined in Articles 3, 4 and 23 of its Constitutive Act; Articles 1 and 2 of the African Charter on Democracy, Elections and Governance (hereinafter, "the ACDEG") and Articles 1, 2, 7, 13, 19, 20, 21, 22 23 and 24 of the Charter.
16. The Applicant further alleges that "even if the Respondent States did not protest the admission of Morocco to the AU" at the time the Assembly made the admission decision, the Court should still hold them responsible for their failure, individually and/or collectively to defend the sovereignty, territorial integrity and independence of the SADR and the right of its people to dispose of their wealth and natural resources.

III. Summary of the Procedure before the Court

17. The Application was filed at the Registry on 14 November 2018.
18. On 25 March 2019, the Registry served the Application on the Respondent States, requesting them to file their list of representatives and Responses to the Application within thirty (30) days and sixty (60) days, respectively, from the date of receipt of the notification. By a separate notice of the same date, the Registry notified all Member States of the AU, including the Kingdom of Morocco of the Application and invited those Member States which wished to intervene to do so as soon as possible, but before the close of pleadings.
19. Some of the Respondent States filed their Responses to the Application on the following dates: Mali on 3 June 2019, Burkina Faso on 24 June 2019, Tunisia on 4 July 2019, Côte d'Ivoire on 17 September 2019 and Ghana on 7 October 2019.
20. On 16 October 2019, the Registry transmitted these Responses to the Applicant with a request to file the Reply thereto within sixty (60) days of receipt of the Responses.
21. By the same notice, the Registry also informed the Parties of the Court's decision to grant *suo motu*, an extension of thirty (30) days to Malawi, Benin, and Tanzania to file their Responses.
22. At its 56th Ordinary Session, held from 2 to 20 March 2020, the Court decided to *suo motu* grant another thirty (30) days extension of time to those Respondent States that had not filed their Responses to do so. The Court also decided to send a reminder to Member States of the AU that wished to intervene in the matter to do so within thirty (30) days of receipt of the reminder. The Court further instructed the Registry to request for *amicus curiae* submissions from institutions that may have knowledge in the subject matter of the Application.
23. On 23 April 2020, the Registry sent a letter to African Commission on Human and Peoples' Rights, African Institute of International Law (AIIL), Pan African Lawyers' Union (PALU), Centre for Human Rights of the University of Pretoria, the Unrepresented Nations and Peoples Organization (UNPO), Liechtenstein Institute on Self-Determination, and the International Commission of Jurists (ICJ) inviting them to file *amicus curiae* briefs.
24. By letters dated 10 May 2020 and 11 May 2020, UNPO and PALU, requested extension of time to file their *amicus curiae* briefs, citing the challenges posed by the COVID-19 pandemic.
25. On 15 May 2020, the Registry sent a notice to both PALU and UNPO indicating that the Court had granted a sixty (60) days extension of time to file their *amici curiae* briefs from the date of

receipt of the notice.

26. On 23 July 2020, the SADR filed an application to intervene indicating that it had vested interests in the matter.
27. On 18 August 2020, Tanzania filed its Response.
28. On 31 August 2020, Mauritius filed a request for intervention together with its intervener's submissions.
29. On 4 September 2020, the Registry transmitted the request of Mauritius for leave to intervene to the Parties for their observations, if any, within fifteen (15) days of receipt of the notice. The Parties did not file submissions.
30. On 25 September 2020, the Court issued orders granting leave to the SADR and Mauritius to intervene and with respect to the latter, the Court deemed its submissions as having been properly filed.
31. On 2 January 2021, the SADR filed its submissions as an intervening State.
32. Morocco, which may have an interest in the subject matter of this Application, did not request to intervene in spite of having been served with the notification from the Registry addressed to all Member States as indicated above.
33. On 4 March 2021, the Parties were notified that the Application was set down for a virtual public hearing on 10 and 11 June 2021. By the same notice, the Parties were requested to confirm their participation in the hearing before 4 May 2021.
34. On 1 May 2021, the Applicant confirmed his availability to participate in the public hearing.
35. On 25 May 2021, SADR and Benin confirmed their participation in the hearing and sent the names of their representatives.
36. On 4 June 2021, Mauritius notified the Registry that its intervention in the case would be restricted to its written submissions and that it would not participate in the public hearing.
37. On 9 June 2021, PALU filed its *amicus curiae* briefings with a note indicating that it will participate in the public hearing and make oral submissions.
38. Public hearings were held virtually on 10 and 11 June 2021 with the attendance of the Applicant, and representatives of Mali, Tanzania, Malawi, the SADR and PALU. On 17 June 2021, the Registry sent copies of the Verbatim Record of the hearings for the Parties to make editorial corrections, if any, within fifteen (15) days of receipt. SADR subsequently made its observations.
39. On 22 February 2022, both written and oral pleadings were closed and this was duly notified to the Parties, and to the entities that had been invited to file *amicus curiae* briefs.

IV. Prayers of the Parties

40. The Applicant prays the Court to issue:
 - a. A declaration that the failure of the Defendants individually and/or collectively to defend the sovereignty, territorial integrity and independence of Western Sahara is illegal as it directly violates Articles 3 and 4 of the Constitutive Act of the African Union; Articles 1, 13 and 20 of the African Charter on Human and Peoples' Rights; Articles 1 and 2 of the International Covenant on Civil and Political Rights and Articles 1 and 2 of the International Covenant on Economic, Social and Cultural Rights.
 - b. A declaration that the failure of the Defendants individually and/or collectively to prevent Morocco from violating the human rights of the people of Western Sahara to dispose of their wealth and natural resources, to their economic, social and cultural development and peace guaranteed by Articles 19, 22, 23 and 24 of the African Charter on Human and Peoples' Rights, and similar provisions in common Article 1 of both the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights in itself violates these rights; and
 - c. An order compelling and mandating the Defendants individually and/or collectively to call an emergency session of the Assembly of the African Union and to sponsor a resolution for the adoption of legal, political and other measures by the African Union to restrain Morocco from further occupying parts of the territory of Western Sahara in any manner whatsoever and howsoever [as well as] sponsor a motion for the immediate expulsion of Morocco from the African Union until it is prepared and ready to recognise the right of the Sahrawi people to self-determination.
41. Mali, Burkina Faso, Tunisia, Côte d'Ivoire and Ghana pray the Court to:
 - i. Declare that it lacks jurisdiction
 - ii. Declare that the Application is inadmissible for the Applicant has not demonstrated that he has locus standi and for failing to meet admissibility conditions specified under Article 56 of the Charter.
 - iii. Dismiss the Application as baseless
 - iv. Order the Applicant to bear the entire cost
42. Tanzania and Malawi pray the Court to dismiss the Application for lack of jurisdiction. Tanzania also prays that the Court should declare the Application inadmissible for failing to meet the admissibility conditions specified in the Charter. It further prays the Court to order that:
 - i. [It] is not in violation of Articles 3 and 4 of the Constitutive Act
 - ii. [It] is not in violation of Articles 1, 2, 7, 13, 19, 20, 21, 22 and 23 of the Charter, Articles 1 and 2 of the ICCPR; as well as Articles 1 and 2 of the ICESCR; and

- iii. A declaration that the admission of Morocco to the AU was in accordance with the Constitutive Act of the AU, thus, lawful.
- iv. Dismiss the Application with costs.
- 43.** The SADR as intervener, prays the Court to:
 - i. Declare that it has jurisdiction
 - ii. Declare the application admissible
 - iii. Rule that the application is well-founded and justified
- 44.** Benin did not make any submissions or prayers.

V. On the default of the Republic of Benin

- 45.** Rule 63(1) of the Rules provides that:

Whenever a party does not appear before the Court, or fails to defend its case within the period prescribed by the Court, the Court may, on the Application of the other party, or on its own motion, enter decision in default after it has satisfied itself that the defaulting party has been duly served with the Application and all other documents pertinent to the proceedings.
- 46.** The Court notes that the afore-mentioned provision sets out three cumulative conditions for judgment in default, namely: i) the notification to the defaulting party of both the application and the documents pertaining to the proceedings; ii) the default of a party; and iii) a request made by the other party or the court acting on its own motion.⁴
- 47.** With regard to the first and second requirements of notification and default by a party, the Court notes that the Application was served on the Republic of Benin and all the Respondent States on 25 March 2019. The Republic of Benin filed the names and addresses of its representatives on 14 May 2019. Subsequently, several reminders and extensions of time to file their responses were sent to the Respondent States, including on 5 July 2019, 16 October 2019, and 23 April 2020.
- 48.** Despite receiving all the communications, the Republic of Benin failed to file its written pleadings within the prescribed time. On 25 May 2021, it confirmed its participation in the public hearing that was held on 10-11 June 2021 but did not appear during the hearing. Furthermore, the Registry transmitted to the Respondent State all additional documents that were filed during and after the public hearing. In this regard, the Court also notes from the record the proofs of delivery of all those notifications. It is thus evident

⁴ *Léon Mugesera v Republic of Rwanda*, ACtHPR, Application No 012/2017, Judgment of 27 November 2020 (merits and reparations), § 14.

that the Respondent State failed to defend itself despite being served with all the documents pertaining to the Application and having full knowledge of the proceedings.

49. As far as the third requirement is concerned, the Court notes that the instant Application involves seven other States which have participated in the proceedings except Benin. The latter knowingly failed to pursue and hence, defaulted within the terms of Rule 63(1) of the Rules to defend its case.
50. Consequently, the Court decides, on its own motion, to proceed with the examination of the Application.⁵

VI. Jurisdiction

51. The Court observes that Article 3 of the Protocol provides as follows:
 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the State concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
52. In accordance with Rule 49(1) of the Rules, “[t]he Court shall conduct preliminary examination of its jurisdiction ... in accordance with the Charter, the Protocol and these Rules”.
53. On the basis of the above-cited provisions, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.
54. The Respondent States raise objections to the material, personal, territorial and temporal jurisdiction of the Court.

A. Objections to material jurisdiction

55. The Court notes that under Article 3(1) of the Protocol, it has jurisdiction to examine any application submitted to it provided that the rights of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.

5 *African Commission on Human and Peoples' Rights v Libya* (merits) (3 June 2016) 1 AfCLR 153, §§ 38-43. See also *Léon Mugesera v Republic of Rwanda*, ACtHPR, Application No 012/2017, Judgment of 27 November 2020 (merits and reparations), § 18. See also *Yusuph Said v United Republic of Tanzania*, ACtHPR, Application 011/2019, Judgment of 30 September 2021 (Jurisdiction and Admissibility), § 18.

56. The Court further notes from the totality of submissions of the parties on material jurisdiction that there are four main issues for determination: i) Whether the Application raises issues of political and diplomatic nature that divest the Court of its competence to examine the same; ii) Whether the Application is based mainly or only on the Constitutive Act of the African Union; iii) Whether the Application is like a request for advisory opinion and deals with a dispute over “ownership” of a territory; and iv) Whether the AU Assembly has transferred the SADR’s matter to the United Nations.

i. Whether the Application raises issues of a political and diplomatic nature which are against the principles of state sovereignty and non-intervention?

a. Respondent States’ submissions

57. The first contention of the Respondent States is that the Court lacks competence to examine the Application, considering that it raises issues of a political and diplomatic nature, not a legal one. In this regard, Mali, Burkina Faso, Tunisia, Côte d’Ivoire, Ghana and Tanzania assert that the Application relates to issues of sovereignty, international relations and diplomacy and the principle of non-intervention, matters which the Court does not have the competence to adjudicate. Côte d’Ivoire stresses that the Court lacks competence to examine an application which asks it to oblige sovereign States to interfere in the internal affairs of another sovereign State, namely, Morocco in the dispute between it and another sovereign State, the SADR.

58. Similarly, Mali submits that the issues the Application raises are essentially political, the solution of which lies in a political process rather than a judicial settlement. Accordingly, it asserts that the subject matter of the Application does not fall within the competence of the Court as enshrined in Articles 3 and 4 of the Protocol according to which the Court can only receive applications or requests for advisory opinions relating to the interpretation and application of human rights treaties.

59. Ghana also avers that the Application does not have any legal questions to be resolved by the Court but if the Court is minded to hear the matter, it may only render an advisory opinion in

accordance with Rule 29 of the Rules.⁶

60. Furthermore, Tanzania submits that the Court lacks material jurisdiction to entertain the Application since its subject matter does not establish a *prima facie* case on the violation of any of the rights protected in the Charter. It further submits that the Court's jurisdiction should be determined not merely by allegations of human rights violations contained in an application but rather on the basis of the nature of the application and the redress sought, which in the instant case are political.

b. Applicant's submissions

61. The Applicant requests the Court to interpret the Constitutive Act of the AU, the Charter and other international human rights instruments. He submits that the Court has material jurisdiction in accordance with Article 3 of the Protocol to examine allegations of violations of Articles 1, 13, 19, 20, 21, 22, 23, and 24 of the Charter, Articles 1 and 2 of the ICCPR, as well as Articles 1 and 2 of ICESCR. The Applicant also contends that the Court has competence to interpret and apply Articles 3 and 4 of the Constitutive Act of the AU, which according to him, correspond materially to the Respondent States' rights and obligations under the Charter, ICCPR and ICESCR. In this regard, citing the judgment of the Court in *Actions pour la Protection de Droits de l'Homme (APDH) v Côte d'Ivoire*, the Applicant submits that a treaty may be considered a human rights instrument even if its main purpose is not the protection of human rights. According to him, the Constitutive Act of the AU is a human rights instrument in so far as it contains human rights provisions.

c. Intervener's submissions

62. The SADR, as intervener, concurs with the Applicant's submissions that the Court has material jurisdiction to consider the Application, as it raises allegations of violations of Article 3 and 4 of the Constitutive Act of the AU, Articles 1, 13, 19, 20, 21, 22, 23, and 24 of the Charter, Articles 1 and 2 of the ICCPR and Articles 1 and 2 of ICESCR. The SADR avers that in accordance with the Court's jurisprudence on the concept of a "human rights instrument",⁷

6 Rule 24 of the Rules of Court of 2010.

7 *Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (merits) (8 November 2016) 1 AfCLR 668, §§ 57-65.

Articles 3 and 4 of the Constitutive Act of the AU form part of the law applicable before the Court since the stated objectives and principles relate substantively to the rights guaranteed by the Charter, the ICCPR and the ICESCR, including the right to self-determination and the independence of peoples, their right to territorial integrity and their right to peace and security. The SADR also submits that Articles 3 and 4 of the Constitutive Act of the AU conversely sets out the obligation of State Parties to take necessary measures to guarantee their effective observance.

d. *Amicus curiae* submissions

63. Citing the jurisprudence of the Court in *Wilfred Onyango & 9 Others v Tanzania*, the Pan-African Lawyers' Union (PALU), similarly argues that the Court has material jurisdiction to examine the Application since the rights alleged to be violated are protected by the Charter, the ICCPR and the ICESCR to which all the Respondent States are parties.

e. The Court's position

64. The Court notes that an application may raise issues of a political or diplomatic nature or may seek reliefs that may require political decisions or diplomatic solutions. An application may also contain allegations that relate to a State's conduct in the arena of international relations, including its commitments or undertakings in international organisations. However, the mere fact that an application contains issues relating to State sovereignty or that it touches on political or diplomatic issues does not automatically remove the Court's competence to consider an application.
65. The Court observes in general terms that, international law is essentially a product of the consensual undertaking of States and its consensual nature is the highest manifestation of their sovereignty and independence. Nevertheless, once States have willingly ceded their consent to the jurisdiction of an international tribunal to interpret and apply specific instruments, they cannot raise sovereignty as a defence or justification to preclude the tribunal from exercising its jurisdiction over a dispute insofar as the dispute relates to issues that fall within the scope of the tribunal's statutory competence.
66. In this vein, the Court refers to its established position on this point that it exercises its jurisdiction over an application as long as the application contains allegations of violations of human rights protected by the Charter or any other human rights instrument

to which a respondent state is a party.⁸ In the instant case, the Application alleges violations of the right to freedom from non-discrimination; the right to a fair trial; the right to participate in public affairs of one's country, the right to equality of all peoples, the right to self-determination; the right to dispose of natural resources, the right to development, the peoples' right to peace, and the right to satisfactory environment contrary to Articles 2, 7, 13, 19, 20, 21, 22, 23, and 24 of the Charter. The Court accordingly dismisses the Respondent States' objection in this regard.

ii. Whether the Application is based mainly or only on the Constitutive Act of the African Union?

67. The Court notes that the Respondent States have raised two interrelated objections to its material jurisdiction in connection with the Constitutive Act of the AU (hereinafter, the Constitutive Act).

a. Respondent States' submissions

68. The first objection is that the instant Application relies on the Constitutive Act, which according to some of the Respondent States, is not among instruments that the Court has the power to interpret. Tanzania and Malawi specifically contend that the present Application is "mainly and (only)" based on the Constitutive Act, the interpretation and application of which is outside the competence of the Court.
69. In its observations to the submissions of the SADR, Tanzania elaborates that pursuant to Article 26 of the Constitutive Act, only the Assembly of Heads of State and Government (hereinafter, the AU Assembly) is empowered to interpret the Constitutive Act, pending the establishment of the African Court of Justice and Human Rights.
70. Furthermore, Tanzania raises its objection to the material jurisdiction of the Court on the basis that the Constitutive Act is not a human rights instrument. In support of this, it cites the caselaw of the Court in *APDH v Côte d'Ivoire* where the Court

8 See *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application No 028/2015, Judgment of 26 June 2020 (merits and reparations), § 18; *Joseph Mukwano v United Republic of Tanzania*, ACtHPR, Application No 021/2016, Judgment of 24 March 2022 (merits and reparations), § 22; *Kenedy Ivan v United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 48, § 20; *Shukrani Masegenya Mango and Others v United Republic of Tanzania* (merits and reparations) (26 September 2019) 3 AfCLR 439, § 29.

held that for the determination of whether a convention is a human rights instrument, it is necessary to refer to the purposes of such convention. On this basis, it submits that the Constitutive Act was adopted for the furtherance of economic and political integration of the AU Member States and fostering the AU's institutional development in achieving the goals for which it was established.

71. Tanzania finally argues that even though the Constitutive Act may be regarded as a human rights instrument as it provides for the promotion and protection of human rights as one of the AU's objectives, such interpretation cannot apply in the instant Application since the basis of the complaint is the admission of Morocco, a matter governed by Article 29 of the Constitutive Act of the AU, and human rights are not provided in this provision.
72. Secondly, some Respondent States, Tunisia, Tanzania and Republic of Côte d'Ivoire assert that since the Application exclusively relies on the admission of Morocco to the African Union, the determination of its compatibility with the Constitutive Act remains within the power of the AU Assembly, and not the Court. They contend that the alleged human rights violations relate to the admission of Morocco to the AU, a decision which was democratically taken by the AU Assembly and not the Respondent States. They aver that the decisions of the AU are democratically taken at the level of the AU Assembly and once they are taken, they bind all Member States.
73. Côte d'Ivoire also asserts that the Applicant's decision to challenge the admission of Morocco to the AU also "tramples, in good or bad faith", on the provisions of the Constitutive Act and the Protocol.

b. Intervener's submissions

74. The SADR, as intervener, underscores that the present action does not, as such, concern the AU Assembly decision to admit Morocco into the AU, which has a legal personality distinct from those of its Member States, but exclusively concerns the behaviour or attitude of the Respondent States on the occasion of the admission. The SADR stresses that the wrongful act on the side of the Respondent States does not lie in the admission of Morocco but in their failure to act on that occasion, which began when Morocco officially submitted its application for admission on 23 September 2016. It points out that from that moment onwards, the Respondent States should have acted, as the application put them in a position to enforce the right to self-determination of the Sahrawi people.

75. However, SADR argues, that for six months, while they could have engaged in consultations and interactions, the Respondent States remained passive and on 31 January 2017, the Assembly admitted Morocco to the AU. The SADR alleges that the Respondent States have taken no measures as required by their obligations under the said Constitutive Act of the AU, the Charter, the ICCPR, the ICESCR and the law of international responsibility, with regard to the Morocco's admission to ensure respect for the sovereign rights and fundamental freedoms of the people of the SADR. Therefore, SADR submits that the wrongful act was not manifest just on the date of admission but it had already existed for six (6) months prior to that.
76. It is also the SADR's submission that even if it were to be assumed that the Court lacks the competence to interpret the Constitutive Act, the reference to provisions of the Act within the Application does not automatically divest the Court of its jurisdiction. In fact, according to the SADR, the principles enshrined in Article 3 and 4 of the Constitutive Act in terms of obligations of States generate corresponding rights to be enjoyed by peoples and as such, the Act could be characterised as a human rights instrument.
77. The SADR substantiates its contentions by referring to the AU's submissions in the International Court of Justice's *Advisory Opinion on the Status of Chagos Archipelagos*, and to the judgments of the European Court of Justice in *Western Sahara Campaign UK v Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco*.

c. The Court's position

78. As regards the first objection, the Court notes that its jurisdiction to interpret the Constitutive Act of the AU is ousted by Article 26 of thereof⁹ and as such, issues exclusively requiring the interpretation of the Constitutive Act are outside its competence. In view of this, the Court does not deem it necessary to determine whether or not the Constitutive Act, to the extent it contains provisions pertinent to the protection of human rights, may be considered as a human rights instrument.

9 According Article 26 of the Constitutive Act of the African Union, "The Court [of Justice] shall be seized with matters of interpretation arising from the application or implementation of this Act. Pending its establishment, such matters shall be submitted to the Assembly of the Union, which shall decide by a two-thirds majority." See also Rule 4(1)(s) of the Rules of Procedure of the Assembly of the African Union (2002).

79. However, apart from the Constitutive Act, the Application is also based on *other* conventions to which the Respondent States are Parties. As indicated above, it contains allegations of violations of several rights of the Sahrawi people, including their right to self-determination, the right to dispose of their natural resources, the right to participation in the political affairs of their country, their right to a fair trial and their right to peace contrary to Articles 1, 2, 7, 13, 19, 20, 21, and 23 of the Charter.
80. The Court also notes the Applicant's allegation of violations of Articles 1 and 2 of the International Covenant on Civil and Political Rights (ICCPR) and Articles 1 and 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which all the Respondent States have ratified.¹⁰ In addition, Benin, Côte d'Ivoire, Mali, Malawi, Ghana and Burkina Faso are also Parties to the African Charter on Election, Democracy and Good Governance (ACEDG),¹¹ which the Applicant further alleges to have been violated.¹²
81. The examination of these allegations of violations falls within the jurisdiction of the Court in accordance with Article 3 of the Protocol. Accordingly, the Court dismisses the Respondent States' objection in this regard.
82. With regard to the second objection, that the Application exclusively relies on the admission of Morocco to the AU, the Court observes that if the Application was solely grounded on the said admission, its consideration would in fact be outside its material jurisdiction. As it has already established in its caselaw, the AU and its member States have separate legal personalities, bearing their own rights and duties in international law, despite the fact that the Union is collectively created by its individual Member States.¹³ The admission as such is the decision of the

10 Benin became a State Party to ICCPR and ICESCR on 12 March 1992, Burkina Faso on 4 January 1999, Côte d'Ivoire 26 March 1992, Ghana 7 September 2000, Malawi on 22 December 1993, Mali 16 July 1974, Tanzania 11 June 1976 and Tunisia on 18 March 1969.

11 In the case of Application No 001/2014, the Court held that "the African Charter on Democracy and the ECOWAS Protocol on Democracy and Governance are human rights instruments within the meaning of Article 3 of the Protocol, and therefore that it has jurisdiction to interpret and apply the same". (1 AfCLR 668, § 65).

12 The Republic of Benin ratified ACDEG on 11 July 2012, Burkina Faso on 6 July 2010, Côte d'Ivoire on 28 November 2013, Ghana on 18 October 2010, Mali on 2 September 2013 and Malawi on 24 October 2012.

13 *Femi Falana v African Union* (jurisdiction) (26 June 2012) 1 AfCLR 118, § 68.

supreme organ of the Union,¹⁴ that is, the Assembly and it cannot in principle be considered as the act of the individual Member States.

- 83.** The Court notes in this regard that Article 26 of the Constitutive Act of the AU is clear that the interpretation and application of the Act is beyond the remit of the Court's jurisdiction. Accordingly, it does not have the competence to examine whether the AU's decision to admit Morocco is compatible with the Constitutive Act. As the Office of the Legal Counsel of the AU has rightly concluded in its Legal Opinion on the issue of the admission:

Articles 3 and 4 of the Constitutive Act ought to guide the actions of the organs of the Union and the decisions they are required to take in the exercise of their powers. It is therefore within the powers of the Assembly to determine whether the admission of the Kingdom of Morocco would be in violation of the principles and objectives of the Union relating to decolonization, defending the sovereignty and territorial integrity of all member states and respecting its own and other member states' internationally recognised borders. In conclusion, the Office of Legal Counsel reiterates that the power to determine the admissibility of a request to join the Union and to make a final decision on such request is ultimately vested in the Assembly of the Union in conformity with Article 9(c) of the Constitutive Act and Rule 4(1)(h) of the Rules of procedure of the Assembly.¹⁵

- 84.** Nonetheless, the Court notes from the record that the instant Application is not exclusively based on the Assembly's decision to admit Morocco to the AU but also on the alleged general behaviour or attitude of the Respondent States towards the suffering of the Sahrawi people as a result of the continued occupation of their territory by Morocco.
- 85.** The Court also takes note of the Applicant and SADR's submissions in this connection, that the admission and the Respondent States' decision to vote in favour of it, which was allegedly taken before the voting in the Assembly, were rather coincidental with and just an indication of the Respondent States' purported acquiescence to the erosion of SADR's sovereignty and territorial integrity and the resultant violations of human rights of the Sahrawi people contrary to their obligation in the Charter, the ACDEG, the ICCPR, and the ICESCR.

¹⁴ Article 6(2) of the Constitutive Act declare that "the Assembly shall be the supreme organ of the Union".

¹⁵ The Legal Counsel of the African Union, Legal Opinion on the Request of the Kingdom of Morocco's for Admission into the African Union, January 2017, paras. 45-46.

86. In other words, the Applicant's main contention is on the Respondent States' alleged failure to ensure that the Sahrawi peoples' right to self-determination is respected by Morocco, citing the admission process as just one manifestation of such failure.
87. Consequently, the Application can neither be said to have been exclusively based on the fact of admission of Morocco to the AU nor on the Constitutive Act and therefore the objection is dismissed.

iii. Whether the Application is like a request for advisory opinion and deals with a dispute over "ownership" of a territory?

a. Respondent States' submissions

88. Côte d'Ivoire objects to the Court's material jurisdiction alleging that the Application is akin to a request for an advisory opinion rather than a contentious claim regarding the purported violation by the Respondent States of their obligations towards a State Party or to the Union itself. As a request for an advisory opinion, it asserts that the Application should be dealt with differently in accordance with Article 4 of the Protocol.
89. Furthermore, Côte d'Ivoire alleges that the instant Application concerns a dispute between two Member States of the AU over a part of Western Sahara, which both claim to be a part of their own territory. According to Côte d'Ivoire, the issue is therefore no longer about the rights and freedoms of the population of the said territory but a question of "ownership" of the territory, a substantive question which falls outside the jurisdiction of the Court. It submits that the onus is on the AU Assembly to hear and determine the status of this territory and until that time, it is the occupying power which is responsible for any human rights violations committed in the disputed territory.

b. The Court's position

90. Regarding the first limb of the objection, the Court notes that although the Applicant mentions Article 4 of the Protocol, the provision dealing with requests for an advisory opinion, he clearly states in his Application that he filed his complaints against the Respondent States. The Court also infers from the entirety of the Applicant's submissions that the Applicant was not in any way

intending to file a request for advisory opinion, rather a contentious Application. Consequently, the Court will treat the Application as such and exercise its jurisdiction to determine the issues raised thereof.

91. Concerning the second limb of Côte d'Ivoire's objection, the Court notes that the instant Application indeed relates to Western Sahara, which Morocco claims to be its own territory. However, the fact that an application alludes to the "ownership" of 'a disputed territory' does not prevent the Court from exercising its jurisdiction with respect to human rights violations alleged to have been committed against the peoples living in that territory.
92. In this regard, the Court underscores that the enjoyment of some group rights such as the right to self-determination may relate to the existence of a specific territory on which a group of people lay claim. As a human rights court, it is also true that the Court has no jurisdiction to rule on a dispute between two Member States of the AU over the "ownership" of a particular territory.
93. However, the determination of whether some rights of individuals or a group of people living in a particular territory are being trampled upon by a respondent State does not necessarily require the Court to delve into the issue of "ownership" of such territory. The Court is thus competent to determine whether the Respondent States in the instant case are responsible for the alleged violations of the rights and freedoms of the people of the SADR, notwithstanding that such violations may relate to 'territorial disputes'. Accordingly, the Court dismisses the Respondent State's objection in this regard.

iv. Whether the AU Assembly has transferred the SADR's matter to the United Nations?

94. The other objection to the Court's jurisdiction is that the AU Assembly, the supreme organ of the Union, has concluded on and decided to leave the matter to the United Nations and thus, it is no longer within the prerogative of the AU organs to consider and make determination. In this regard, Tunisia recalls that during the AU Summit of July 2018, held in Nouakchott, Mauritania, the Assembly adopted a resolution (No 693), by which it limited the competence of the Union to consider and discuss the dispute on Western Sahara and decided to leave the matter to the UN. Accordingly, Tunisia submits that the subject matter of the current Application is no longer within the prerogative of the AU organs, including the Court, as it was concluded upon by a decision of the Assembly, which in accordance with Article 6 of the Constitutive

Act is the supreme organ of the AU.

- 95.** The Court notes that at its 31st Ordinary Session, held from 1 to 2 July 2018, in Nouakchott, Mauritania, the Assembly of the AU considered and adopted its decision on the Report of the Chairperson of the Commission on the issue of Western Sahara. The relevant paragraphs of the decision are reproduced below for ease of reference.

The AU Assembly:

REITERATES ITS DEEP CONCERN at the continued stalemate in the conflict in Western Sahara and the resulting consequences on the ground and in the region, as well as its impact on the functioning of the AU and the implementation of its priorities;

STRESSES THE NEED for renewed efforts to overcome the current impasse in the negotiation process and to find a just, lasting and mutually acceptable political solution which will provide for the self-determination of the people of Western Sahara, in line with the relevant AU decisions and UN Security Council resolutions. (...)

AGREES ON THE NEED for the AU to actively contribute to the search for solution, through renewed support to the efforts led by the UN Secretary-General and his Personal Envoy. In this respect, the Assembly:

- a. DECIDES to establish an African mechanism comprising the AU Troika, namely the outgoing, the current and the incoming Chairpersons, as well as the Chairperson of the Commission, to extend effective support to the UN-led efforts, by encouraging the parties to demonstrate flexibility, mobilizing as large support as possible for the United Nations led-efforts, and reflecting, in close consultation with the UN, on the substance of the desired compromise. This mechanism shall report regularly on the implementation of its mandate to the Assembly of the Union and, as necessary, to the Peace and Security Council at the level of the Heads of State and Government; (...)
 - b. REQUESTS the Chairperson of the Commission to initiate the required consultations for the reactivation of the AU Office in Laayoune to the UN Mission for the Referendum in Western Sahara, in order to facilitate operational coordination with the UN;
 - c. APPEALS to all AU Member States, in particular the neighbouring countries, to support the UN-led efforts.¹⁶
- 96.** The Court observes from the foregoing that the AU Assembly has not, as was alleged by some of the Respondent States, decided to disengage itself and entirely transfer the matter to be exclusively resolved under the auspices of the UN. Nor did

¹⁶ Decision on the Report of the Chairperson of the Commission of the African Union on the Issue of Western Sahara, Assembly/AU /Dec.693(XXXI), §§ 4-6.

the Assembly obliquely or categorically decide to preclude other organs from dealing with the issue. In fact, the Assembly decided to establish “an African mechanism comprising the AU Troika”, which shall report regularly “to the Assembly of the Union and, as necessary, to the Peace and Security Council”. This clearly reflects the Assembly’s “deep concern” (...) “at the current impasse in the negotiation process and to find a just, lasting and mutually acceptable political solution which will provide for the self-determination of the people of Western Sahara”.¹⁷ More importantly, it demonstrates the Assembly’s interest to remain seized of the matter and the AU’s general commitment to finding a final settlement to the dispute.

97. There is also nothing in the Assembly’s decision indicating that it seeks to oust the Court’s competence to consider any application relating to the issue of Western Sahara. Even though the Court was to accept the Respondent States’ contention that the AU Assembly has totally relinquished the matter for the UN’s consideration, a decision pertaining to a political process that aims to find a political solution, cannot be invoked to exclude a judicial determination of a matter.
98. In this regard, the Court is cognisant of the fact that as an organ of the African Union, it is operating within the Union’s general institutional framework. However, as far as its jurisdiction is concerned, it is guided by the Protocol, the Charter and other human rights instruments ratified by State Parties to the Protocol on the basis of which it is empowered to consider an application alleging the violations of human and peoples’ rights. The Court therefore rejects the Respondent States’ objection that its jurisdiction is ousted by the abovementioned decision of the Assembly.
99. In view of the foregoing, the Court finds that it has material jurisdiction to consider the Application.

B. Objection to personal jurisdiction

i. Respondent States’ submissions

100. Mali, Burkina Faso, Tunisia, and Tanzania assert that the Court lacks jurisdiction on the grounds that the Applicant does not have *locus standi* before the Court as he has neither demonstrated

¹⁷ *Ibid*, §§ 3-4.

interest in the issues that he raised in the Application nor claimed to be a victim of the alleged human rights violations.

101. Mali specifically asserts that the right to individual remedy is subordinate to the *locus* of the victim and only an individual who is a victim of human rights violation can exercise the right to seek remedy. This, according to Mali, requires the existence of a direct link between the individual and the alleged violation. Mali asserts that the Applicant should adduce reasonable and convincing evidence, not mere suspicions and conjectures, of the responsibility of the Respondent States and the violation as far as he is concerned personally, which is not the case in the instant Application. It adds that the violation of a human right is assessed not in abstract but in *concreto* and established after it has taken place; yet the Applicant in this regard fails to demonstrate in any way how the situation of Western Sahara affects him personally.
102. Similarly, Tunisia submits that the seizure of national and international courts is an entitlement to a person who has the right to file an application. According to Tunisia, an individual can exercise this right upon showing interest in a matter and a judge, before considering an application, must always examine and confirm that this precondition is met.
103. Tunisia further expounds that the interest prompting the seizure of a court should be based on a right subsisting and valid at the time of filing the application, that is, the right must have already been violated or harm has been sustained by the applicant, and finally, the interest should be direct and personal in the sense that the applicant or whoever represents him owns the right to be protected. It contends that the Applicant is a Ghanaian citizen, making a claim based on Morocco's occupation of the SADR, which is not his country of nationality, and he fails to demonstrate that he is being directly affected by such occupation. It is Tunisia's view that the Applicant's allegation that he is being indirectly affected as an African citizen is not sufficient for him to seize the Court.
104. Tanzania also asserts that the Applicant is suing the wrong party. It submits that his Application is based on the AU Assembly's decision to admit Morocco to the Union, which is the function of the Assembly itself and not that of the Member States. Tanzania contends that the AU and its Members have distinct legal personalities and if the Applicant is aggrieved by the decision of the Assembly, he should sue the AU not the individual Member States.
105. Ghana concedes that the Court has personal jurisdiction given that the Applicant is its national and that it has ratified the Charter and

the Protocol and deposited the Declaration required under Article 34(6) of the Protocol. Similarly, Côte d'Ivoire accepts that the Court has personal jurisdiction to consider the Application given that it has ratified the Protocol and deposited the Declaration. It also submits that pursuant to the Protocol, the Applicant has standing before the Court.

ii. Applicant's submissions

- 106.** The Applicant avers that he is a Ghanaian national whose country ratified the Protocol and deposited the Declaration accepting the competence of the Court to hear and determine cases involving human rights abuse by a Member State of the African Union.
- 107.** The Applicant emphasises that he is not suing the AU and although the Respondent States are individual members thereof, the AU is not a party to the case. He submits that the SADR is a Member State of the AU and under the Charter, the Sahrawi people are entitled to all the rights enshrined therein, including the universally recognised right to self-determination. The Applicant asserts that it is the duty of the Respondent States to ensure that these rights are protected. According to the Applicant, this duty emanates from Articles 3, 4 and 17 of the Constitutive Act, which embody the guiding principles of the AU that all Member States should comply with, including respect for human rights, the rule of law and good governance.
- 108.** The Applicant further adds that he filed his Application in discharge of the duty imposed on all individuals towards their family, society and the State under Article 27(1) and Article 28 of the Charter to ensure respect for fellow human beings without discrimination and to maintain relations aimed at promoting, safeguarding and reinforcing mutual understanding and tolerance.
- 109.** The Applicant asserts that in accordance with Article 29(7) and (8) of the Charter, he also owes the duty to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation, and in general, to contribute to the promotion of the moral well-being of the society and to the African Unity to the best of his abilities. The Applicant argues that by seeking to enforce the human rights of the people of Western Sahara, he is performing his aforementioned duty as part of a coalition of civil society organisations fighting for the independence of the SADR and respect for the right to self-determination of the Sahrawi people.
- 110.** In response to the objection that he lacks personal interest or that he is not a victim of the alleged violations, the Applicant

contends that his Application is prompted by the desire to protect a public, but not personal, interest. Citing the Court's decision in Application No 009/2011, *Tanganyika Law Society and Another v United Republic of Tanzania*, he asserts that to properly file his Application, what is required of him is to show that the action or omission of the Respondent States applies to a right that the Applicant has or the right of an individual on behalf of which he wishes to seize the Court. In this vein, he claims that he has demonstrated how the omission of the Respondent States applies to the rights of the Sahrawi people on whose behalf he is seizing the Court.

111. In conclusion, the Applicant submits that the Court has personal jurisdiction to determine his Application.

iii. Intervening State's submissions

112. The SADR submits that the Court has personal jurisdiction over the instant matter, as all the Respondent States are parties to the Charter and to the Protocol, and have deposited the Declaration prescribed under Article 34(6) of the Protocol allowing individuals to bring cases against them before the Court. It argues that the Application is not directed against the African Union, which has a legal personality distinct from the Member States but rather concerns the behaviour of the Respondent States.
113. In this regard, SADR emphasises that the question in issue does not concern, even indirectly, the behaviour of the African Union. It submits that the issue of concern is rather the attitude of the Respondent States which have taken no measures in regard to the Morocco's admission to the AU to ensure respect for the sovereign rights and fundamental freedoms of the people of the SADR, in accordance with their obligations under the said Constitutive Act, the Charter, the ICCPR, the ICESCR and the law of international responsibility.
114. Furthermore, the SADR avers that in comparison with other human rights protection systems, the system established by the Charter does not require that the Applicant also be a victim of the alleged violation. Citing the jurisprudence of the African Commission on Human and Peoples' Rights (*hereinafter*, the African Commission), it argues that the principle of *actio popularis* applies to the African context and Article 56(1) of the Charter only requires a disclosure of the identity of the author of the communication, irrespective of him/her being the actual victim of the alleged violation. The SADR also refers to the judgments of the Court in *XYZ v Benin* and *Ajavon v Benin*, and asserts that the interest to act in the African

human rights system does not depend on the existence of harm to a personal interest.

115. The SADR also agrees with the Applicant that Articles 27(1) and 29(8) of the Charter impose duties on African citizens towards the international community to contribute to the promotion and achievement of African Unity. It is the SADR's contention that these obligations form the basis of the Applicant's legal interest in seeing the right to self-determination respected.

iv. *Amicus curiae's* submissions

116. In its *amicus curiae* brief, PALU asserts that the Application has been filed by an individual, Mr. Bernard Mornah and in accordance with Article 5 of the Protocol, he is entitled to directly seize the Court considering that all the Respondent States have ratified the Protocol and deposited the requisite Declaration under Article 34(6) of the same.

v. The Court's position

117. The Court observes that its personal jurisdiction is governed by Article 5 and 34(6) of the Protocol with regard to applications brought to it by individuals or Non-Governmental Organisations. Pursuant to these provisions, there are three (3) cumulative conditions that must be fulfilled for the Court to assume jurisdiction over a particular matter filed by an individual; namely, the State against which an application has filed must have ratified the Charter or any other human rights instrument; second, it must be a party to the Protocol and thirdly, this State must have deposited a Declaration allowing individuals to have direct access to the Court.
118. In the instant Application, the Court notes that all the Respondent States are parties to the Charter and the Protocol and have deposited the Declaration required under Article 34(6) of the Protocol.¹⁸
119. The Court notes that some of the Respondent States in the instant Application have withdrawn their Declaration. However,

18 The Republic of Benin, Burkina Faso, Côte d'Ivoire, the Republic of Ghana, Malawi, Mali, Tanzania and Tunisia ratified the Charter on 25 February 1986, 21 September 1984, 31 March 1992, 1 March 1989, 23 February 1990, 22 January 1982 and 9 March 1984, respectively. They became State Party to the Protocol and deposited the Declaration on 22 August 2014 and 8 February 2016, 23 February 1999 and 28 July 1998, 21 March 2003 and 23 July 2013, 16 August 2005 and 10 March 2011, 9 October 2008 and 9 October 2008, 20 June 2000 and 19 February

it reiterates its position that the withdrawal of a Declaration deposited pursuant to Article 34(6) of the Protocol does not have any retroactive effect and it also has no bearing on matters pending prior to the entry into force of the instruments of withdrawal of the Declarations, as is the case with the present Application.¹⁹

- 120.** On the objection to the Applicant's *locus standi*, based on his alleged lack of interest in the matter or his status as not being a victim of the alleged violations, the Court recalls its jurisprudence that:

[...] [Articles 5(3) and 34(6) of the Protocol] do not require individuals or NGOs to demonstrate a personal interest in an Application in order to access the Court, especially in the case of public interest litigation. The only precondition is that the Respondent State, in addition to being a party to the Charter and the Protocol, should have deposited the Declaration allowing individuals and NGOs to file a case before the Court. This is also in cognisance of the practical difficulties that ordinary African victims of human rights violations may encounter in bringing their complaints before the Court, thus allowing any person to bring applications to the Court on others' behalf without a need to demonstrate victimhood or a direct vested interest in the matter.²⁰

- 121.** Similarly, in the instant Application, the Applicant's purported lack of interest or the fact that he is not a victim of the alleged human rights violations does not bar him from accessing the Court. Nor does this fact alone divest the Court of its competence to consider the Application. This notwithstanding, the Court emphasises that the issues raised in the Application, including the right to self-determination, have particular importance to the African society considering the continent's history of colonialism and military occupation. This is reflected in the Charter which, among others, stipulates self-determination as one element of the right to existence of all peoples and categorically rejects foreign domination, be it political, economic or cultural.²¹ The Application may as such be considered to contain matters in which African citizens, including the Applicant, have vested interest, thus, allowing them to seize the Court.

- 122.** As regards the objection that the Applicant is suing the wrong party as his allegations are based on the decision of the AU to admit

2010, 10 February 2006 and 29 March 2010, and 5 October 2007 and 2 June 2017, respectively.

19 See paragraph 6 above.

20 *XYZ v Republic of Benin*, ACtHPR, Application No 010/20220, Judgment of 27 November 2020 (merits and reparations), §§ 47-48.

21 See Article 20 of the Charter.

Morocco to the AU, the Court reiterates that the Application is not grounded on the fact of the said admission, at least not exclusively, but rather on the alleged omission of the Respondent States to ensure that Morocco respects the right to self-determination of the people of the SADR. Therefore, the Application is properly filed against the Respondent States in accordance with Articles 5(3) and 34(6) of the Protocol.

- 123.** In view of the foregoing, the Court dismisses the Respondent States' objection in this regard and holds that it has personal jurisdiction to examine the present Application.

C. Objection to temporal jurisdiction

i. Respondent States' submissions

- 124.** Tanzania asserts that even though the admission of Morocco to the AU took place after the Respondent States became parties to the Protocol and deposited the Declaration allowing individual and NGO' access, this alone does not give the Court jurisdiction to entertain the matter. It asserts that the temporal jurisdiction of the Court should also be examined *vis-à-vis*, the fact that the allegations by the Applicant stem from the decision by the AU Assembly made in accordance with Article 29 of the Constitutive Act, the interpretation of which is the function of the Assembly itself, not the Court.

ii. The Applicant's submissions

- 125.** The Applicant did not make submissions in response to this objection.

iii. Intervening State's submissions

- 126.** The SADR alleges that the Applicant's allegations against the Respondent States, which coincided with the admission of Morocco to the AU, occurred subsequent to the entry into force, with respect to those States, of the Protocol establishing the Court and of the Declaration deposited by them under Article 34(6) of the Protocol. It adds that the violations committed by the Respondent States constitute a continuous wrongful act having begun at the time of the Moroccan application for admission to the AU and has continued to this day. Consequently, the Court

has jurisdiction *ratione temporis* to hear the present Application.

iv. *Amicus curiae's* submissions

127. PALU also contends that the Court has temporal jurisdiction over the instant Application to the extent that the Applicant impugns acts of the Respondent States on or about January 2017. It cites the Court's judgment in *Peter Chacha v Tanzania*, and asserts that the Court's temporal jurisdiction can be properly invoked in view of the fact that the alleged violations of human rights of the Sahrawi people are of a continuing nature.

v. The Court's position

128. As regards its temporal jurisdiction, the Court has held that the relevant dates are the ones when a respondent State became a Party to the Charter and the Protocol, as well as, where applicable, the date of deposit of the Declaration under Article 34(6) of the Protocol through which it accepts the jurisdiction of the Court to receive Applications from individuals and NGOs, with respect to the Respondent State.²² Where an alleged violation of human rights has occurred before the entry into force of the Charter and the Protocol with respect to the respondent State and prior to deposit of the said Declaration, the Court lacks temporal jurisdiction except when the alleged violations are continuing in nature.²³
129. In the instant case, the Applicant's contention relates to the Respondent States' alleged omission of protecting the rights and freedoms of the people of Western Sahara, including the right to self-determination. The alleged omission is said to have started, at least, from the moment the Morocco notified the AU of its intention to join the organisation on 22 September 2016, that is, after all the Respondent States, with the exception of Tunisia, became Party to the Charter and the Protocol and deposited the

22 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197, §§ 71-77; *Jebra Kambole v United Republic of Tanzania*, ACtHPR, Application No 018/2018, Judgment of 15 July 2020 (merits), § 22.

23 *Ibid.*

Declaration required under Article 34(6) of the Protocol.²⁴

130. With respect to Tunisia, the Court recalls that it became a party to the Charter on 21 October 1986 and to the Protocol on 21 August 2007 but deposited its Declaration under Article 34(6) of the Protocol on 2 June 2017, that is, after Morocco's admission processes was completed. However, the Court observes that the human rights alleged to have been violated as a result of such omission are continuing in nature given that the people of Sahrawi are still living under Morocco's occupation. The Applicant thus could have seized the Court at any time as long as the violations continue to occur.²⁵
131. In view of the above, the Court therefore holds that it has temporal jurisdiction to determine the instant Application.

D. Objection to territorial jurisdiction

i. The Respondent States' submissions

132. Tanzania submits that the Court lacks territorial jurisdiction. It argues that pursuant to Article 29 of the Vienna Convention on the Law of Treaties, a State is bound by a treaty in respect of its entire territory and cannot be held liable for an action or omission that has occurred outside its jurisdiction, unless such actions or omissions are perpetrated by the State in question or its agents.
133. In this regard, Tanzania avers that there is lack of causal link between the obligations of the Respondent States and the acts allegedly committed by Morocco towards Western Sahara's sovereignty, and its peoples' rights and freedoms as guaranteed in the Charter, ICCPR and ICESCR. According to Tanzania, the mere fact of participation in the decision to admit Morocco to the AU does not suffice to establish violations by the Respondent States. To support its contention, it cites the jurisprudence of the Court in the matter of *African Commission on Human and Peoples' Rights v Libya*.
134. Mali also asserts that the obligation that the Respondent States have assumed to protect human and peoples' rights has territorial

24 See "Morocco officially requests to join the African Union" AU Press Release, 23 September 2016 <https://au.int/en/pressreleases/20160923> [accessed April 2022].

25 *Jebra Kambole v United Republic of Tanzania*, ACTHPR, Application No 018/2018, Judgment of 15 July 2020 (merits and reparations), § 50; *Yusuph Said v United Republic of Tanzania*, ACTHPR, Application No 011/2019, Judgment of 30 September 2021 (jurisdiction and admissibility), § 42.

limits. It specifically contends that States' undertaking in the Charter does not impose on them the duty to protect rights and freedoms of individuals such as the right to vote anywhere in the world. According to Mali, each State has its own organised political system and in accordance with the principle of state sovereignty and non-interference in internal affairs, one State cannot for example, intervene in the electoral system of another State to ensure the protection of the right to vote. Consequently, it submits that the Court's jurisdiction must be limited to the territory of the State where the violations of rights was committed.

135. In the same way, Côte d'Ivoire contends that a Respondent State can only be responsible for human rights violations committed by itself or by its subjects on its territory. Therefore, it submits that the territorial jurisdiction of the Court should be limited to alleged human rights violations committed in the territory of the concerned Respondent State by virtue of the principle of non-interference of a Member State in the internal affairs of another as enshrined under Article 4(g) of the Constitutive Act of the African Union.

ii. The Applicant's submissions

136. The Applicant contends that the Charter has not defined any territory in terms of its scope of application. The Applicant asserts that when it comes to fighting against foreign domination, colonialism and Apartheid, the practice of the AU has been that all Members of the AU have a collective obligation. In this regard, he recalls that during Apartheid and the process of decolonisation in Southern Africa, all Member States of the OAU acted together despite the fact that the violations of human rights occurred outside their respective territories. Furthermore, the Applicant asserts that the AU Member States acted in tandem to ensure that the Ex-President of Chad, Mr. Hissène Habré, was tried in Senegal for alleged human rights violations committed during his presidency in Chad, notwithstanding that none of the violations took place in Senegal.

iii. Intervening State's submissions

137. The SADR avers that the violations committed relate to acts and omissions directly attributable to the authorities of the Respondent States which, therefore, can be located in their national territory where the said authorities are to be found. According to the SADR, for the Court to have jurisdiction, it is sufficient that the alleged violations have taken place within the juridical space of the Court,

that is, in the territory of a State Party to the Protocol, which may factually be that of the Respondent States but not necessarily limited to their national boundaries.

138. The SADR contends that in the present case, the violations took place “in the territory of a State Party to the Protocol”, regardless of whether these violations are localised in relation to the damage suffered or to the event causing it. In this regard, it submits that as to the place of the damage suffered, the SADR is a State Party to the Protocol, and accordingly, the Court’s jurisdiction extends to the whole of the Sahrawi territory including the occupied zone.
139. Secondly, as regards the event causing the damage, the SADR alleges that it took place in the territories of the Respondent States, where the seat of their Presidency, Ministry of Foreign Affairs –“their nerve and decision-making centre”, are located. It is SADR’s submission that, the violations committed happened there as it is where the choice to remain silent and to look away, was made in direct violation of the right to self-determination of the Sahrawi people, while Morocco was seeking admission to the African Union.
140. Furthermore, the SADR argues that the notion of territorial jurisdiction should not apply to the right to self-determination and independence. According to the SADR, Article 1 common to both the ICCPR and ICESCR, which concerns the “right of peoples”, does not include a reference to the notion of “jurisdiction” in contrast to Article 2(1) of the ICCPR. Secondly, the SADR asserts that the notion of jurisdiction is foreign to the Charter, while Article 1 of the corresponding European and Inter-American Conventions of Human Rights, contains the term “jurisdiction”. It alludes that this difference stems from the fact that the Charter protects “human and *peoples’* rights” while the European and Inter-American human rights Conventions only guarantee “the rights of *individuals*”.
141. Thirdly, the SADR relies on General Comment 12 of the Human Rights Committee where the latter emphasised that the obligation of States to act in favour of the realisation of the right to self-determination exist irrespective of “whether a people entitled to self-determination depends on a State Party to the Covenant or not”. In view of this, SADR avers that the obligation is not limited to the administering powers that temporarily control the territory of colonised peoples but rather applies to all.
142. Finally, the SADR submits that in its advisory opinions on the *Wall* and *Chagos*, the International Court of Justice (hereinafter, the ICJ) did not differentiate between States that actually control the territory of peoples entitled to self-determination and other States.

On the contrary, SADR contends that, the ICJ “emphasise[d] the *erga omnes* nature of the right to self-determination, stressing that it is an obligation of all States”.

iv. *Amicus curiae*’s submissions

143. PALU agrees with the submission of the SADR and asserts that the facts which gave rise to the alleged violations, including the occupation of the SADR, spoliation of its resources and impeding of its popular government are occurring in the territory of a party to the Charter and the Protocol, that is, the SADR, the Court has, therefore, territorial jurisdiction to consider the matter.
144. PALU nevertheless concedes that the Court needs to specify the location to ascribe the violations and impute them to the Respondent States. In this vein, PALU asks at what point did the respective Respondent States make the decision: on whether or not to raise the issue of SADR and on whether and/or how to vote on the unconditional admission of Morocco to the AU. PALU requests the Court to determine whether this was done in the capital city of each Respondent States or should be limited to the site of the meetings of the AU policy organs where the admission decision was made.
145. PALU further avers that some of the alleged violations in the Application are continuing in nature and the potential remedial actions that could be taken by the Respondent States are also very broad, they potentially could be taken in any or multiple parts of the Respondent States. PALU also argues that Article 20(3) of the Charter, which provides for the right of the Sahrawi people to get assistance from all the State Parties in their liberation struggle expands the territorial jurisdiction of the Court literally to the entire continent.

v. The Court’s position

146. The Court notes that unlike its European and Inter-American counterparts,²⁶ the Charter does not specify the territorial scope

26 Article 1 of the European Convention on Human Rights (1950) declares that “The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined ... in this Convention”. Similarly, the American Convention on Human Rights under its Article 1(1) stipulates that “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons *subject to their jurisdiction* the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or

of its application. Neither does the Protocol define the territorial domain of the Court's competence. However, the Court has always examined its territorial jurisdiction as part of other aspects of its competence.²⁷

147. The Court notes that the determination of the territorial jurisdiction of international tribunals has traditionally been confined to the national boundaries of the States. This stems from the general belief that a State's capacity to enact and enforce laws is *de jure* restricted to its national boundaries. As spelt out in Article 29 of the Vienna Convention on the Law of Treaties (1980), "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory." On this basis, international courts have also established their territorial competence only with respect to those matters which are said to be committed within the national territories of a State.
148. However, in recent times, with the increasing extra-territorial undertakings of States and the erosion of the defence of sovereignty with respect to violations of human rights, the classical notion of territorial jurisdiction has seen some changes. International human rights jurisprudence has also continuously expanded the territorial application of international human rights conventions beyond the physical national boundaries to areas where States have effective control and to acts and omissions committed by their agents or persons under their military, political, and economic influence.²⁸
149. Regional and international judicial and quasi-judicial human rights institutions have also engaged State's responsibilities

other opinion, national or social origin, economic status, birth, or any other social condition".

27 In *ACHPR v Libya*, it held that "...the Court notes that with regard to territorial jurisdiction (*ratione loci*), there is no shadow of doubt that the facts of the case occurred in the territory under the authority of Libya", § 58; in *Anacleto Paulo v United Republic of Tanzania*, the Court held that "It has territorial jurisdiction because the facts took place in the territory of a State Party to the Protocol, that is, the Respondent State.", § 29; see also *Minani Evarist v United Republic of Tanzania*, Application No 027/2017, 21 September 2018, § 22; *Werema Wangoko Werema & Another v United Republic of Tanzania*, Application 024/2015, 21 September 2018, § 33; *Ingabire Victoire Umuhoza v Republic of Rwanda*, Application No 003/2014, § 57. In *Kennedy Ivan v United Republic of Tanzania*, the Court further found that "it has territorial jurisdiction given that the facts of the matter occurred within the territory of a State Party to the Protocol, that is, the Respondent State."

28 *Ilaşcu and Others v Republic of Moldova and Russia* 8 July 2004 (European Court of Human Rights, *Grand Chamber – judgment*); see *Ivanțoc and Others v the Republic of Moldova and Russia* 15 November 2011 (judgment); *Catan and Others v the Republic of Moldova and Russia* 19 October 2012 (Grand Chamber – judgment); Inter-American Commission of Human Rights, Cuban military

with respect to acts and omissions committed within their national territories but generating extraterritorial effects.²⁹ This jurisprudential development is compatible with the purposes and objects of human rights treaties, that is, the protection of human and peoples' rights in view of which "there is no *a priori* reason to limit a state's obligation to respect human rights to its national territory."³⁰ Accordingly, there is a growing consensus that the obligation to protect or at least, not to violate human rights extends beyond the traditional confines of State territories.

- 150.** In addition, there are some rights such as the right to self-determination with respect to which States' obligation cannot be limited to their national boundaries. In this regard, the United Nations Human Rights Committee in its *General Comment 12* on the right to self-determination emphasised that:

[The Covenant] imposes specific obligations on State parties, not only in relation to their own peoples but *vis-à-vis* all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination. The general nature of this paragraph is confirmed by its drafting history...The obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not. It follows that all State parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination..., States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination.³¹

- 151.** The Court observes that by its very nature and the manner in which the right to self-determination is stipulated in the Charter, it is clear that the obligation of States extends beyond their national territories and also applies extraterritorially towards other people whose right to self-determination is yet to be fully respected. Article

intervention in international airspace – Report No 86/99, Case No 11.589, Cuba, 29 September 1999; US military intervention in Grenada – Report No 109/99, Case No 10.951 United States, 29 September 1999.

29 For example, in cases of expulsions/extraditions to places where individuals face a risk of torture or other serious human rights violation, the European Human Rights Court and the United Nations Human Rights Committee held that the expelling State incurs responsibility; *Soering v the United Kingdom*, ECtHR, judgment of 7 July 1989, UN Human Rights Committee (HRC), *Communication No 2104/2011: Human Rights Committee: Decision adopted by the Committee at its 110th session (10-28 March 2014)*, 29 April 2014, CCPR/C/110/D/2104/2011.

30 Theodore Meron, "Extraterritoriality of Human Rights Treaties" 89 AJIL 78, 80 (1995).

31 UN Human Rights Committee (HRC), *CCPR General Comment No 12: Article 1 (Right to Self-determination)*, *The Right to Self-determination of Peoples*, 13 March 1984, § 6.

20(3) of the Charter imposes a corresponding obligation on State Parties to offer their help to oppressed or colonised people by declaring that “*All peoples* shall have the right to the assistance of the State Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural”.

152. The examination of whether State Parties are discharging their obligation towards the oppressed or colonised people therefore remains within the scope of the Court’s territorial competence, notwithstanding the fact that the said people are outside the States’ national territory.
153. The Court further stresses that as far as its territorial jurisdiction is concerned, it is immaterial whether State Parties breached their obligations by way of commission or omission.
154. In the instant case, the Court notes that the Applicant alleges violations by the Respondent States of the right to self-determination and other related rights of the Sahrawi people as a result of their failure or omission to take action against the continued occupation of Western Sahara or to prevent Morocco from joining the AU without any commitment or condition to respect the rights of the Sahrawi people.
155. The Court observes that the alleged human rights violations have been committed against the Sahrawi people in the territory of the SADR, a State Party to the Protocol but outside the Respondent States’ national boundaries. The Court notes that it cannot automatically assume jurisdiction over an Application simply because alleged violations are said to have happened in the territory of *any* State Party to the Protocol. In order to exercise its territorial competence, the Court must also establish that such alleged violations must have occurred in the territory of a State Party against which an application is filed or by persons under its control.
156. In the present case, the Court notes that it is the alleged conduct of the Respondent States, that is, their failure to protect the sovereignty, territorial integrity and independence of the SADR that is said to have engendered the aforementioned violations of the rights of the Sahrawi people. The actual violations are thus alleged to have been committed in the SADR’s territory, strictly speaking, not in the territories of the Respondent States. However, it is evident that it is the Respondent States’ purported omission that has had an extraterritorial effect, that is, the continued violation of the rights and freedoms of the people of SADR
157. Accordingly, in view of the nature of the right to self-determination and the obligation that the Respondent States’ owe towards the Sahrawi people, it is the Court’s position that it has territorial

competence to examine the Application. The Court underscores that its territorial jurisdiction remains unaffected irrespective of whether the alleged failure or omission of the Respondent States is said to have occurred in the diplomatic precincts or headquarters of the respective Ministries of Foreign Affairs of the Respondent States or elsewhere. What is rather important is that the alleged violations are purportedly occasioned by such omission of the Respondent States.

- 158.** The Court thus finds that it has territorial jurisdiction to examine the Application.
- 159.** In view of the foregoing, the Court concludes that it has material, personal, temporal and territorial jurisdiction, and thus, is competent to determine the Application.

VII. Admissibility

- 160.** In terms of Article 6(2) of the Protocol, “the Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter.”
- 161.** Rule 50(2) of the Rules, which in substance restates the content of Article 56 of the Charter, provides as follows:
Applications filed before the Court shall comply with the following conditions:
 - a. Disclose the identity of the Applicant notwithstanding the latter’s request for anonymity;
 - b. Comply with the Constitutive Act of the Union and the Charter;
 - c. Not contain any disparaging or insulting language;
 - d. Not based exclusively on news disseminated through the mass media;
 - e. Be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 - f. Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the Matter;
 - g. Not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union.
- 162.** The Respondent States have raised objections to the admissibility of the Application based on Rule 50(2)(a)-(b) and (d)-(g) of the Rules.

A. Objections to admissibility

i. Objection based on the identity of the Applicant

a. Respondent States' submissions

163. Burkina Faso asserts that although the Applicant alleges that he is filing his Application as part of a coalition of civil societies defending the rights of the Sahrawi people, the Applicant failed to mention the non-governmental organisation which mandated him to file this Application and which he is defending. Burkina Faso contends that if the Applicant is from a non-governmental organisation, it is that organisation which would have the status of an Applicant. According to Burkina Faso, this would introduce the additional requirement in Article 5(3) of the Protocol of having observer status before the Commission as a requisite that the Applicant should fulfil to access the Court.

b. Applicants' submissions

164. The Applicant contends that his identity is clear as he disclosed his name, nationality and current role. In this regard, he recalls that he is Bernard Anbataayela Mornah, a Ghanaian citizen and the National Chairman of the Convention of People's Party, a political party in Ghana, which is committed to the struggle for the total decolonisation of the African continent including Western Sahara.

c. Interveners' submissions

165. In support of the Applicant's contention, SADR avers that in comparison with other human rights protection systems, the system established by the Charter does not require that the Applicant be a victim of the alleged violation. Citing the jurisprudence of the African Commission,³² it argues that the principle of *actio popularis* applies to the African context and Article 56(1) of the

³² African Commission decision 155/96, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR)/Nigeria*, adopted at the 30th session ordinary, held in Banjul, The Gambia, from 13 to 27 October 2000, § 49, African Commission decision 260/02, *Bakweri Land Claims Committee/Cameroon*, adopted at the 36th ordinary session held in Dakar, Senegal, from 23 to 7 December 2004, § 46.

Charter only requires a disclosure of the identity of the author of the communication, irrespective of whether they are the victim of the alleged violation.

- 166.** The SADR further asserts that Rule 1(a) of the Rules provides that “Applicant” means any entity or individual who initiates proceedings before the Court under Article 5 of the Protocol”, but does not provide that the author of the applicant must be a victim of a violation of the Charter. Conversely, it argues that Rule 41(7) of the Rules refers to cases where an Applicant is also the victim of a human rights violation” which implies on the contrary that the applicant does not necessarily have to be a victim of the alleged violation to seize the Court, as the adverb “also” indicates.

d. *Amicus curiae* submissions

- 167.** PALU also contends that the author of the Application, as well as his address for service, which is through his Counsel on record, is clearly stated and hence, the Application meets the requirement specified under Article 56(1) of the Charter.

e. The Court’s position

- 168.** The Court notes that pursuant to Rule 50(2)(a) of the Rules, an applicant must vouchsafe his or her identity to the Court in the absence of which the Court shall declare an application inadmissible. Disclosure of identity to the Court is a minimum requirement though an applicant may still request anonymity with respect to the public. The rationale behind this requirement is to maintain the integrity of the Court’s proceedings by precluding individuals who might wish to abuse the judicial platform by filing frivolous applications hiding behind the veil of anonymity.
- 169.** In the instant Application, the Court notes that the Applicant has through his Counsel, identified himself by his name, Mr. Bernard Anbataayela Mornah, and disclosed his nationality, profession and address. Although the Applicant indicates that he filed his Application as part of a coalition of civil society organisations fighting for the independence of the SADR and respect for the right to self-determination of the Sahrawi people, it is clear from his submissions that he was not acting on behalf of the said coalition. Neither has the Applicant also claimed to represent nor of having been mandated by a particular civil society to bring his Application.
- 170.** In view of the above, the Court dismisses the objection of Burkina Faso and holds that the identity of the Applicant is sufficiently

disclosed as required under Rule 50(2)(a) of the Rules.

ii. Objection based on non-compliance with the Constitutive Act and the Charter

a. Respondent States' submissions

171. Tanzania asserts that the determination of compatibility of an application with the Constitutive Act and the Charter needs to take into account the provisions of the two instruments as a whole. On this basis, it submits that as Article 26 of the Constitutive Act of the AU ousts the jurisdiction of the Court in relation to the interpretation of its provisions, the Applicant's invocation of the Constitutive Act as an enabling instrument to his Application renders the Application not compatible with the Constitutive Act.

b. Applicant's submissions

172. The Applicant did not file submissions on this issue.

c. Intervener's submissions

173. With respect to compatibility with the Constitutive Act of the AU and the Charter, the SADR relying on the Court's jurisprudence on its jurisdiction,³³ submits that the violations alleged by the Applicant – which are all related to the right to self-determination and independence of the people of the SADR fall within the scope of the Charter, which guarantees these rights in its Articles 19 to 23; and of the Constitutive Act which, in its Articles 3(a), 3(b), 3(f), 3(g) and 3(h) as well as 4(a)-(b), 4(e) 4(f)-(j), and 4(m), enshrines, as objectives and fundamental principles of the Continental Organization.

d. Amicus curiae submissions

174. PALU similarly asserts that *prima facie*, the Application is compatible with both the Constitutive Act and the Charter; and in fact, the Application lists the specific provisions of both legal instruments which it relies upon.

³³ Application 007/2013. Judgment of 3 June 2016, *Mohamed Abubakari v Tanzania*, § 50; Application 038/2016. Judgment of 22 March 2018, *Gombert v Côte d'Ivoire*, § 45.

e. The Court's position

175. The Court notes that in accordance with Rule 50(2)(a) of the Rules, an application must be compatible with the Constitutive Act and the Charter. The Court further notes that this requirement must be assessed in the light of the principles and objectives of the Act and the Charter. In this regard, Articles 3 and 4 of the Constitutive Act set out the objectives and principles of the AU, respectively.
176. Article 3(h) of the Act particularly specifies that one of the principal objectives of the Union is “to promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments”. Pursuant to Article 4(m) of the same, the Union shall achieve its objectives, among others, on the basis of the principles of “respect for democratic principles, human rights, the rule of law and good governance”.
177. The Court notes that the instant Application, having been filed with a view to protecting the rights and freedoms of the people of the SADR, is compatible with the objective and principles of the Union.
178. The Court concedes that the Application makes reference to the provisions of the Constitutive Act and requests the Court to find that the Respondent States have breached their obligation under the afore-cited provisions of the Act. However, the Court rejects the submission that this fact alone makes the Application inadmissible.
179. The Court is of the view that the mere fact that an application invokes provisions of the Constitutive Act, does not necessarily render the application incompatible with the Act or the Charter as long as its subject matter is consistent with the general objectives and principles of the AU and relates to the purpose of the Charter, that is, the protection of human and peoples’ rights.³⁴
180. Consequently, the Court dismisses the objection of Tanzania in this regard and finds that the Application meets the requirement set out under Rule 50(2)(b) of the Rules.

34 See *Chacha v Tanzania* (admissibility) (2014) 1 AfCLR 398, § 124.

iii. Objection based on the fact that the Application is exclusively grounded on news disseminated through the mass media

a. Respondent States' submissions

181. Ghana argues that the Applicant is neither a citizen nor a resident in Western Sahara or Morocco and does not have first-hand knowledge about the Western Sahara conflict. It asserts that his arguments are to a large extent based on information obtained from the internet and media. In this regard, Ghana refers to a paragraph in the Application where the Applicant cites information obtained from a website which publishes news and information regarding Western Sahara.

b. Applicant's submissions

182. The Applicant responds that the illegal occupation of the territory of Western Sahara is a notorious fact, which the Respondent States themselves have not disputed. The Applicant asserts that his complaint is not based exclusively on media reports but also relies on AU and UN resolutions on the status of Western Sahara. Accordingly, he submits that in view of the celebrated 1975 Advisory Opinion of the ICJ on the same, this Court should take judicial notice of this fact and make its determination.

c. Intervener's submissions

183. The SADR also argues that the Application is not solely based on media reports but formal decisions and deliberations of the UN and the AU.

d. *Amicus curiae* submissions

184. PALU contends that the Application dealing with a known fact, is not exclusively based on media reports. Citing the jurisprudence of the African Commission in *Dawda Jawara v The Gambia*, it asserts that the issue under Article 56(4) of the Charter "should not be whether the information was gotten from the media, but whether the information is correct".

e. The Court's position

- 185.** The Court notes that Rule 50(2)(c) of the Rules requires that an application must not be based exclusively on news disseminated through the mass media. This condition of admissibility requires applicants to base their complaints on credible information other than the ones available on the media. The Rule seeks to save the Court's resources from being expended on applications that are solely grounded in media reports, which may be unverified, incomplete or are mixed with or influenced by individual editorial opinions.
- 186.** The Court observes that Rule 50(2)(c) does not absolutely proscribe any reference to media reports in an application. The term "exclusively" in this provision makes it clear that what is prohibited is the complete reliance of an application on news obtained from the media. Furthermore, there are facts whether or not reported in the media, that an applicant may rely on in his application or that the Court itself should take judicial notice.
- 187.** In the instant case, the Applicant substantially relies on the various resolutions and decisions of organs of the UN and decisions of the AU. The decisions and resolutions and the realities on which they are based are facts that the Court also takes judicial notice and are not mere media reports. Accordingly, the instant Application cannot be said to be exclusively based on news disseminated through the media.
- 188.** The Court therefore holds that the Application fulfils the admissibility requirement under Rule 50(2)(c) of the Rules.

iv. Objection based on failure to exhaust local remedies

a. Respondent States' submissions

- 189.** Burkina Faso, Ghana and Côte d'Ivoire raise the issue of lack of exhaustion of local remedies. Burkina Faso specifically argues that its domestic law allows foreigners to seize its courts but the Applicant has never done so. It contends that the Applicant has not properly justified why this requirement should be waived for him nor has he explained why he did not approach its domestic courts or the unavailability or ineffectiveness of the remedy before them. Côte d'Ivoire also asserts that it has civil courts that adjudicate human rights and freedoms but the Applicant has not submitted that he took his matter before the said courts prior to seizing this Court.

190. On the other hand, Tanzania submits that the requirement of exhaustion of local remedies does not apply in the present Application. According to Tanzania, the Application itself is before a body with no competence to hear the same.
191. Furthermore, Tanzania reiterates that the impugned acts or omissions in the instant Application relate to State's obligations and liability in international treaty. It notes that Tanzanian courts do not generally have a mandate to determine a dispute between State parties or third parties that arise out of implementation of a certain treaty. Accordingly, it is Tanzania's submission that considering the nature of the matter, there is no possibility for the Applicant to exhaust local remedies within its jurisdiction.

b. Applicant's submissions

192. The Applicant submits that his Application should be treated as falling within the exception to the rule of exhaustion of local remedies. He contends that domestic remedies would be unusually delayed if he had to move from one Respondent State to the other seeking reliefs for his application. The Applicant notes that if he was to do that, he would have to engage the service of numerous lawyers to prosecute the suits in all the Respondent States thereby not only negating the very essence of "re-establishing the African Court of Justice and Human Rights (ACHJ) but also fostering the multiplicity of jurisdiction".
193. The Applicant further asserts that the instant case involves a plurality of Respondent States whose behaviour is closely linked given their collective responsibility to act to ensure respect for the rights of the Sahrawi people. In this regard, the Applicant notes that the African Commission in similar cases agreed to disregard the application of the rule of exhaustion of local remedies on the grounds that the national judge of a Respondent State, taken in isolation, will not have jurisdiction over the other Respondent States, and besides, it would be unfair to expect the victim to institute parallel suits in the national courts of the States involved, separately.
194. The Applicant also notes that he would not have been able to sue the Respondent States in Ghana as all of them except the latter enjoy sovereign immunity in his country. In this vein, the Applicant cites the decision of the Court of Justice of the Economic Community of West African States (ECOWAS) in *Starcrest Investment Ltd. v The President of the ECOWAS Commission* (2010) CCJLR (PT 3) 99. The Applicant contends that the ECOWAS Court in this case held that the question of

exhaustion of local remedies “does not arise in matters involving persons enjoying diplomatic immunity from the national Courts”.

c. Interveners’ submissions

195. The SADR similarly argues that this rule does not apply to this Application given that the violations committed by the Respondent States concern the sovereign rights of the Sahrawi as a people whose State is a party to the Charter. In this regard, recalling the case-law of the ICJ,³⁵ it asserts that the obligation to exhaust domestic remedies does not apply to requests made by a State, in its own name, even when there is an interdependence between the rights of that state and the individual rights it intends to protect. According to SADR, in accordance with the principle of *par in parem non habet imperium*, a sovereign State cannot be forced to submit to the jurisdiction of another State, particularly as regards *jure imperii* activities which directly relate to its sovereignty. It further asserts that it is clearly contrary to Article 19 of the Charter and the right which it guarantees, to require a State Party to exhaust the domestic remedies of another State Party to demonstrate the violation of its sovereign rights, as a prerequisite for referral to the Court.
196. In addition, the SADR alternatively asserts that any recourse before the national courts of the Respondent States would have had no chance of prospering. This is firstly, because the present case involves facts which, under domestic law, concerns the domain of external relations to which the theory of acts of government applies. According to SADR, in almost all States, such acts are outside the scope of review by the national judge and any referral to the national judge would have been doomed to fail since, in any event, the courts concerned would have refused to pronounce themselves on the conformity of the behaviour of the Respondent States with their international obligations towards the Sahrawi people.
197. Secondly, the SADR contends that the Applicant’s claim involves a plurality of Respondent States, whose behaviour is closely linked given their collective responsibility to act to ensure respect for the rights of the Sahrawi people. In such circumstances, it argues

35 *Avena and Other Mexican Nationals (Mexico v United States of America)*, Judgment, ICJ Reports 2004, p. 36, § 40.

that in conformity with the decision of the African Commission,³⁶ the application of the rule of exhaustion of remedies should not apply in this case on the grounds that the national judge of a Respondent State, taken in isolation, will not have jurisdiction over the other Respondent States. Furthermore, it would be unfair to expect the victim of human rights abuses to pursue multiple proceedings in the national courts of each of the States involved, separately.³⁷

198. Finally, SADR submits that in accordance with the established jurisprudence of the African Commission, the rule of exhaustion of domestic remedies does not apply to cases of serious and massive violations of human rights.

d. *Amicus curiae* submissions

199. On its part, PALU contends that the rule of exhaustion of local remedies should not apply to the instant Application. First, it argues that the Application involves about nine (9) countries, including SADR which potentially also concerns a tenth non-party State of Morocco. The multiplicity of parties, in and of itself, makes it appropriate to consider the case in a single international tribunal to which all the Respondent States are party. According to PALU, the alternative would be to lodge a separate case in each of the eight Respondent States' national courts, which would not be an effective way of addressing this matter.
200. Secondly, PALU asserts that some of the Respondent States have conceded that the potential domestic remedy in their jurisdiction is ineffective – given that the Application deals with matters of international relations. In this connection, PALU notes that the instant Application indeed involves the international responsibility of different Respondent States on which national courts have no jurisdiction.

36 African Commission, decision No 157/96, *Association for the Safeguarding of Peace in Burundi/ Kenya, Uganda, Rwanda, Tanzania, Zaire (DRC), Zambia*, adopted at the 33rd session ordinary held in Niamey, Niger, from 15 to 29 May 2003, § 65, ACHPR, decision n ° 409/12, *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Zimbabwe and thirteen others*, adopted during the 54th ordinary session, held in Banjul (The Gambia) from 22 October to 5 November 2013, §§ 103-105. 527 AHPR Commission, decision n ° 338/07, *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria*, adopted at the 48th Ordinary Session, held in Banjul (The Gambia) from 10 to 24 November 2013, § 67.

37 *Jawara v Gambia* (Communication No 147/95, 149/96) [2000] ACHPR 17; (11 May 2000).

201. Furthermore, citing the African Commission's decision in *Dawda Jawara v The Gambia*,³⁸ it submits that considering that the Respondent States have been aware of existing violations but have not taken any actions, it is not necessary to take the matter to them for redress. As long as a State was aware of a violation and had a chance to remedy but failed to do so, the rule of exhaustion of local remedies does not apply.
202. Finally, PALU submits that the Court should adopt the position of the African Commission that the requirement of exhaustion of local remedies is waived when a series of serious or massive violations of human rights in terms of Article 58 of the Charter occur, which is the case in the instant Application.

e. The Court's position

203. The Court notes that Rule 50(2)(e) of the Rules provides that an application filed before it must fulfil the requirement of exhaustion of local remedies. The rule of exhaustion of local remedies offers States the opportunity to deal with human rights violations at the domestic level before an international human rights body determines their responsibility for the same.³⁹ On several occasions, the Court has emphasised that the requirement of exhaustion of local remedies can only be dispensed with if local remedies are manifestly unavailable, ineffective, insufficient or the proceedings to pursue them are unduly prolonged.⁴⁰
204. The determination of the existence of a circumstance that warrants dispensing with the rule of exhaustion local remedies is made on a case-by-case basis taking into account, *inter alia*, the nature of the case, parties involved, alleged human rights violations, the reliefs sought and the likelihood that an applicant may be able to utilise local remedies without considerable difficulty.
205. The Court acknowledges that in comparison to all cases that it has previously entertained, the instant Application is the first of its kind both in terms of the number of parties and the nature of

38 *Jawara v Gambia* (Communication No 147/95, 149/96) [2000] ACHPR 17; (11 May 2000).

39 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017), 2 AfCLR 9, §§ 93-94, see also *Stephen John Rutakikiwa v United Republic of Tanzania*, ACtHPR, Application No 013/2016, judgment of 24 March 2022 (merits), § 36.

40 *Peter Joseph Chacha v United Republic of Tanzania* (admissibility) (28 March 2014) 1 AfCLR 398, §§ 142-144, *Almas Mohamed Muwinda and others v United Republic of Tanzania*, Application No 030/2017, judgment of 24 March 2022 (merits), § 43.

the submissions filed. The Application is filed against eight (8) Respondent States “individually and/or collectively” and involves allegations of human rights violations arising from their “individual and/or collective obligation” to protect the sovereignty, territorial integrity and independence of the SADR. The Applicant also seeks reliefs that require the Respondent States to act individually and/or severally.

206. Furthermore, while some of the Respondent States, namely, Burkina Faso, Ghana and Côte d'Ivoire assert that judicial remedies are available in their domestic jurisdictions, others, notably, Tanzania, aver that their domestic courts do not have competence to rule on disputes arising out of implementation of their obligations in international treaties.
207. The question that arises here is whether the Applicant should have attempted to pursue local remedies in at least, those countries which claim to have judicial avenues to determine and engage their responsibility for violating international obligations.
208. The Court is alive to the fact some national courts have recently scrutinised the international conduct of their governments and granted reliefs on the basis of the findings of such scrutiny.⁴¹ It would thus be casting aspersions if one is to conclude that domestic remedies would be unavailable, insufficient or ineffective or their proceedings unduly prolonged simply because an application relates to treaties or international wrongful act of a State.
209. Nonetheless, considering that the current Application is directed against several Respondent States and that the reliefs sought require their individual and/or collective action, the Court finds it unreasonable to require the Applicant to sue all the Respondent States either in his country, which as he rightly points out is barred by sovereign immunity, or before their respective domestic remedies. It would not only be cumbersome but also occasion foreseeable undue prolongation resulting from the multiplicity of the Respondent States.
210. Furthermore, the Court takes note of the submissions of some of the Respondent States, particularly, Tanzania, that the domestic courts do not have the competence to entertain matters related to their obligations arising from international treaties. It would

41 For example, the High Court of South Africa sitting in Pretoria ordered the government to revoke the country's October 2016 notice to the United Nations to withdraw from the Rome Statute of the ICC based on the government's failure to obtain prior parliamentary approval. *Democratic Alliance v Minister of International Relations and Cooperation et.al*, High Court of South Africa (Gauteng Division, Pretoria), judgment of 22 February 2017 <http://www.saflii.org/za/cases/ZAGPPHC/2017/53.pdf>.

therefore be futile for the Applicant to take his case to domestic courts in a situation where such courts lack jurisdiction to consider his complaints. It is also important to emphasise that the Applicant is suing the Respondent States individually and/or severally. Consequently, even if he had decided to approach the domestic courts of some of the Respondent States, where it is claimed that the municipal courts have the competence to consider international obligations, the general principle of sovereign equality of States would have prevented them from deciding on the case in a holistic manner with respect to the joint responsibility of all Respondent States.

211. The Court finally recalls the decision of the African Commission that when an application involves an allegation of a series of serious and massive violations of human rights, the rule of exhaustion of local remedies becomes inapplicable.⁴² In view of the fact that the instant Application contains allegations of several serious violations of the rights and freedoms of the people of SADR continuing for decades, the Court considers that there is sufficient ground to dispense with the rule of exhaustion of remedies in the present case.

212. Accordingly, the Court holds that the instant Application is deemed to have met the requirement of exhaustion of local remedies.

v. Objection based on failure to file the Application within a reasonable time

a. Respondent States' submissions

213. The Republic of Ghana contends that the Application does not fulfil the requirement of Rule 50(6) of the Rules relating to filing of an Application within a reasonable time. On the other hand, Tanzania reiterates that this Application is before a wrong forum and thus, this requirement of filing within a reasonable time does not arise in the present case.

b. Applicant's submissions

214. The Applicant did not make any submissions on the question of filing within reasonable time.

⁴² Communications 25/89, 47/90, 56/91 & 100/93, *World Organisation against Torture and Others v Zaire* (Zaire mass violations case), Ninth Annual Activity Report, para 3.

c. Interveners' submissions

215. Similarly, the intervening States did not file any submissions on this objection.

d. *Amicus curiae* submissions

216. PALU contends that some of the alleged violations commenced in 1976 when Morocco occupied parts of Western Sahara and some from January 2017, when Morocco was admitted to the African Union both of which are continuing to date. Accordingly, PALU submits that it is for the Court to set a time limit which it shall be seized of the matter, bearing in mind the continuous and massive nature of the violations.

e. The Court's position

217. The Court notes that Rule 50(2)(f) of the Rules which in substance restates the contents of Article 56(6) of the Charter, requires an Application to be filed within: "a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter."

218. The Court recalls its jurisprudence that: "...the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."⁴³ The Court has also held that in situations of continuing violations, the requirement of filing an application within a reasonable time becomes inapplicable in view of the fact that such violations renew themselves every day as long as a State fails to take steps to remedy them.⁴⁴

219. The Court further recalls its earlier position that by the nature of his Application, multiplicity of the parties involved and reliefs sought, the Applicant was not required to exhaust local remedies in the instant case. Accordingly, the Court shall specify the date from which the reasonableness of time for filing under Rule 50(2)(f) of the Rules shall be computed. In this regard, the Court recalls the submissions of the Applicant and the SADR that the Respondent States have failed to protect the right to self-determination and

43 *Norbert Zongo v Burkina Faso* (merits), op. cit, § 92; *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015), 1 AfCLR 465, § 73.

44 *Jebra Kambole v United Republic of Tanzania* (merits), § 52.

other rights of the people of Sahrawi since the beginning of Morocco's occupation on 6 November 1975, or at least, from 19 September 2016, that is, the date on which the latter officially notified the AU of its intention to join the Organisation.

- 220.** The Court notes that considering the continuing nature of the Respondent States' alleged failure to safeguard the independence and territorial integrity of the SADR and as a result, the alleged violation of the rights and freedoms of its people, it matters little whether the relevant date to compute reasonableness is 6 November 1975 or 19 September 2016. The alleged breach of their obligation under the Charter renews itself every day and hence, an application may be filed at any time as long as the Respondent States do not take actions in the discharge of their obligations.
- 221.** The Court thus holds that the Application is filed within a reasonable period of time and complies with the requirement of Rule 50(2)(f) of the Rules.

vi. Objection based on the contention that the Application raises issues previously settled by the Parties

a. The Respondent States' submissions

- 222.** Burkina Faso, joined by Tunisia, Côte d'Ivoire and Ghana, asserts that the Application fails to fulfil the requirement of Article 56(7) of the Charter, as the case of Western Sahara was the subject of a report presented by the Chairperson of the AU at the Nouakchott Summit in July 2018, which was unanimously adopted by the Assembly. Burkina Faso notes that this report fell within the purview of the implementation of Decision No 653 of the 29th Session of the AU Assembly held in July 2018.
- 223.** Furthermore, Ghana contends that the issue of independence of the Western Sahara Territory has been settled by the ICJ in its Advisory Opinion of Western Sahara on 16 October 1975. According to Ghana, it is based on this resolution that the UN and the AU are working on a referendum for the independence of Western Sahara.

b. Applicant's submissions

224. The Applicant did not make any submissions on this objection.

c. Interveners' submissions

225. With respect to the *non bis in idem* principle, the SADR recalls the Court's jurisprudence where it held that the "the notion of 'settlement'" requires the combination of three main conditions: (i) the identity of the parties; (ii) the identity of the applications or their supplemental or alternative nature or if a case derives from an application filed in an initial case; and (iii) the existence of a first decision on the merits". It further cites the case law of the African Commission that "The mechanisms envisaged under Article 56(7) of the Charter must be capable of granting declaratory or compensatory relief to victims, not mere political resolutions and declarations".⁴⁵

226. Relying on the above, the SADR submits that the instant Application was never brought before another judicial or quasi-judicial body by the Applicant before seizing this Court. Consequently, it argues that it has not yet been settled in accordance with the principles of the UN Charter, the Constitutive Act or the provisions of the Charter. As for the scope of decision Dec. 693 (XXXI), SADR recalls that the African mechanism created by the Assembly is part of AU's contribution to the search for a "political solution". It also aims to "provide effective support to UN led efforts deployed "between the two parties to the conflict, namely, the SADR and the Kingdom of Morocco. As such, it asserts that as a political mechanism, it does not operate at the same level as the Court.

d. Amicus curiae submissions

227. PALU submits that both the Applicant and the Respondents concur that the matter of SADR has not been resolved and that serious and massive violations of human and peoples' rights are taking place there. According to PALU, some of the Respondent States detail measures that they allege to have taken but concede that there has been no resolution of the matter and that the matter continues to occupy the attention of both the UN and AU.

⁴⁵ See, in this regard, by analogy, African Commission, Decisions Nos. 279/03, 296/05, *Sudan Human Rights Organization and Center on Housing Rights and Evictions (COHRE) v Sudan*, adopted at the 45th ordinary session held in Banjul, The Gambia, from 13 to 27 May 2009, § 105.

e. The Court's position

- 228.** In accordance with Rule 50(2)(g) of the Rules, an application filed before the Court shall “not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the UN, the Constitutive Act, the provisions of the Charter or of any legal instrument of the African Union”. The Court notes that the examination of compliance with this provision requires it to ascertain that an application has not been settled “in accordance with the principles” of the UN Charter or the Constitutive Act or the provisions of the Charter.⁴⁶
- 229.** The Court observes that the nature of the settlement envisaged in Rule 50(2)(g) may cover judicial or quasi-judicial, diplomatic or any other solution, as long as the parties in question willingly accept it and it follows some basic principles of due process of law and is potentially capable of offering the reliefs sought thereof by parties.
- 230.** The Court further recalls that a matter is considered as “settled” within the meaning of Rule 50(2)(g) of the Rules only if three cumulative conditions are fulfilled: (i) the identity of the parties is the same; (ii) the issues for determination are identical or substantially similar as ones before the Court; and (iii) there already exists a decision on the substance or merits.⁴⁷ In other words, there must be a final resolution of the matter. When an application is “settled” as such, it has the effect of making the Court’s determination superfluous and unjustified.
- 231.** In the instant case, the Court takes note of the Respondent States’ objections that the matter is already settled by the Advisory Opinion of the ICJ on Western Sahara of 16 October 1975 and the African Union Assembly’s decision during the Nouakchott Summit of July 2018.
- 232.** The Court notes that the substance of the instant Application concerns the responsibility of the Respondent States with respect to the violations of the rights and freedoms of the people of SADR. This is distinct from the issues determined by the ICJ in the said Advisory Opinion and the decision adopted by the Assembly of the African Union in Nouakchott in July 2018. Furthermore, whereas the Advisory Opinion is by nature not binding on anyone, the AU Assembly in its decision did not make a final resolution of the matter but rather provided direction towards the finding of an

46 *Gombert v Côte d’Ivoire* (jurisdiction and admissibility) (2018) 2 AfCLR 270, § 44.

47 *Johnson v Ghana* (jurisdiction and admissibility) (2019) 3 AfCLR 99, § 47.

amicable political solution to the conflict between the SADR and Morocco.⁴⁸

- 233.** The Court also points out that in both the ICJ's Advisory proceedings and the AU Assembly meetings of Nouakchott, the instant Parties, particularly the Applicant, were not involved in the process nor were the reliefs sought in the instant Application addressed. In view of this, the matter cannot be considered to have been 'settled' to render the instant proceedings unnecessary.
- 234.** Accordingly, the Court finds that the Application is compatible with the admissibility condition specified under Rule 50(2)(g) of the Rules.

vii. Other conditions of admissibility

a. Respondent States' submissions

- 235.** None of the Respondent States allege that the Application contains disparaging or insulting language.

b. Applicant's submissions

- 236.** The Applicant did not make submissions concerning the compatibility of his application with the requirement that it should not contain disparaging or insulting language.

c. Interveners' submissions

- 237.** The SADR nevertheless submits that the Application does not contain terms that are outrageous or insulting towards the States concerned, their institutions or the African Union. Moreover, as regards the nature of the evidence, the Applicant relies on official UN documents.

d. *Amicus curiae* submissions

- 238.** PALU contends that it has not identified any disparaging language in the Application nor does any of the submissions of the Respondent States allege any disparaging or insulting language.

48 See paragraph 95 above.

e. The Court's position

- 239.** The Court notes that pursuant to Rule 50(2)(c) of the Rules, applications filed before it shall not have any disparaging or insulting language. The Court recalls that an application is said to be disparaging or insulting if it contains remarks or a particular language “calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence...”⁴⁹
- 240.** In the instant case, the Court observes that the Application does not contain any language or remarks that could be considered as offensive or insulting. Thus, the Court finds that the Application is consistent with the requirements of Rule 50(2)(c) of the Rules.
- 241.** In view of the foregoing, the Court finds that the Application meets all the admissibility conditions specified under Rule 50(2) of the Rules. The Court therefore declares that the Application is admissible.

VIII. Merits

- 242.** The Court will now decide on the merits of the case after first having set out the various submissions and observations of the parties.

A. Applicant's submissions

- 243.** The Applicant asserts that when Morocco applied for admission to the AU, it was not required to end its “colonization and occupation” of Western Sahara. According to the Applicant, this is despite the Respondent States’ individual and collective obligation to defend the sovereignty, territorial integrity and independence of Western Sahara under Articles 3 and 4 of the Constitutive Act.
- 244.** The Applicant alleges that the Respondent States’ failure to discharge their obligation and prevent Morocco from continuing to occupy the territory of the SADR has resulted in the violation of the right to self-determination, right to freedom from discrimination, the right to a fair trial; the right to participation in political activities; the right to equality of all peoples, right to peace, the right to satisfactory environment and the right to dispose of wealth and natural resources, and the right to economic, social and cultural development of the people of Western Sahara contrary to Articles

49 *APDH v Côte d'Ivoire* (2016) 1 AfCLR 668, § 81.

1, 2, 7, 13, 19, 20, 21, 22, 23 and 24 of the Charter, and common Article 1 of both the ICCPR and ICESCR. The Applicant further alleges that the Respondent States have also violated Articles 1 and 2 of the African Charter on Democracy, Elections and Good Governance of the African Union.

- 245.** By way of illustration, the Applicant alleges that the Respondent States were aware that the Sahrawi people are entitled to the right to self-determination and the right to freely determine their political status and pursue their economic, social and cultural development. Regardless, he asserts that the Respondent States supported the admission of Morocco as a Member State of the AU despite its illegal occupation of Western Sahara deliberately ignoring the over hundred (100) resolutions of the UN and the AU itself on the planned referendum to determine the desire of the Sahrawi people.
- 246.** According to the Applicant, this conduct by the Respondent States contravenes the principles of the Constitutive Act of the AU, the Charter, ICCPR and ICESCR as well as the many resolutions that they should have considered before allowing an occupying power to join the AU for which the Respondent States should be held individually and/or collectively liable.
- 247.** The Applicant avers that there are several provisions in the Charter that impose a legal obligation on himself and the Respondent States to be their “brother’s keeper”. In this regard, he indicates that Article 20 of the Charter provides for the right to self-determination and is opposed to colonisation. The same provision goes further to impose a legal duty on the Respondent States to give assistance to the colonised people of Western Sahara in their liberation struggle against foreign domination by Morocco.
- 248.** The Applicant also cites Article 21(1), (4) and (5) of the Charter, which provide that all peoples shall freely dispose of their wealth and natural resources and their right shall be exercised in the exclusive interest of the people. According to the Applicant, a legal obligation is imposed on the Respondent States individually and collectively to protect the right of the Sahrawi people to exercise the right to freely dispose of their wealth and natural resources with a view to strengthening African unity and solidarity.
- 249.** The Applicant reiterates that the Respondent States are individually and/or collectively under a duty to defend the sovereignty, territorial integrity and independence of Western Sahara in accordance with Articles 3 and 4 of the Constitutive Act of the African Union; Article 1, 13 and 20 of the Charter and Articles 1 and 2 of the ICCPR and ICESCR. According to the Applicant, the Respondent States

breached their abovementioned obligations by admitting Morocco to the AU and doing nothing to prevent Morocco's continued occupation of the territory of the Sahrawi people.

- 250.** The Applicant substantiates his allegations by citing the ICJ Advisory Opinion,⁵⁰ the UN General Assembly Resolution 1514 (XV),⁵¹ resolution 3292(XXIX) on Western Sahara⁵² and resolution 34/37 of 1979, UN Security Council Resolution on the mandate of the UN Mission for Referendum in Western Sahara,⁵³ AU General Assembly Decision AU/Dec. 583 (XXV) of 2015, as well as the African Commission's Resolution on the human rights situation in the Sahrawi Arab Democratic Republic, ACHPR/Res. 340 (LVIII) of 20 April 2016.

B. Respondent States' submissions

- 251.** Burkina Faso, Mali, Tunisia, Tanzania and Côte d'Ivoire argue that they do not have responsibility for a decision made by the AU or have powers to interfere in matters between sovereign States and that the violations that were alleged to have occurred are outside their own jurisdiction. In this regard, Burkina Faso and the Republic of Mali specifically assert that pursuant to Articles 3 and 4 of the Constitutive Act, they have the duty to respect the sovereignty of other Member States and to refrain from intervening in their internal affairs.

i. Burkina Faso's submissions

- 252.** Burkina Faso asserts that the Applicant himself admits that SADR is a sovereign country recognised by the AU since 1984. Rather, it is the issue of international recognition which has been posed as the UN refers it as a non-self-governing territory. Together with the international community, Burkina Faso avers that the Respondent States are working towards holding a referendum to settle the dispute between SADR and Morocco. However, it contends that the referendum has not happened because of differences between the parties on the composition of the electoral body and

50 ICJ Advisory Opinion on Western Sahara (1975).

51 Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960.

52 UN General Assembly, *Question of Spanish Sahara*, 10 December 1975, A/RES/3458.

53 UNSC resolutions 377 (1975) of 22 October 1975, 379 (1975) of 2 November 1975 and 380 (1975) of 6 November 1975 on the situation concerning Western Sahara.

this cannot be imputed to the Respondent States.

253. Burkina Faso also submits that the Constitutive Act, the Charter, the ICCPR and the ICESCR all require States to acknowledge the rights of their citizens as well as foreigners residing in their territory. To that end, Article 4 of its Constitution recognises that all Burkinabè and every individual residing in Burkina Faso have equal rights of protection. It submits that the Applicant however failed to show any violation of the rights of the Sahrawi citizen in Burkina Faso territory.
254. Regarding the decision of the AU Assembly to admit Morocco to the AU, Burkina Faso, also joined by Mali, recalls that the African Union never excluded Morocco in which case its return would have been subject to a prior meeting to discuss the conditions that led to the exclusion. It avers that Morocco voluntarily withdrew from the institution in 1984 but in 2016, made known its intention to return and its admission was accepted by an overwhelming majority.
255. According to Burkina Faso, in matters of responsibility, be it civil, or contractual, it is necessary to justify the combination of three issues: namely, guilt, prejudice and causal link between the two. With regard to guilt specifically, it avers that the Court should examine alleged human rights violations *in concreto* and not in *abstracto* and the Applicant being unable to impute any accusation to any of the Respondent States in the instant case, the Court should find that it was not seized of any alleged violation of human rights.

ii. Republic of Mali's Submission

256. According to Mali, as a member to the AU and the United Nations, it has always abided by the Resolutions and Decisions of these organisations, which have always called for the peaceful settlement of the Sahrawi conflict. In addition, Mali asserts that the defence of the sovereignty, territorial integrity and independence of Member States, enshrined in the Constitutive Act, is the function of the Union and that only a decision from the AU Assembly, if necessary, at the request of the oppressed country, or the President of the AU could initiate such procedure. As such, Mali submits that it cannot take measures aimed at preventing Morocco from occupying the territory of Western Sahara. It further points out that the AU in its July 2018 Summit in Nouakchott, mandated a troika of Heads of State and the Chair of the AUC to attempt to resolve the conflict under the supervision of Assembly.

- 257.** Mali also contends that the exercise of the right to self-determination as protected in Articles 1 and 2 of ICCPR and ICESCR is linked to the existence of a specific State, whose sovereignty is often envisaged as a manifestation of the totality of this right. However, it asserts that Western Sahara, being a non-autonomous territory, the Covenants encourage the State which has the responsibility to administer it, that is, Morocco, not Mali, to facilitate the right of the people to govern themselves. Mali stresses that it behoves the people concerned, namely, those of Morocco and Western Sahara to fight for the respect for their right to self-determination by all available legal means and only Morocco can facilitate this.
- 258.** In this regard, Mali further avers that the UN Charter has a partially supra national or supra state character and accordingly, it should be the reference framework for the legality and legitimacy of international intervention. Noting that negotiations to resolve the conflict are at the moment taking place under the auspices of the UN, Mali submits that it is in favour of this approach.
- 259.** Finally, Mali emphasises that it has neither taken any steps nor adopted any measures to restrict the rights and freedoms of the Sahrawis nor has it impeded any procedure aimed at the self-determination of Western Sahara.

iii. The United Republic of Tanzania's submissions

- 260.** On its part, Tanzania reiterates its position that “the re-admission of Morocco back to the AU was not done by the Respondent State, rather by the AU Assembly.” It argues that there is lack of a causal link between the obligations of the Respondent States, their membership to the AU or participation in the decision of the Assembly to admit Morocco to the AU and the acts allegedly committed by Morocco towards SADR and its people's rights and freedoms guaranteed in the Charter. Given that the “admission of Morocco back to the AU” was a result of a decision made by the AU's Assembly, not by the Respondent States, Tanzania contends that the Applicant has wrongly instituted an Application against eight (8) Respondent States, who obviously cannot be the AU Assembly.
- 261.** Tanzania further elaborates that the decision of admission was taken pursuant to Article 29 of the Constitutive Act, which allows any African State to notify the AU of its intention to be admitted as a member of the Union. Accordingly, Morocco, on 19 September 2016, notified its intention to join the Union and this was forwarded by the AUC to all 54 Member States for their consideration and decision at the Assembly. Tanzania notes that Article 9 of the Act

provides for the functions of the Assembly, including considering “requests for Membership of the Union”.

262. Citing the Court’s jurisprudence in *Femi Falana v the African Union*, Tanzania asserts that the AU has its own legal personality, possesses international rights and duties and carries out functions independently of its Member States. In this regard, it emphasises that once a decision is taken by the AU Assembly, it is binding on all Member States including those which voted against it. Consequently, it submits that any person who is aggrieved by such a decision cannot proceed to claim redress against certain Member States, which could not even make “a simple majority”.
263. Furthermore, Tanzania notes that the majority of the AU Assembly (39 Member States) decided to admit Morocco after the latter fulfilled all the requirements for membership specified in Articles 27(3) and 29 of the Protocol. According to Tanzania, a majority of the Member States was also of the view that the return of Morocco to the AU gives room for a peaceful resolution of the conflict between Morocco and Western Sahara from within as both are members of the AU.
264. In conclusion, Tanzania submits that there is lack of causal link between the obligations of the Respondent States and the acts allegedly committed by Morocco towards Western Sahara’s sovereignty and its peoples’ rights and freedoms. According to Tanzania, the mere fact that the Respondent States are Member States of the AU and that they participated in the decision to admit Morocco back to the Union does not suffice to establish violation of the alleged rights and freedoms as set out in the Constitutive Act, the Charter, the ICCPR, ACDEG and the ICESCR.

iv. Republic of Côte d’Ivoire’s submissions

265. Côte d’Ivoire submits that it has no obligation towards the SADR and the Applicant’s complaints reveal no concrete fact constituting the breach of any obligation incumbent upon the State of Côte d’Ivoire. In addition, Côte d’Ivoire submits that its decision to vote in favour of the admission of Morocco to the AU does not entail any responsibility. It emphasises that voting is a right and means of practising democracy and facilitating decision-making in cases where it is difficult or even impossible to reach a consensus and it is in accordance with this democratic principle that the decision on admission was decided.
266. In addition, Côte d’Ivoire questions how the mere fact of Morocco’s admission to the AU violates the rights of the Sahrawi people. According to Côte d’Ivoire, both Morocco and SADR claim the

disputed territory in Western Sahara as their own and it would be showing bias to call it “SADR territory”. In any event, it submits that by voting for admission, the Respondent States cannot be held accountable for alleged violations of the human rights of Sahrawi people. In this respect, Côte d'Ivoire reiterates that voting was not a commission of human rights violation, rather an act of a political nature done in compliance with the principle of state sovereignty and non-interference in the internal affairs of other States.

v. Republic of Ghana's submissions

- 267.** The Republic of Ghana avers that the issue of self-determination is a political question and should be resolved politically. It asserts that, as it is treated as a political right in the ICCPR and the ICESCR, the right to self-determination is of “a transient nature than a legal obligation” the application of which is confined to a colonial context. In this regard, it recalls that many of the Western Powers opposed the inclusion of an article on self-determination in ICCPR and ICESCR on the ground that it was a political problem which ought to be tackled by political machinery rather than by a judicial body.
- 268.** Ghana further notes that contrary to the Applicant's assertion that the Respondent States have failed to protect the sovereignty and territorial integrity of SADR, the AU has made several concrete efforts to bring closure to the issue of the sovereignty of SADR and Morocco's occupation of its territory through AU's collaboration with the UN.
- 269.** In this connection, Ghana refers to the AU Assembly's decision during its 31st Ordinary Session held in Nouakchott and the Communiqué of the 496th Peace and Security Council Meeting of 27 March 2015 where it emphasised its determination to resolve the conflict. In those decisions, Ghana stresses that the AU charged the UN with the mandate to find resolution to the issue in line with international law and appealed for enhanced and coordinated international action towards the early organisation of a referendum. In addition, the Chairperson of the AUC and the Personal Envoy of the UN Secretary General for Western Sahara in a meeting held on 28 September 2018, expressed their support and the commitment of the AU to the UN led process in arriving at a just, lasting and mutually acceptable political solution to the conflict.
- 270.** Furthermore, it is the view of Ghana that the admission of Morocco to the AU was done with a view to achieving greater unity and solidarity between African countries and the people of Africa in

accordance with the Constitutive Act. Ghana avers that in fact, Morocco is bound by the provisions of the Constitutive Act and thus, its admission to the AU is a step towards ensuring such compliance.

- 271.** In conclusion, Ghana submits that given the political nature of the right to self-determination, it is not under a legal obligation to defend the sovereignty, territorial integrity and independence of the Western Sahara. It is rather committed to promote progressively the fight for the right to self-determination which the AU itself is also positively doing in a progressive manner through concrete actions to achieve the same.

vi. Republic of Tunisia's submissions

- 272.** Tunisia submits that international relations operate on the basis of the principle of sovereignty by virtue of which each State has the supreme authority over its territory, its institutions and its political, legal, economic and social options and in managing its foreign relations. In support of its submission, Tunisia cites Article II (7) of the UN Charter which states that "Nothing contained in the Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require Members to submit such matters for settlement under the present Charter..."

- 273.** It argues that the essence of non-intervention is the prohibition of interference in what is considered to be the business of the State's internal authority and it is the foreign policy that it adopts in international relations as a sign of its independence and sovereignty. Nevertheless, according to Tunisia, in the instant case, the Applicant is asking the Court to compel the Respondent States to submit a request forcing the AU to suspend, place on probation or terminate the membership of Morocco in the organisation, contrary to this principle and against the independence and sovereignty of States.

C. Interveners' submissions

i. Sahrawi Arab Democratic Republic's submissions

- 274.** The SADR asserts that the Respondent States have failed in their obligations towards the Sahrawi people at the time of admission of Morocco into the AU. In this regard, relying on the jurisprudence

of the ICJ and the Court of Justice of the European Union,⁵⁴ it submits that the right to self-determination is a fundamental human right and a peremptory norm of international law which imposes an obligation *erga omnes* on all States to ensure its respect.⁵⁵

275. In view of the said fundamental nature, the SADR submits that the rights to self-determination and independence entails two types of legal consequences for third States: to refrain from recognizing and rendering aid or assistance in the maintenance of a situation arising from a serious violation of this right and to allow its effective realization including by adopting positive acts, material and legal.
276. According to the SADR, this obligation is also reflected in Article 20(3) as read together with the preamble of the Charter which enshrines a real “obligation of solidarity” towards peoples struggling for the actualization of their right to self-determination and independence. In the same vein, it submits that Article 23 of the Charter expressly stipulates that “the principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern the relations between States”.
277. The SADR asserts that the right to self-determination imposes an obligation on States not to give recognition and assistance in the event of its violation. As part of their *erga omnes* obligation, it alleges that “States shall not recognize as lawful, a situation created by a serious breach of international law, nor render aid or assistance in maintaining that situation”.
278. Furthermore, the SADR contends that customary international law requires that reservations that are incompatible with the objectives and purposes of a treaty cannot be made and this is codified in Article 19 of VCLT. In this regard, SADR stresses that

54 ICJ Judgment of 30 June 1995, *East Timor (Portugal v Australia)*, ICJ Reports 1995, p. 102, s. 29, ICJ, Advisory Opinion on the legal effects of the separation of the Chagos archipelago from Mauritius in 1965, General roll No 169, 25 February 2019, p. 139, § 144 (hereinafter, “ICJ, Advisory Opinion on Chagos Archipelago” (2019)).

55 Arbitration Commission of the Conference for the Peace in Yugoslavia, Opinion No 1, 29 November 1991, RGDIP 1992, p. 265 and Opinion No 9, 4 July 1992; *Guinea Bissau v Senegal*, Sentence of 31 July 1989, RIAA, vol XX, pp. 119-213, §§ 37-50. See, also, the comments of the International Law Commission relative to the Vienna Convention on the Law of Treaties (Doc. No A/CN.4/SER.A/1966/Add. 1, p.270, § 3), to the draft articles on responsibility under international law (Doc. No A/56/10, pp. 305-306), to the draft articles on international organizations (Ann. CDI, 2011, vol. II (2), pp. 57-58), and the individual opinion of Judge Ammoun, in the opinion of the ICJ of 21 June 1971, Legal Consequences for the States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding resolution 276 (1970), ICJ Reports 1971, p. 90, §. 12.

Article 3 and 4 of the Constitutive Act are fundamental provisions in that they define the objectives and principles of the Union and as such, cannot be the subject of any derogation. It is thus the submission of SADR that a State wishing to join the AU must fully comply with the letter and spirit of these provisions.

- 279.** In the instant Application, SADR submits that the Respondent States have failed in their obligations towards the Sahrawi people since, before and at the time of admission of Morocco, they took no measures, nor made even the slightest declaration, to accompany this admission, in compliance with international and African legality. It contends that the Respondent States could have, for example, individually and/or collectively, supported the development of a differentiation policy likely to guarantee the consent of the Sahrawi people, with regard to their national territory and their resources, and to respect the separate and distinct status of Western Sahara, in their bilateral and intra-community relations with Morocco in the AU.

ii. Submissions by the Republic of Mauritius

- 280.** On its part, the Republic of Mauritius citing ICJ's Advisory Opinion on *the Legal Consequences of the Separation of the Chagos. Archipelago from Mauritius*, underscores that the respect for the right to self-determination is an obligation *erga omnes* which all States have legal interests in protecting it. Again, relying on the Advisory Opinion of the same Court on Western Sahara,⁵⁶ it submits that the UN Declaration on the Granting of Independence to Colonial Countries and Peoples Resolution 1514 (XV) (1960) should be applicable to the SADR.
- 281.** Mauritius further contends that the complete decolonisation of the African continent cannot be achieved without the elimination of the remnants of colonialism still existing in a few territories on the continent. In this regard, it submits that Mauritius supports the right of the Sahrawi people to self-determination including their right to dispose of their natural resources; recognizes SADR as a sovereign and independent State; pledges its continued solidarity with the Sahrawi people in their struggle for self-determination; and backs the implementation of all UN resolutions and AU decisions pertaining to SADR.

⁵⁶ *Western Sahara*, Advisory Opinion, ICJ GL No 61, [1975] ICJ Rep 12, ICGJ 214 (ICJ 1975), 16 October 1975.

iii. *Amicus curiae's* submissions

- 282.** PALU avers that the right to self-determination imposes an obligation *erga omnes* on the Respondent States and in determining the scope of such obligation, the Court should look at the various resolutions of the AU and its predecessor, the OAU.

D. The Court's position

- 283.** The Court notes that at the core of the instant Application lies the Applicant's allegation that the admission of Morocco to the AU was not opposed by Respondent States in spite of their individual and collective obligation to defend the sovereignty of Western Sahara. According to him, this resulted in a violation of the rights and freedoms of the Sahrawi people contrary to the principles of the Constitutive Act, and the provisions of the Charter, the ICCPR, the ICESCR as well as the numerous resolutions which they should have taken into account before allowing the admission of an occupying power.
- 284.** The Court further notes that the Applicant alleges violations of several rights of the Sahrawi people, including the right to non-discrimination, the right to a fair trial, the right to participation in political activities of one's own country; the right to equality of all peoples, the right to self-determination; the right to dispose of natural resources, the right to development, the right to peace and the right to satisfactory environment.
- 285.** Considering the facts of the case and the submissions of the Parties, the Court is of the view that the present Application is essentially and firmly linked to the right to self-determination, particularly, the right of the Sahrawi people to obtain assistance in their struggle for freedom from foreign occupation.
- 286.** Although the other rights are autonomous by their nature, their violation in the instant case basically flows from the alleged denial of the right to self-determination of the people of Western Sahara. It is the occupation of the SADR and the deprivation of its people of their right to self-determination that have occasioned and facilitated the alleged violations of their other rights, including their right to development, right to disposal of their natural resources, their right to peace and to non-discrimination. In these particular circumstances, the Court therefore deems it unnecessary to deal with them and thus, limits its determination to the alleged violation of the right to self-determination of the people of the SADR and the putative responsibility of the Respondent States with regard to such violation.

- 287.** At the outset, the Court observes that the eight Respondent States are in no way alleged to have collectively or individually engaged in undertakings to conquer or annex the territory of the SADR. However, the Applicant asserts that in conducting their international affairs, particularly, while voting to admit Morocco to the AU, the Respondent States did not take into account their obligation to support and protect the Sahrawi people against violations resulting from Morocco's occupation.
- 288.** Accordingly, in the application of Article 20 of the Charter, which relates to the right to self-determination, the conduct of these eight States with regard to the SADR should be distinguished from that of Morocco, which is alleged to have directly violated the rights of the Sahrawi people through occupation. However, the alleged Morocco's conduct is not subject to the Court's determination as Morocco is not a party in this case. It is therefore the view of this Court that the conduct of the Respondent States should be determined in the light of their obligation arising from Article 20(3) of the Charter, which declares that:
- All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.
- 289.** The Court also finds pertinent that such determination of the Respondent States' responsibility under the above provision should consider the nature of the right of self-determination in general, and its unique place and relevance in the African continent and to the African society, in particular.
- 290.** In this regard, the Court observes that the notion of self-determination has strong resonance with Africa and carries a special and deep meaning to its people. Colonisation, Apartheid, military occupation and various forms of foreign oppressions that the continent experienced has defined the African identity and history as inherently and inextricably intertwined with the struggle for self-determination. It is for this reason that when the OAU was established in 1963, the Assembly, having been "convinced that it is the inalienable right of all people to control their own destiny", expressed their determination "to safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity of our states, and to fight against neo-colonialism in all its forms".⁵⁷
- 291.** The Charter establishing the OAU also stipulated that the eradication of all forms of colonialism from Africa was one of the

57 The OAU Charter (1963), *Preamble* paragraphs 2 and 7.

principal purposes of the organization. In the subsequent years, the OAU took steps to ensure the total decolonisation of the continent and repeatedly reaffirmed the importance of guaranteeing the “inalienable right to self-determination” to oppressed people in Africa and elsewhere.⁵⁸ Outside the OAU framework, African States have also consistently exhibited unwavering commitment to the right to self-determination by supporting or sponsoring resolutions adopted in the United Nations and other regional and international fora.⁵⁹

292. Despite the fact that the Constitutive Act of the AU, did not explicitly mention the right to self-determination, the defence of “the sovereignty, territorial integrity and independence of its Member States” is specified as one of the objectives of the Union. The Constitutive Act also makes the promotion and protection of “human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights, and other relevant human rights instruments” its additional objective.⁶⁰

293. The Charter guarantees the right to self-determination under its Article 20 as follows:

All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

294. The Court notes that as clearly spelt out in its preamble, State Parties agreed to adopt the Charter being “conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, Apartheid, Zionism and to dismantle aggressive foreign military bases and all

58 See Resolution on the Namibian Question, Imposition of the Unilateral Sanctions Against South Africa, Council of Ministers CM/Res.855 (XXXVII) (1981); Resolution on the Palestinian Question, CM/Res.858 (XXXVII) (1981), Abuja Declaration on South Africa, adopted by the Assembly of Heads of State and Government of the Organization of African Unity at its twenty-seventh ordinary session held at Abuja, Nigeria, from 3 to 5 June 1991.

59 See resolution 1514 (XV), 14 December 1960, UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625(XXV), General Assembly Resolution GA 47/82, Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights (16 December 1992).

60 Article 3(b) and (h) Constitutive Act of the African Union.

forms of discrimination, language, religion or political opinions”.⁶¹

- 295.** In comparison with the corresponding provisions of the ICCPR and ICESCR,⁶² Article 20 of the Charter offers broader and stronger protection to the right to self-determination, again reflecting the importance African States attach to self-determination. Unlike the ICCPR and ICESCR, the Charter weaves the right to self-determination into the *right to existence of peoples*, something that denotes a wholesale entitlement or right to survival as people. The Charter further explicitly embodies the right of colonized or oppressed peoples to free themselves from the bonds of domination and the right to the get assistance of the State Parties in their struggle for freedom.
- 296.** The Court will now consider the nature of the obligation of States in international law, arising from the right to self-determination and determine the status of the people of Sahrawi and the Respondent States’ purported responsibility with respect to the alleged human rights violations committed against these people.

i. Nature of the obligation arising from the right to self-determination

- 297.** The Court notes that the right to self-determination imposes both positive and negative obligations on State Parties.⁶³ Positive obligations comprise the duty to protect, promote, and fulfil conditions for the realization of the right. States are required to take actions individually and jointly to facilitate the realization of the right to self-determination, including by offering assistance to people struggling for independence and freedom from domination. On the other hand, negative obligations involve the

61 Preambular paragraph 9 of the Charter.

62 Article 1 common to both ICCPR and ICCR declares that:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

63 UN Human Rights Committee (HRC), *General comment No 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev1/Add.13, § 6.

duty to respect the right, that is, abstaining from engaging in acts or taking measures that adversely affect people from fully enjoying their right to self-determination.

298. The Court also observes that in international law, the right to self-determination has achieved the status of *jus cogens* or a peremptory norm; thereby, generating the corollary obligation *erga omnes on all States*. As such, no derogation is permitted from the right and “all States have a legal interest in protecting that right”.⁶⁴ Where a peremptory norm is breached, States are also under an obligation not to recognize the illegal situation resulting from such breach and not to render aid or assistance in maintaining the situation.⁶⁵

299. Furthermore, the Court recalls that the obligations resulting from the right to self-determination are owed by States not only towards those who are under their jurisdiction but also to all other peoples who are not able to exercise or have been deprived of their right to self-determination.⁶⁶ In line with this, Article 20 of the Charter confers the right to get assistance on “all peoples” without geographical or temporal limitations.

ii. The status of the People of SADR and their right to self-determination

300. The Court notes that according to the Applicant, the people of the SADR have been deprived of their right to self-determination as a result of the continued occupation of part of its territory by Morocco.

301. The Court observes that the right to self-determination is essentially related to peoples’ right to ownership over a particular territory and their political status over that territory. It is inconceivable to materialise the free enjoyment of the right to self-determination in the absence of any territory that peoples could call their homeland. In this regard, the Court notes that both the UN and the AU recognise the situation of SADR as one of occupation and consider its territory as one of those territories

64 ICJ, Advisory Opinion on Chagos Archipelago” (2019), § 180; see also Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, ICJ Reports 1970, § 33; *East Timor (Portugal v Australia)* case, ICJ Reports 1995, p. 102, § 29.

65 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion of 9 July 2004, § 163.

66 See *CCPR General Comment No 12*, paragraph 150 above.

whose decolonisation process is not yet fully complete.⁶⁷ As a result, both organisations have consistently called for Morocco and SADR to engage in direct negotiations in good faith with a view to conducting a referendum to ensure the right to self-determination of the people of Western Saharawi.⁶⁸

302. The Court recalls that although Morocco has always laid claim on the territory it occupies, its assertion has never been accepted by the international community. In fact, in its 1975 Advisory Opinion, the ICJ found no evidence to establish any historical tie of territorial sovereignty between the territory of Western Sahara and Morocco and concluded that “Morocco had no legal ties of such a nature with Western Sahara to affect the application of the UN General Assembly resolution 1514 (XV) (1960)⁶⁹ in the decolonization of Western Sahara and, in particular, the respect for the principle of self-determination through the free and genuine expression of the will of the people of the Territory”.⁷⁰ Accordingly, as far as the SADR’s sovereignty over the occupied territory is concerned, it is a settled fact that the Court should take judicial notice of in its assessment of the instant Application.

303. The Court stresses that the continued occupation of the SADR by Morocco is incompatible with the right to self-determination of the people of SADR as enshrined in Article 20 of the Charter. The question here is whether the Respondent States should be held responsible for such violation. The Parties disagree on this point.

iii. Determination of the Responsibility of the Respondent States

304. The Court recalls that in international law, a State incurs international responsibility where three cumulative conditions are proven to have existed: *an act or omission violating international law*, that is, *an internationally wrongful act*; *the act must be*

67 See UN General Assembly Resolution 2983 (XXVII) on the Question of Spanish Sahara adopted on 14 December 1972; UNGA resolution 61/123 adopted on 14 December 2006 on Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories; UNSC Resolution 1979 (2011) adopted on 27 April 2011; ICJ Advisory Opinion on Western Sahara of 16 October 1975; 50th Anniversary Solemn Declaration of the OAU/AU (Assembly/AU/Decl.3.(XXI), adopted by the twenty first AU Summit held from 26-27 May 2013 in Addis Ababa, Ethiopia).

68 See UN Security Council 2218 (2015).

69 Declaration on the Granting of Independence to Colonial Countries and Peoples General Assembly resolution 1514 (XV) adopted on 14 December 1960.

70 ICJ Advisory Opinion on Western Sahara (1975), § 162.

*attributed to a State (attribution); and the act must cause a damage or loss (causal link).*⁷¹ In addition, there should not be *circumstances precluding responsibility*.⁷² These conditions are spelt out in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts and have been generally considered as reflecting customary international law.

305. The Court also reiterates that the right to self-determination under Article 20 of the Charter imposes an international obligation on all State Parties to take positive measures to ensure the realisation of the right, including by giving assistance to oppressed peoples in their struggle for freedom and refraining from engaging in actions that are incompatible with the nature or full enjoyment of the right.
306. The Court will now consider whether the Respondent States in the instant case should be held responsible for failing to end the occupation of Western Sahara, or to make the admission of the Morocco to the AU conditional on respect for the territorial integrity, independence and sovereignty of the SADR, as well as the right to self-determination of the Sahrawi people.
307. The Court notes that, in view of the fact that part of the SADR's territory is still under occupation by Morocco, there is no question that State Parties to the Charter have an obligation, individually and collectively, towards the people of SADR to protect their right to self-determination, particularly, by providing assistance in their struggle for freedom and by not recognising Morocco's occupation and any human rights violation that might have resulted from such occupation.
308. The issue for determination is whether the Respondent States, contrary to the said obligation, have shirked their responsibility in the Charter by either failing to give assistance to the people of SADR or by recognising the illegal occupation by Morocco of the SADR's territory contrary to the peoples' right to self-determination, that is, whether they have engaged in conduct that would amount as internationally wrongful act.
309. The Court recalls the Applicant's allegation on this point that, by deciding to vote in favour of the admission of Morocco to the AU without putting any preconditions requiring the latter to respect the right to self-determination of the people of SADR, the Respondent States have failed in their obligation to assist the Sahrawi people, and consequently, gave legitimacy to Morocco's occupation.

71 Articles 1-3, ILC Draft Articles on State Responsibility (2001).

72 See Chapter V, *Ibid*.

The Court further recalls the submission of the SADR that the process of admission of Morocco showed the Respondent States' behaviour towards the suffering of its people and their reluctance to do their part to end the suffering.

- 310.** The Court observes that, although both the Applicant and the SADR assert that the fact of admission in and of itself is not the basis of their Application, the conduct of the Respondent States that they are complaining about is basically related to the said admission.
- 311.** The Court accordingly notes that in order to establish the internationally wrongful act of the Respondent States, it is imperative to examine the overall context of the decision of Morocco's admission as a member to the AU and the role of the Respondent States in the process. The Court shall, particularly, ascertain whether the Respondent States have complied with their obligation under the Charter. Furthermore, the Court should establish whether there is any wrongful act that could be imputed to the Respondent States and whether there is a casual link between such wrongful act and the violation of the right to self-determination of the people of the SADR.
- 312.** The Court recollects that Morocco withdrew from the OAU in 1984 protesting the seating of a delegation of the Polisario Front, representing the SADR, an independent State, which was admitted into the organisation in 1982. It is to be noted that Morocco's departure was its own decision and not as a result of the decision of the organisation, for instance, in the form of sanction for violating the territorial integrity of the SADR or the right to self-determination of the people of Western Sahara. Thirty-two (32) years later, on 22 September 2016, Morocco officially made its request to join the African Union, the successor to the OAU and on 31 January 2017, the AU Assembly admitted Morocco as Member to the AU. None of the Respondent States dispute that they voted in favour of the admission.
- 313.** It is evident from the preceding that the Respondent States were aware of Morocco's request to join the AU as early as September 2016. It is also true that, from that moment on, the Respondent States in their individual capacity could have taken certain steps such as attempts to galvanise support from other State Parties to the Charter to object to Morocco's admission or make its admission conditional on its respect for the right to self-determination of the people of Western Sahara.
- 314.** However, it is the considered view of this Court that, there is no evidence before it showing that the Respondent States did or failed to take certain steps to object to Morocco's admission

or make the admission conditional on respect for the rights of the Sahrawi people. In any event, even if evidence existed that the Respondent States' failed to do so, this would not in itself amount to a violation of their international obligation arising from the Charter. Firstly, Article 20 of the Charter imposes on the Respondent States the duty to assist the people of the SADR in their struggle to realize the full enjoyment of their right to self-determination but it does not require States to take a list of specific actions or measures of a particular nature. Therefore, it is up to the Respondent States to choose the kind of positive measures that they consider appropriate for the realisation of the right for the said people.

315. In this vein, the Court takes note of the Respondent States' submissions that they are supporting diplomatic efforts under the aegis of the AU and the UN to find political solutions. Although one may still question the adequacy of their measures, the Respondent States cannot therefore be considered to have failed to discharge their obligation to assist the people of the SADR or take positive steps required in the Charter to ensure the full realisation of the right to self-determination of the Sahrawi people.
316. Secondly, as some of the Respondent States have rightly pointed out, the process of admission of a State to the AU is not the exclusive role of one or more of the Respondent States. Certainly, individual Member States of the AU can in the exercise of their right of membership, vote in favour or against the admission. However, such act of voting by a Member State cannot in itself *a priori* constitute a breach of its international obligation or in the instant Application, a violation of the right to self-determination of Sahrawi people. Furthermore, in the present case, the Court has no cogent evidence on record showing how the Respondent States voted.
317. Thirdly, the decision to admit a State as a member to the AU, including the inspection of whether the candidate State complies with the objectives and principles of the Constitutive Act, which includes the protection and promotion of human rights in accordance with the Charter or whether its admission should be attached to certain conditions is the decision of the Assembly, not the individual Member States. In this regard, the Court considers appropriate to refer to Article 29 of the Constitutive Act, which declares that:
 1. Any African State may, at any time after the entry into force of this Act, notify the Chairman of the Commission of its intention to accede to this Act and to be admitted as a member of the Union.
 2. The Chairman of the Commission shall, upon receipt of such

notification, transmit copies thereof to all Member States. Admission shall be decided *by a simple majority of the Member States*. The *decision of each Member State* shall be transmitted to the Chairman of the Commission who shall, upon receipt of the required number of votes, communicate the decision to the State concerned. [Emphasis provided]

- 318.** As it can be discerned from this provision, the admission of a State as a member to the Union depends both on the decision of each Member State as well as the collective decision of the Member States constituting a simple majority within the Assembly. Accordingly, the Respondent States' individual decision to support or oppose the admission of Morocco does not alone necessarily determine the final outcome. Nor could the Respondent States, individually or collectively, determine the admission of a candidate State or subject it to conditions requiring it to respect the right to self-determination of the people of the SADR. The Court stresses that their inability to do so cannot constitute a breach of their international obligation in the Charter or violation of the right to self-determination of the people of the SADR.
- 319.** Furthermore, the Court reiterates its earlier position that ultimately, the admission of Morocco is essentially the decision of the Assembly, which has a distinct legal personality, and not of its individual Member States.⁷³ Consequently, the decision of admission cannot as such be imputed to the Respondent States so as to engage their international responsibility.
- 320.** The Court wishes to point out that the admission of Morocco might be challenged as incompatible with the Constitutive Act, the determination of which is outside the competence of this Court.⁷⁴ However, the Respondent States' individual decision to vote in favour of Morocco's admission to the Union *per se* cannot be taken as a recognition of Morocco's occupation of the territory of the SADR or giving legitimacy to the resulting violations of the right to self-determination of the people thereof.
- 321.** With regard to the alleged human rights violations directly ensuing from Morocco's occupation of Western Sahara, the Court finds it unnecessary to examine or pronounce itself on them, as Morocco is not a party to this case. As far as the responsibility of Respondent States' is concerned, there is no evidence available before it to attribute these violations to them. There is also no demonstrated causal link between the complained conduct of the

⁷³ See paragraph 74 above.

⁷⁴ See paragraph 83 above.

Respondent States and such violations.

- 322.** In view of the foregoing, the Court holds that the Respondent States have not, individually or collectively, violated the right to self-determination of the people of the SADR guaranteed under Article 20 of the Charter and [consequentially], Article 1 common to ICCPR and ICESCR.
- 323.** Having held that the Respondent States have not violated the rights of the Sahrawi people, the Court nevertheless reiterates that the Respondent States, and indeed, all State parties to the Charter and the Protocol, as well as all Member States of the AU, have the responsibility under international law, to find a permanent solution to the occupation and to ensure the enjoyment of the inalienable right to self-determination of the Sahrawi people and not to do anything that would give recognition to such occupation as lawful or impede their enjoyment of this right.

IX. Reparations

A. Applicant's submissions

- 324.** The Applicant prays the Court to issue an order compelling the Respondent States to individually and/or collectively call an emergency session of the Assembly of the AU and to sponsor a resolution for the adoption of legal, political and other measures by the AU to restrain Morocco from further occupying parts of the territory of Western Sahara in any manner whatsoever and howsoever. He also requests that such resolution should place Morocco on probation until it respects the rights of the Sahrawi people or be expelled from the Union.

B. Respondent States' submissions

i. Burkina Faso's submissions

- 325.** Burkina Faso asserts that the Respondent States are not individually and/or collectively, legally obliged to summon an extraordinary meeting of the AU Assembly to sponsor the resolution that the Applicant is requesting. It submits that regardless of the nature of the relief the Applicant is asking the Court to grant, be it a report or a resolution, the whole objective is for the Union to examine the case on Western Sahara. It contends that this is what the AU has been doing including at its meeting in July 2018,

where it decided to join efforts with the international community in a bid to resolve the conflict.

ii. Republic of Ghana's submissions

326. Ghana asserts that the relief sought by the Applicant is not tenable as it may not necessarily result in a vote in favour of adopting pragmatic measures aimed at resolving the issue in view of the requirement of two-thirds majority needed for decision making in the AU. According to Ghana, the eight Respondent States represent less than one-fifth of the Assembly. Ghana also notes that as per Rule 11 of the Rules of Procedure of the Assembly, Extraordinary Sessions can be held only if approved by two-thirds majority of the Member States. Given that the Respondent States are only eight, Ghana submits that they cannot collectively or individually be ordered to call for an Extraordinary Session and sponsor a resolution and any order to this effect would be incapable of enforcement.

iii. Republic of Tunisia's submissions

327. Tunisia reiterates that the Court cannot issue a decision compelling the Respondent States to suspend or terminate the membership of Morocco to the AU. According to Tunisia, doing so will affect the sovereignty of States and their independence to make foreign policy decisions.

iv. Republic of Mali's submissions

328. Mali reiterates that the issue of whether Member States are required to convene an Extraordinary Session of the Assembly is the concern of the AU's policy organs and not of the Member States. It also recalls that at the 2018 AU Summit in Nouakchott, the AU Assembly adopted a decision that reaffirmed the UN as the sole framework to resolve the West Sahara conflict. In accordance with this, Mali notes that discussions between Morocco and the Polisario Front –the group representing SADR have resumed on 21 March 2019 under the supervision of the UN Secretary General's Special Envoy, Horst Köhler.

v. United Republic of Tanzania's submissions

329. Tanzania, joined by Côte d'Ivoire, submits that there is no obligation on the Member States of the AU to convene an

extraordinary session in terms of Article 58 of the Charter. It contends that Article 58 provides for the mandate of the African Commission to refer a case that reveal the existence of a series of serious or massive violations of human and peoples' rights to the AU Assembly. According to Tanzania, the Court is distinct from the Commission and thus, is not empowered to invoke this provision and refer the matter to the Assembly or order the Respondent States to convene an extra-ordinary session of the Assembly.

- 330.** In addition, Tanzania argues that the holding of an extra-ordinary session of the Assembly at the request of the Member States is subject to the approval of two-thirds majority, hence, it is discretionary. In view of this, Tanzania stresses that the Court does not have the power to order the Respondent States to individually and/or collectively to call the said session.

vi. Republic of Malawi's submissions

- 331.** Malawi asserts that although the right to self-determination creates an *erga omnes* obligation, this does not extend to the obligation to convene an Assembly of parties or sponsor a resolution. According to Malawi, the obligation is subject to the principle of state sovereignty and the discretion of States. It submits that international law also prescribes the principle not to intervene in matters within the domestic jurisdiction of another State. In view of this, Malawi avers that the Court may not compel a State to sponsor or co-sponsor a resolution, for this is within the sovereign power of the State. Accordingly, it stresses that Malawi cannot be held responsible for violating the right to self-determination of the Sahrawi people for not exercising its sovereign right (not) to sponsor or co-sponsoring a resolution.

C. Intervening State's submissions

- 332.** The SADR prays that the Court should hold that the Application is well-founded and justified and declare the Respondent States' responsible for the violations of the right to self-determination of its people.

D. *Amicus curiae* submissions

- 333.** PALU has not made any specific submissions on the issue of reparations.

E. The Court's Position

334. Article 27(1) of the Protocol provides that:

If the Court finds that there has been a violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

335. The Court has consistently held that reparations are only awarded when the responsibility of the Respondent State for an internationally wrongful act is determined and a causal link is established between the wrongful act and the alleged harm.⁷⁵

336. The Court has also adopted the position that it cannot order reparation measures based on allegations for which no human rights violation has been found.⁷⁶

337. In the instant Application, the Court has not found any violations of human rights of the people of the SADR by the Respondent States and, thus the issue of reparations does not arise.

338. Accordingly, the Court dismisses the Applicant's prayers for reparations.

X. Costs

339. The Applicant has not made submissions on costs.

340. Tanzania argues that the Application is frivolous and vexatious, and prays the Court to dismiss the Application with costs. Mali, Burkina Faso, Tunisia, Côte d'Ivoire and Ghana also similarly pray that the Court should order the Applicant to bear the costs. The other Respondent States have not made submissions on costs.

341. The Court notes that under Rule 32(2) "Unless otherwise decided by the Court, each party shall bear its own costs, if any"

342. In the instant case, the Court sees no reason to depart from the above general principle and accordingly, it decides that each

⁷⁵ *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*, ACtHPR, Application No 062/2019, Judgment of 4 December 2020 (merits and reparations), § 139; *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No 003/2020, Judgment of 4 December 2020 (merits and reparations), § 117.

⁷⁶ *Omar Mariko v Republic of Mali*, Application No 029/2018, Judgment of 24 March 2022 (merits and Reparations), § 175.

party shall bear its own costs.

XI. Operative part

343. For these reasons,

The Court

Unanimously,

On jurisdiction

- i. *Dismisses* the objections to its jurisdiction
- ii. *Declares* that it has jurisdiction.

On admissibility

- iii. *Dismisses* the objections to the admissibility of the Application.
- iv. *Declares* that the Application is admissible.

On merits

- v. *Finds* that the Respondent States have not violated the right to self-determination guaranteed under Article 20 of the Charter and, other related rights alleged to have been violated by the Applicant.

On reparations

- vi. *Dismisses* the Applicant's request for reparations

On costs

- vii. *Orders* that each party shall bear its own costs.

Separate Opinion: TCHIKAYA

1. I concur with the entirety of the decision in the matter of, *Bernard Anbataayela Mornah v Benin and others* that the Court rendered on 23 September 2022.⁷⁷ I am in agreement with the whole content of the operative part, the final and unanimous Decision of the Court. I wished to include this opinion, perhaps overly so, in order to better share this judgment and, above all, the reasons

⁷⁷ AfCHPR, *Bernard Anbataayela Mornah v Benin and others*, 23 September 2022.

that led to its decision.

2. On 14 November 2019, a Ghanaian national,¹ *Mr. Anbataayela Mornah* filed an Application to institute proceedings against the Republic of Benin, Burkina Faso, the Republic of Côte d'Ivoire, the Republic of Ghana, the Republic of Mali, the Republic of Malawi, the United Republic of Tanzania and the Republic of Tunisia. These States have been individually and collectively summoned as Respondent States. In addition to being party to the Charter, these States have acceded to the Protocol establishing the African Court on Human and Peoples' Rights.² They have also made the Declaration to allow individuals and non-governmental organizations (NGOs) to seize the Court directly.
3. In contrast to the usual litigation, and as stated in the previous Opinion on the Ruling in the case, the Court is not strictly confined to the rights of individuals but has a broad appeal to the law of states – *the Western Sahara*³ Advisory Opinion Case was an example. As a human rights Court, this had – without a doubt – an effect that will be difficult to assess definitively in the long work that the Court did in this case.
4. The Application essentially makes two allegations that are unusual for the Court's docket: that the failure of the Respondent States to safeguard territorial integrity constitutes a violation of the rights of the Sahrawi people, and that the independence of their Republic is violated by allowing the Kingdom of Morocco to join the African Union. It was evident that both of these alleged violations involved fundamental public policy rights.⁴ The Application also established a link, which it was up to the Court to assess, according to which the referendum on the independence of the SADR under the aegis of the UN planned in 1992 would not have taken place because of Morocco and that, furthermore:

Morocco occupies the part of the Western Sahara that contains one of the richest fish reserves in the world, with abundant phosphate rock

1 He is the National Chairman of the Convention of People's Party in Ghana.

2 Respectively on the following dates: Benin, 22 August 2014; Burkina Faso, 25 January 2004; Côte d'Ivoire, 25 January 2004; Ghana, 25 January 2004; Mali, 25 January 2004; Malawi, 9 September 2008; Tanzania, 29 March 2010; Tunisia, 21 August 2007.

3 ICJ, *Western Sahara*, Order, 22 May 1975; Advisory Opinion, 16 October 1975, Rec. p. 6; Chappez (J.), RGDIP, 1976, p. 1132; Condorelli (L.), Cta. I. 1978, p. 396; Flory (M.), AFDI, 1975, p. 253; Prévost (J.-F.), JDI, 1976, p. 831.

4 AfCHPR, judgment, *op. cit.* at § 1 and § 8 et seq.

mines and oil reserves that it exploits to the detriment of the Sahrawi people.⁵

5. Apart from these obvious issues that the application raised, the Court had to respond to another issue that was presented to it, relating to the requests for intervention by two countries – Mauritius and the Saharawi Republic – as reflected in the two Rulings dated the same day.⁶ The majority opinion was that the two countries could intervene in the proceedings and be accepted by the Court. The Court should only accept this intervention by a decision of the plenary, which is the view we adopted.
6. The Court issued its decision on 23 September 2022, more than 100 pages of reasoning, even though the situation in the Sahrawi territory did not always present converging political and diplomatic prospects. One question seemed to haunt the Court's judges, even after the 2020 Rulings: was it necessary to make a decision in this case? A reading of the Protocol establishing the Court, in its relevant Articles 3 and 7 on jurisdiction, helped answer that question. But the "litigation octopus",⁷ so tentacular, could not be contained by a simple question of law.
7. As the facts of the matter highlighted by the decision show,⁸ they are supported by the alleged violations, namely that "the admission of Morocco to the African Union is incompatible with the principles and objectives of the Union, enshrined in the Constitutive Act of the AU. The Application ultimately states that:
the Respondent States have not protested against Morocco's admission to the AU, the Court should, (...) hold them accountable for their individual and collective failure to defend the sovereignty, territorial integrity and independence of the SADR....

5 AfCHPR, *Bernard Anbataayela Mornah v Benin and others*, Judgment, 23 September 2022, § 11 et seq..

6 V Ruling *Bernard Anbataayela Mornah v Benin et al.* (Interventions) 25 September 2020. v Joint Opinion of Judge Blaise Tchikaya.

7 Section II, A on the Facts of the matter is instructive: § 8 refers to the issue of "human rights of the Sahrawi people due to the loss of sovereignty, violation of territorial integrity and independence of Western Sahara... The Petitioner argues that Morocco, on the other hand, continues to occupy the territory of the SADR (§ 9); "Morocco occupies the part of Western Sahara that is home to one of the richest fish reserves in the world, with abundant natural phosphate mines and oil reserves that it exploits to the detriment of the Saharawi people" (§ 10) ; that in 2017, Morocco applied for membership in the AU and was accepted (§ 12); The applicant argues that "notwithstanding its admission to the AU, Morocco has not provided any evidence of its intention to renounce its occupation of Western Sahara" (§ 13). See Mens (Y.), *Le Sahara Occidental aiguisse les appétits*, Revue Géopolitique, 20 July 2015.

8 *Idem.*, § 8-14.

8. Attention is drawn to § 48 and § 49 of the judgment. They highlight the absence of Benin in the proceedings. Benin did not file its pleadings within the prescribed time limit.⁹ On 25 May 2021, the Respondent State confirmed its participation in the public hearing held on 10 and 11 June 2021, but did not send a representative to the hearing.¹⁰ The Court decided, in accordance with its jurisprudence, to render its judgment by default with respect to the Republic of Benin.¹¹ This default was taken into account by the Court.
9. The Court was clearly at the convergence of different decisions on the Saharawi issue.¹² It was not unaware that the International Court of Justice had issued an important advisory opinion on the same subject in 1975, that the European Union had issued numerous decisions, and that the Security Council had regularly issued resolutions. The temptation to have the case decided on the merits was high. The Applicant used so many common-sense questions, including the one in support of his argument on jurisdiction, which recalled that “in addition to condemning illegal and unconstitutional changes of government, the OAU and the AU have in the past refused to admit colonial powers as members”.¹³
10. In the interest of clarity in this opinion, it should be recalled that the African Court in a straightforward ruling stated that the eight Respondent States:
 - have not violated the right to self-determination guaranteed by Article 20 of the Charter and the related texts alleged to have been violated by the Applicant.
11. Therefore, in this exercise, I will explain why we have adhered to the empowerment that the Court has recognized in establishing its jurisdiction in this case (I) on the one hand, and, on the other, my concurrence to the Court’s decision on the merits (II.).

9 AfCHPR, *Léon Mugesera v Republic of Rwanda*, Judgment, 27 November 2020, § 14.

10 However, the Registry of the Court transmitted to the respondent State all additional documents that were filed during and after the public hearing; Judgment, § 48.

11 *African Commission on Human and Peoples’ Rights v Libya* (merits) (3 June 2016), 1 RJCA 158, §§ 38–43. See also *Yusuph Said v United Republic of Tanzania*, CAFDHP, Judgment of 30 September 2021 (jurisdiction and admissibility), § 18.

12 He notes as examples “the OAU’s refusal to admit South Africa during apartheid and the AU’s recent suspension of Côte d’Ivoire, Niger, Burkina Faso and Egypt because of the removal of democratic regimes by coup plotters.

13 *Arrêt*, § 14.

A. Adherence to the jurisdiction of the African Court

12. Two questions emerged. First, whether the Court really had jurisdiction to hear the *Bernard Mornah case*; second, whether the Application was properly admissible on the merits. The Application, with its multiple diplomatic dimensions, therefore had to be cast in the mould of the proceedings.

i. Objections to jurisdiction overruled

13. The idea that the Court should not hear the Application rested, by and large, on two limbs; both of them rather flimsy. They were presented as preliminary objections to the Court's jurisdiction; first, the highly diplomatic and political nature of the application.¹⁴ This dispute would not be about the defence of human rights. Second, the application is akin to a request for an advisory opinion and the Assembly of the African Union has referred the SADR matter to the United Nations.
14. Did these approaches really limit the Court's jurisdiction? Burkina Faso, Tunisia, Côte d'Ivoire, Ghana, Mali and Tanzania argued that the Application raises political, sovereignty, international relations and diplomatic issues as well as the principle of non-intervention on which the Court has no jurisdiction to rule. They argued that the Court lacks jurisdiction to consider an application in which it is asked to compel sovereign states to interfere in the internal affairs of another sovereign state, namely Côte d'Ivoire and Mali.
15. The Court resorted to the separability of contentious issues, well known in international law, to respond to this first objection. As is often the case, disputes contain different aspects. Iran's argument to *the International Court of Justice on the United States Diplomatic and Consular Staff in Tehran* was also of a similar nature.¹⁵
16. Although it included various political issues, it also included human rights issues. The Court states in paragraph 65 that:
the issues raised by the Application clearly touch on the fundamental rights of the persons who are the subject of its mandate. The Application also contains allegations of violations of rights protected

14 *Idem*, § 56 et seq..

15 ICJ, *United States Diplomatic and Consular Staff in Tehran, Iran v United States* Order on provisional measures and merits, 15 December 1979 and 24 May 1980.

by the Charter or by any other human rights instrument ratified by the State concerned.¹⁶

The Court also found that “violations of the right to liberty, non-discrimination, the right to a fair trial, the right to participate in the conduct of public affairs in one’s own country, the right to equality of all peoples, the right to self-determination, the right to dispose of natural resources, the right to development...”. This state of affairs obliged the Court’s jurisdiction.

17. Côte d’Ivoire raised a specific, but well-known argument on lack of jurisdiction in international litigation. It argued that the Application would confuse a request for an advisory opinion with a contentious proceeding to denounce an alleged violation by States.¹⁷ The Application, it said, is a request for an advisory opinion and thus, should be treated differently, in accordance with article 4 of the Protocol. For the Court, this argument did not seem to be acceptable for reasons it indicated in the judgment. In fact, the Court’s answer mainly takes into account the terms of the Protocol, whose first paragraph of article 4 specifies that:

At the request of a Member State of the OAU, any of its organs or an African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instrument, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.

18. It emerges from the reading of the above provisions, *ratione personae*, that the opinion does not include an individual application. *Mr. Mornah’s* only recourse was to refer the matter to the Court. It should be recalled that the Moroccan Sovereign considered in the Advisory Opinion of *Western Sahara*¹⁸ before the International Court of Justice that a contentious procedure was more appropriate. While the Court will keep an eye on the validity of the chosen procedure, the nature and timing of the case are decisive. The *South West Africa* dispute, which concerned the regime of a territory, provides some insight. No less than four

16 See AfCHPR, *Kalebi Elisamehe v Tanzania*, 26 June 2020, § 18; *Joseph Mukwano v Tanzania*, AfCHPR, 24 March 2022, § 22; *Kenedy Ivan v Tanzania*, 28 March 2019, § 20; *Shukrani Masegenya Mango and others v Tanzania*, 26 September 2019, § 29..

17 See also the position of Ghana: “if the Court were to decide to examine the case, it could only give an advisory opinion in accordance with Article 29 of its Rules”, *Judgment*, § 59.

18 ICJ, *Western Sahara*, Order, 22 May 1975; Advisory Opinion, 16 October 1975, ECR 6. On the Opinion see Chappez (J.), RGDIP, 1976, p. 1132; M. Flory (M.), AFDI, 1975, p. 253.

requests for Opinions were presented before the decision of the International Court of Justice of 18 July 1966 (judgment), on *South West Africa* (2nd phase), *Ethiopia v South Africa*; *Liberia v South Africa*.¹⁹ In the latter decision, the Court established its jurisdiction, notwithstanding its controversial decision on the merits.²⁰ It simply showed that a question on its extension and legal implications could give rise to different settlement procedures.

19. Finally, it is necessary to recall the provisions of Article 3 of the Protocol, which does not exclude any case from the jurisdiction of the Court when “it is seized with respect to the interpretation and application of the Charter” or when it is seized with respect to any instrument ratified by the State concerned in matters of human rights. And it is ultimately for the Court to decide.
20. One thing that attracted attention in the *Bernard Mornah* decision is the fact that it concerns the application of a kind of extra-territorial jurisdiction to the States being sued, since the facts in matter did not fall within their own territory. The Court nevertheless recognized its jurisdiction. The Court based its jurisdiction on a broader examination of its competence. This allows it to hear the alleged violations. The court is in fact following the evolution of international law.²¹ This would allow for the prosecution of human rights abuses regardless of the spatial setting in which they were committed. This position has been strongly supported in Europe.²²
21. In its jurisprudence, at least three conditions are retained by the Court:
 - First, the Court has ascertained that the existence of the alleged violations falls within its applicable international law;

19 I.C.J., *South West Africa, Ethiopia and Liberia v South Africa*, 18 July 1966; see Favoreu (L.), AFDI, 1963 and 1966, p. 303 and p. 123; G. Fischer, AFDI, 1966, p. 145; Higgins (R.), Journal of Law, Commission of Jurists, 1967, p. 3; Johnson (D. H. N.), Int. Rel. 1967, No 3, p. 157; Nisot (J.), RBDI, 1967, p. 24; Marchi (J.-F.), AFDI, 2004, p. 173..

20 Weisburd (A. M.), *Failings of the International Court of Justice*, Oxford, OUP 2016, p. 181 f.; Ch. De Visscher (Ch.), *Aspects récents du droit procédural de la Cour internationale de Justice*, Paris, Pedone, 1966, p. 75).

21 Lea Raible, “The Extraterritoriality of the ECHR: Why *Jaloud* and *Pisari* Should be Read as Game Changers”, commentary on *Jaloud v Netherlands* [GC], No 47708/08, [2014] VI ECHR 327 and *Pisari v Republic of Moldova and Russia*, No 42139/12 (21 April 2015) (2016) 2 Eur HRL Rev at p 15; see also Costa (J.-Paul), “Qui relève de la juridiction de quel(s) État(s) au sens de l'article 1 de la Convention européenne des droits de l'homme” in *Paul Amselek, dir, Liberté, Justice et tolérance – Mélanges en Hommage au Doyen Gérard Cohen-Jonathan*, vol 1, Brussels, Bruylant, 2004, 483 at p 484..

22 The European Court retained extraterritorial responsibility for acts of arrest and detention executed in a third State. In an extradition proceeding initiated by the Respondent State. In the 2009 case, the European Court held that: “The Court decided of its own motion to examine whether Malta was responsible for the

- Secondly, the Court verifies whether the States in question meet the condition of personal jurisdiction, in other words, whether these States are bound by the Protocol establishing the Court; and
 - Thirdly, the Court has ascertained that the alleged violations were committed in the African space, covered by the Charter. Under these conditions, and in the case at hand, extraterritorial jurisdiction can be invoked.
- 22.** Already in *Loizidou v Turkey*, a decision of 23 March 1995, explaining the obligations of States as to the meaning of Article 1²³ (obligation to respect human rights) of the European Convention on Human Rights, the Court recalled that, while Article 1 (obligation to respect human rights) of the European Convention sets limits to the scope of the Convention, the notion of “jurisdiction” within the meaning of this provision is not limited to the national territory of the contracting States. In particular, the State may also incur responsibility when, as a result of military action – legal or otherwise – it exercises effective control over an area outside its national territory.
- 23.** Apart from the two questions that seemed, at first sight, complex, namely the detachability of human rights violations from political/diplomatic issues on the one hand, and the territorial question on the other, the jurisdiction of the Court in this case was not debatable in the eyes of the judges.

ii. Subscription to the admissibility of the application before the Court

- 24.** Some questions were raised in relation to Article 56 of the Charter,²⁴ but they did not prevent the judges from unanimously

Applicant's detention in Spain. If so, the Applicant's complaints against Malta under Article 5 fall within the Court's jurisdiction. While the Applicant was under the control and authority of Spain throughout his detention, his deprivation of liberty was due solely to measures taken exclusively by the Maltese authorities", see ECHR, *Stephens v Malta*, 4 April 2009. In an Advisory Opinion requested by Colombia, the Inter-American Court highlighted the concept of “trans-border violation”. At the request of Colombia, the Inter-American Court of Human Rights issued an Advisory Opinion (OC-23/17) on the right to the environment and the environmental and transboundary obligations of States. The Court began by arguing that the right to a healthy environment entails obligations of States whose damages may be transboundary.

- 23** Article 1 of the European Convention states: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”.
- 24** Applications to the Court must meet all the following requirements: a) Disclose the identity of the Applicant, notwithstanding the latter's request for anonymity; b) Comply with the Constitutive Act of the Union and the Charter; c) Not contain any

agreeing on the admissibility of the Application. This was the case with the question of the identity of the Applicant. This last question, which had objective aspects, did not present any difficulty.²⁵ I agreed with the Court's position. The Applicant had declared his full identity.

25. Another argument was dismissed by the Court. The argument that the Applicant had essentially referred to:

Various resolutions and decisions of United Nations bodies and decisions of the African Union, including the one on the admission of Morocco. These decisions and resolutions, and the realities on which they are based, are facts of which the Court took note.

26. Pursuant to its jurisprudence and the admissibility requirement of Rule 50(2)(c) of the Rules of Court, the Court found that the application was not based merely on information gathered from the mass media. The press is eloquent on the Sahrawi issue, and the case at the African Union dates back to the mid-1970s. The pan-African organization has addressed various aspects of the issue in numerous decisions. However, the Applicant had also adduced documents and information to constitute his complaint. Consideration of admissibility paid attention to all of this.

27. One objection that did not fail to attract attention was that relating to the prior exhaustion of local remedies. As noted in §198, the Respondent States argued strongly that their domestic legislation allowed foreigners to file cases before their courts, and the Applicant did not explain why this condition should be waived. Nor have the courts of his country been seized to exhaust this available remedy.

disparaging or insulting language (e) Be filed after the exhaustion of local remedies, if any, unless it is apparent to the Court that the local remedies process is being unduly prolonged; (f) Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter (g) Not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union or the provisions of the Charter or any other legal instrument of the African Union..

- 25 In § 168, it is stated that: "the Applicant, through his counsel, identified himself as *Mr. Bernard Anbataayela Mornah*, and disclosed his nationality, occupation and address. Although the Applicant indicates that he has seized the Court as a member of a coalition of civil society organizations fighting for the independence of the SADR and the respect of the right to self-determination of the Sahrawi people. This is also the meaning of the decision *Sindicatul "Păstorul cel Bun" v Romania*, 9 July 2013 in which the European Court noted that: "once the Applicant has provided factual and legal elements that allow the Court to identify him and establish links with the facts of which he complains and the complaint he invokes".

28. The Court was at one time seduced by a practical argument relating to the number of Respondent States. It was stated that:

Because of the multiplicity of Respondent States whose conduct is closely related in view of their collective responsibility to work for the respect of the rights of the Saharawi people. In this regard, the Applicant notes that in similar cases, the African Commission on Human and Peoples' Rights has departed from the rule of exhaustion of local remedies (...) it would be unfair to expect the victim to multiply parallel remedies by separately bringing applications before the national courts of the States in question.
29. The argument of the SADR – the intervening country – was that the rule of prior exhaustion of local remedies did not apply in this case because the issue concerned the sovereign rights of the Sahrawis as a people and as a State party to the Charter. Although in a hasty but good-natured way, it took up a large body of case law.²⁶ The Court therefore, while bearing the principle in mind, granted the benefit to the Applicant (see Jean Guinand, *Etudes sur « La règle de l'épuisement des voies de recours internes dans le cadre des systèmes internationaux de protection des droits de l'homme »*, RBDI 1968, II, p.476.) For the plaintiffs, the Pan-African Lawyers Union's *amicus curiae* argument was unanimous in that it emphasized the idea that:

the requirement of exhaustion of domestic remedies is waived as soon as a series of serious or massive violations of human rights within the meaning of Article 58 of the Charter occurs, which is the case, in this instance.
30. The Court finally considered, not without reason, the question of whether or not:

“the Applicant should have attempted to pursue domestic remedies, at least in those countries that claim to have judicial remedies to determine whether their responsibility can be engaged for breach of their international obligations”
31. In the end, the Court recognizes that:

the Applicant sues the Respondent States individually and jointly and severally. Therefore, even if he were to decide to apply to the national courts of some of the Respondent States, where it is argued that the municipal courts have jurisdiction to examine international obligations,

26 ECHR, *Sejdovic v Italy*, 1 March 2006, § 100 et seq. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was effective and available both in theory and in practice at the material time, i.e. that it was accessible, was capable of affording the Applicant a remedy for his or her grievances and had a reasonable prospect of success. v HRC, *Communication N°1353/2005*, 19 March 2007 § 5.2: the Human Rights Committee in the Case of *Philip Afuson v Cameroon*, “with regard to the obligation to exhaust domestic remedies, the Committee notes that the State party has not challenged the admissibility of any of the complaints presented”.

the general principle of the sovereign equality of States prevents them from ruling on the case in a comprehensive manner with regard to the joint responsibility of all Respondent States (§ 210).

32. This argument was decisive, it was accepted. The States were in fact brought before the Court collectively and individually. Collective proceedings would have been ineffective in a national context. In addition, the idea that serious, massive and repeated violations had been at issue for almost three decades was emphasized, and that the principle of prior exhaustion was therefore no longer useful. The Applicant should have the benefit of the rule of exhaustion of local remedies and should be exempted from it.²⁷ The Court was convinced that there was sufficient material for the exhaustion rule to be waived in this case.
33. It paved the way for consideration of the merits of the *Mornah* case. As no other objections to admissibility were raised, we were persuaded that the issues raised merited consideration, without prejudice to the decisions on the merits. It was in this same spirit that the question of the reasonableness of time for bringing the case before the Court was addressed. The position that prevailed was the same, namely that for the Court, the:

“...the reasonableness of time for its referral depends on the particular circumstances of each case and that it must determine this on a case-by-case basis”.²⁸
34. Aside from the procedural aspects, *the Mornah* case brought to light various questions whose density and the principle of the speciality of litigation did not always reveal themselves. It is a principle that each application must be assessed within its own limits and must not in any way overflow in its assessment of the conclusions of other courts.
35. Interpreting one of the rules of admissibility, namely that of Article 56(7) which requires that applications should not concern cases that have already been decided by the parties, Burkina Faso, Tunisia, Côte d'Ivoire and Ghana stated that *the Mornah* Case should not be received by the Court. The question of the independence of the territory of Sahrawi, Ghana further argued, had been settled by the International Court of Justice in its Advisory Opinion of 16 October 1975, of which the referendum

27 Position rooted in international law: see S.A., *Rodhope Forest, O. Unden*, 4 November 1931, Advance Questions 29 March 1933, merits, RSA, vol. III, p. 140: “The rule of exhaustion of local remedies does not, in general, apply where the act complained of consists of measures taken by the government or by a member of the government in the exercise of his official functions.

28 AfCHPR, *Norbert Zongo v Burkina Faso* (merits), § 92; *Alex Thomas v Tanzania* (merits), 20 November 2015, § 73.

process for independence was only a result. It did not fulfil the requirement of Article 56(7) of the Charter. The Western Sahara dispute would have been the subject of:

a report presented by the Chairperson of the African Union at the Nouakchott Summit in July 2018, which was unanimously adopted by the Assembly.²⁹

36. This argument did not stand up to criticism. We fully agreed with the majority position of the Court on this aspect; in application of the concept of settlement, *a bis in idem* (in the useful sense of Article 56(7)) could only be avoided if there was a decision on the merits.³⁰ Such a decision obviously does not exist. The argument adduced by the Respondent States was, as it stood, and on this point, not tenable. In any event, the Court having found that there was no contention to admissibility, it should consider the merits.

B. Concurring with the merits of the African Court's decision

37. I came to the view that whatever the Court's answers on the merits, they should be of definite legal gravity. It was clear that the legal question was whether, because of the relationship between Morocco and the SADR, the eight Respondent States, members of the African Union, are violating and continue to violate the rules protecting the rights of the Saharawi peoples; if so, what reparation is due; if not, because of the continuing nature of these violations, what should be the reaction of the Court?
38. We will examine, on the one hand, the decision in which the Court found that there was no violation (2.1) and, on the other, the explanation that the Court gave for the absence of the third party that was essential to the proceedings, namely Morocco (2.2). This last aspect, which attracted the Court's attention, had a particular impact on the merits.

i. Unanimity on the absence of a violation

39. It emerges from the conclusions submitted to the Court that the

29 Burkina Faso recalls that this report relates to the implementation of Decision No 653 of the 29th Assembly of Heads of State and Government held in July 2018.

30 African Commission, Decisions No 279/03, 296/05, *Sudan Human Rights Organization and Center on Housing Rights and Evictions (COHRE) v Sudan*, 45th Ordinary Session, 13 to 27 May 2009, § 105: It should be noted, as the Court of Appeal did: "The mechanisms referred to in Article 56(7) of the Charter must be able to grant a measure of declaration relief or compensation to the victims, and not mere political resolutions and declarations."

eight States were summoned because of the actions attributable to the Moroccan sovereign. The bench had to say in what way these actions could have led to any responsibility of these third States. It seemed to me that in accordance with the international law of responsibility, the so-called illicit facts must be proven and an imputable link must be established. This is the responsibility of the State for the act of another State, as it is underlined in Article 16 of the Draft Articles of the ILC on the responsibility of States for internationally wrongful acts.³¹ Normally, it would be established against these States a responsibility with an obligation to repair damage caused to others.³² This approach will be used in the analysis here, on the alleged violations.

40. Above all, it seemed to me that the Applicant was proceeding by assertion, the content of which he hoped would be corroborated by the Court by means of information that it would obtain here or there. For example, when he states that:

“at the time Morocco applied for admission to the AU, it was not asked to end its “colonization and occupation of Western Sahara”.

41. He goes on to state that:

the failure of the Respondent States to fulfil their obligation and prevent Morocco from continuing to occupy the territory of the SADR has resulted in the violation of the right to self-determination, the right not to be discriminated against, the right to a fair trial, the right to participate in political activities; the right to equality of all peoples, the right to peace, the right to a satisfactory environment and the right to dispose of natural wealth and resources,³³

42. Tanzania and Mali’s argument that they were not responsible for the lack of evidence to support the allegations of violations. These

31 Article 16 reads: “A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State.

32 The ICJ has said this in several cases. In the *Phosphates of Morocco* case, 14 June 1936, it says “a State commits an internationally wrongful act (...), international responsibility is established “directly in the plane of relations between those States”. There is an automaticity between the commission of the harmful act and the responsibility. The ICJ has applied the principle on several occasions: *Corfu Channel Case*, 9 April 1949; *Case concerning Military and Paramilitary Activities in and against Nicaragua*, Order on Provisional Measures, 10 May 1984, Rec. p. 169; *Declaration of Intervention by the Republic of El Salvador*, Order, 4 October 1984, p. 215; *Jurisdiction and Admissibility*, Order, 26 November 1984, [1984] ECR 392; merits, Judgment, 27 June 1986, [1986] ECR 14; and *Gabčíkovo-Nagymaros Project*, Judgment, 25 September 1997.

33 Judgment, § 242 et seq.

Respondent States emphasized in particular that:

the Court does not have jurisdiction (...) to hear the Application insofar as its subject matter does not establish a *prima facie* case of the occurrence of a violation of one of the rights protected by the Charter.

43. The three situations that imply a possible responsibility of a third State are not identifiable in the material before the Court. Article 16 of the Draft Articles on Responsibility refers to the case where a State provides aid or assistance to another State and thereby facilitates the commission of a wrongful act by the latter. Article 17 of the same contemplates the case where a State is responsible for the internationally wrongful act of another State because it has directed and exercised control over that other State in the commission of an internationally wrongful act. Article 18 contemplates the case where a State deliberately coerces another State to commit an act which constitutes for that other State, or would in the absence of coercion constitute, an internationally wrongful act. The application before the Court does not provide evidence of any of the above elements.
44. Assuming that these States acted or failed to act through a common organ, which in this case would be the African Union, to commit a wrongful act; the responsibility of the assisting States can normally only be engaged under article 16 if the States were aware that they were contributing by their acts to the wrongful conduct. This state of affairs would have to be proven for each of these eight States in order for reparation to be due.³⁴
45. This individual position was in tandem with that of the Bench. In § 311 it was stated that:
the responsibility of a State is engaged when three cumulative conditions are met: an action or omission violating international law, i.e. an internationally wrongful act; this act must be attributed to a State and must be the cause of damage or loss (causal link).³⁵
46. Finally, on the question of human rights violations arising directly from the occupation of the SADR, the Court considered it unnecessary to examine them as Morocco is not a party to the present Application. With regard to the responsibility of the Respondent States, the Court had no evidence to impute these violations to them.

34 This is the logical consequence, which the Court does not consider to be present in the present case (see *Factory of Chorzó*, 13 September 1928, p. 47). See also ICJ, *Mavrommatis Concessions*, 26 March 1925; ICJ, *Temple of Preah-Vihear*, 15 June 1962 and Request for Interpretation, 11 November 2013; SA, Martini, 3 May 1930.

35 Articles 1-3, ILC Draft Articles on State Responsibility (2001).

47. Nor has it been shown that there is any causal link between the conduct attributed to the Respondent States and these violations, or how the States violated their obligations (see § 314 et seq.). The Court defends its solution to the dispute quite clearly by indicating that the violations lacked evidence, on the one hand, and on the other, that no specific obligation on the part of the Respondent States was established. It was paragraph 314 that stressed that:

no evidence was placed on record before it to show whether or not the Respondent States did so. (...) Article 20 of the Charter imposes a duty on the Respondent States to assist the people of the SADR in their struggle for the full enjoyment of their right to self-determination, but it does not require States to undertake a specific set of actions or measures of a particular nature. Consequently, it is for the Respondent States to choose the type of positive measures they deem appropriate for the enjoyment of this right by the said people.³⁶

The Court considered that the Respondent States had not exceeded the obligations to which they were subject.

ii. Relative unanimity, the “monetary gold” principle

48. This is a key principle of international dispute settlement. It is used to protect the sovereign rights of States, which could be involved in an instance without their presence being proven in the proceedings. The case of Morocco in this instance suggested this.³⁷
49. In the case of the *Rome Gold Decision*,³⁸ which gave the principle its name, or in the *East Timor Case*, the International Court of

36 *Arrêt*, § 314.

37 Not to be confused with the non-appearance of States, which can have the same consequences on the sovereign rights of States; See in particular, Application 007/2017, *Fidèle Mulindahabi v Rwanda*, 4 July 2019. Situation regulated by the Rules of Court, Rule 44, in particular: “7. Where a party fails to file its pleadings and does not request an extension of the time limit fixed for that purpose, its attention is drawn to Rule 63 of these Rules. In such a case, the defaulting party shall be given an additional period of time not exceeding forty-five (45) days to file its pleadings.

38 Goy (R.), *Le sort de l’or monétaire pillé par l’Allemagne pendant la deuxième guerre mondiale*, AFDI, 1995, pp. 382-391. *ICJ, Case Concerning Monetary Gold Taken in Rome in 1943*, 15 June 1954: Filed by an Italian application against France, the United Kingdom of Great Britain and the United States, the Court had to decide legal questions on which depended the handing over to either Italy or the United Kingdom of a quantity of monetary gold taken in Rome in 1943 by the Germans, recovered in Germany and recognized as belonging to Albania. The United Kingdom argued that the Court had ordered Albania to compensate it for damage caused by explosions in the Straits of Corfu in 1946 and that the compensation due to it had never been paid. For its part, Italy claimed, firstly, that it had a claim against Albania as a result of confiscation measures allegedly taken by the Government of that country in 1945 and, secondly, that this claim should have

Justice decided to dismiss the case. This was not the decision of the Court, which argued, among other things, the particularity of the African human rights system.

50. Was the application admissible insofar as it sought to hold the eight States responsible for the fact that Morocco occupied part of Western Sahara? This structure of the dispute is reminiscent of the *East Timor Case*³⁹ before the International Court of Justice in 1995.
51. The latter case clarified the principle, which the situation of Morocco in the *Mornah case* suggested. The legal question was whether or not, with Indonesia absent, the Court could rule. This is the problem of the absence of the third party in the proceedings. In accordance with its own jurisprudence (see ICJ: *Monetary Gold taken in Rome* in 1943*, 15 June 1954; *Certain Phosphate Lands in Nauru*, 26 June 1992), the Court stated that “the judgment sought by Portugal would have effects equivalent to those of a decision declaring that Indonesia’s entry into and continued presence in East Timor are unlawful... The rights and obligations of Indonesia would therefore constitute the very subject-matter of such a judgment, rendered in the absence of that State’s consent. A judgment of this nature would be in direct contravention of the well-established principle of international law embodied in the Statute that the Court may not exercise jurisdiction over a State except with the consent of that State.
52. The issue of Morocco’s presence is addressed in paragraph 32. It is noted that: “Morocco, which has an interest in the subject matter of the present Application, has not requested to intervene although it has received the notification from the Registry addressed to all Member States ...”. It should be clarified that under the African Union’s human rights system, all Member States are served with notice of the proceedings before the Court. It states in this case as follows:

priority over that of the United Kingdom. The Italian Government, availing itself of the declaration signed in Washington on 25 April 1951 by the Governments of France, the United Kingdom and the United States, referred these two questions to the Court. The Court’s decision will clarify two procedural principles: the principle that an applicant may make preliminary objections during a proceeding, and the principle known today as “monetary gold”, which requires the Court to refrain from making objections in the absence of an indispensable third party to the proceedings.

- 39 ICJ, *East Timor*, 30 June 1995: On 22 February 1991, Portugal brought a case before the ICJ against Australia concerning “certain actions of Australia in relation to East Timor”. Portugal accused Australia of wanting to integrate East Timor into Indonesia, and in particular of having negotiated, concluded and begun to implement the “Timor gap” treaty of 11 December 1989 with Indonesia.

On 25 March 2019, the Registry notified the Respondent States of the Application, requesting them to submit the list of their representatives as well as their response to the Application within the respective deadlines of thirty (30) days and sixty (60) days, from the date of receipt of the notification. By a further notice dated the same day, the Registry notified all AU Member States, including the *Kingdom of Morocco*, of the Request and invited those who wished to intervene to do so as soon as possible, but before the closure of the written procedure.⁴⁰

53. One can only have a relative appreciation of the “monetary gold principle” in relation to human rights, as the Court did in this case. There is no doubt that a State that fails in the field of human rights can have the same attitude in litigation. Shouldn’t the protection of rights come first? The Court should ensure a balance which, in any case, allows the Respondent States, as is normal, to adduce their arguments.
54. Hence, the Court’s final judgment:
With regard to the violations of human rights arising directly from the occupation of Western Sahara by Morocco, the Court considers it unnecessary to examine or rule on them, since Morocco is not a party to the present case.⁴¹

C. Conclusion

55. What decision could the Court have made in *Anbataalaya Mornah*? The doctrine will tell us more. The Court’s decision would have been to rule on the merits; the other option would have been to dismiss the case. The wisdom of the Court has opportunely prevailed: “
the Respondent States, and indeed all State Parties to the Charter and Protocol, as well as all AU Member States, have a responsibility under international law to find a permanent solution to the occupation and to ensure the enjoyment of the right to self-determination of the Sahrawi people (...).⁴²”
56. The Court’s jurisprudence will have to tell us under what conditions jurisdiction over human rights violations allegedly committed by African states on non-African territories on the basis of the African

40 *Judgment*, § 18.

41 *Idem.*, § 321.

42 *Judgment*, § 323.

Charter would be valid.⁴³

57. While I fully concur with the *Mornah decision*, it must be said that it may seem to leave some issues unresolved. The decision is however linked to the state of the applicable law, of *lex lata*, on the issues that the Court found to be important from the perspective of the African human rights system.

43 One may doubt the effectiveness of the control of human rights by territories, a physical and limiting notion. The means of action of States, which may include infringements of the rights of individuals, are more fluid. See in particular, Touzé (S.), Si la compétence l'emportait sur le territoire? Réflexions sur l'obsolescence de l'approche territoriale de la notion de juridiction, *Revue québécoise de droit international*, Numéro hors-série, décembre 2020, p. 189-200.

Motiba v Tanzania (judgment) (2022) 6 AfCLR 656

Application 055/2016, *Cleophas Maheri Motiba v United Republic of Tanzania*

Judgment, 22 September 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant, a citizen of the Respondent State and a former employee of its Ministry of Finance, brought this Application alleging that some of his human rights were violated when his employment was unlawfully terminated. The Applicant claimed that his employment was terminated without due process and his challenge of his termination before the domestic courts was unsuccessful. The Court held that the Respondent State had not violated any of the rights claimed. Accordingly, the Court dismissed the request for reparations.

Jurisdiction (material jurisdiction, 42-46; temporal jurisdiction, 50)

Admissibility (exhaustion of local remedies, 61-68; filing within a reasonable time, 74-83)

Work (illegality of termination, 100-101, 109)

Fair trial (adherence to rule of law, 121-122; trial within a reasonable time, 128-136; Court's role in evaluating evidence, 140-143)

I. The Parties

1. Cleophas Maheri Motiba (hereinafter referred to as “the Applicant”) is a national of Tanzania and also a former employee of the Ministry of Finance, who claims that his rights were violated when his employment was “unlawfully terminated”.
2. The Application is filed against the United Republic of Tanzania (hereinafter, “the Respondent State”), which became a Party to the African Charter on Human and Peoples’ Rights (hereinafter, “the Charter”) on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter, “the Declaration”), by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission an instrument withdrawing its Declaration. The Court held that this withdrawal

has no bearing on pending cases and new cases filed before the withdrawal came into effect, that is, one year after its deposit, which is on 22 November 2020.¹

II. Subject of the Application

A. Facts of the matter

3. It emerges from the Application that the Applicant was employed as a civil servant, on a permanent and pensionable basis, by the Respondent State's Ministry of Finance in one of the Revenue Departments² as a "Finance Manager Officer". However, in 1995, the Government of the Respondent State converted its Revenue departments to form an independent public corporate entity known as the Tanzania Revenue Authority (herein after referred to as "TRA") by virtue of the TRA Act No 11 of 1995 which came into force vide *Government Notice No 419 of 1995*.
4. The Applicant alleges that all employees, including him, who were part of the previous Revenue Departments were assimilated into the TRA as its employees and not as civil servants. Subsequently, TRA undertook a screening of all its staff as a result of which, on 14 April 1996, the Principal Secretary, Ministry of Finance,³ recommended the termination of two categories of staff, in public interest. The two categories consisted of those who had a bad record in revenue collection and with doubtful integrity, and those whose performance was affected by advanced age, long sickness and low education.
5. The Applicant avers that he was one of those who was unlawfully "terminated" by TRA yet he did not fall into any of the two categories. He further avers that at the time of the "retrenchment", he was barely 40 years old and was a graduate of the University of Dar es Salaam with a Bachelor's degree in Commerce and Management. Furthermore, that no legal procedure was followed in "terminating" his employment, no reasons were given to support

1 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACTHPR, Application No 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.

2 The Ministry of Finance had 3 departments namely: Sales Tax and Inland Revenue Department, Income Tax Department and Customs and Exercise Department.

3 The Applicant has used the titles 'Principal Secretary, Ministry of Finance', 'Principal Secretary, Treasury' and 'Principal Secretary, Establishment' in his pleadings, interchangeably but the title 'Principal Secretary, Ministry of Finance' will be used as this is the title used in the domestic court's decisions, except where there is a quotation of the Applicant's pleadings using another title.

his “termination” other than that the Government had decided to reduce its workforce as a means of reducing its expenditure and increasing office productivity.

6. The Applicant states that after being served with the “termination letter” dated 25 June 1996,⁴ he wrote a letter of protest to the Principal Secretary, Ministry of Finance on 14 August 1997, to which he received a response on 9 January 1999.⁵ Furthermore, that the Principal Secretary, Ministry of Finance had no power or authority to retrench him, because he was no longer a civil servant, since his contract was transferred to TRA by virtue of the TRA Act, which came into existence on 7 August 1995. He also states that the Respondent State “paid him Ex-gratia, the terminology found in Government Retrenchment Circular to Civil Servants”.
7. The Applicant avers that being aggrieved with the reply to his letter of protest to the Principal Secretary, Ministry of Finance, on 1 October 1999, he and six (6) other affected, employees, who are not before this Court, filed a case before the High Court at Dar es Salaam – *Civil Suit, Case No 361/1999*. The suit was filed against three (3) entities, that is, the Principal Secretary, Ministry of Finance, the Attorney General and TRA. Before the suit could be determined on the merits, the 3rd respondent (TRA) raised two preliminary objections to the effect that the suit was bad in law for misjoinder of parties and revealed no cause of action against TRA. The High Court, Judge Bubeshi, rendered a Ruling on 28 September 2001 upholding the preliminary objections and struck out TRA as a defendant.
8. The Applicant further avers that in considering the case, Judge Bubeshi also considered the question of whether it was TRA or the Ministry of Finance that was the Applicant’s employer. In so doing the Judge held that TRA had come into being on “1 July 1996”, therefore the liabilities inherited did not extend to taking on former employees of the former revenue departments since it had to engage its employees afresh.
9. Aggrieved with the ruling of the High Court, on the preliminary objections, the Applicant appealed to the Court of Appeal in *Civil Appeal No 17 of 2003*, on two grounds. Firstly, that the trial judge was wrong to hold that the 3rd respondent, TRA, came into being

4 Civil Appeal No 17 of 2003 Judgment dated 27 March 2006, p 1 indicates that the Applicants were terminated on 30 June 1996.

5 The Permanent Secretary’s letter is not on file and the Applicant does not divulge the contents of the response nor does he expound on the contents of his protest letter.

on 1 July 1996 and secondly, that the judge erred in holding that Section 28(2) of the TRA Act did not intend to include the former employees of the revenue departments. The Applicant prayed the Court of Appeal to order TRA to be reinstated as a respondent in the suit.

10. The Applicant states that in a judgment dated 27 March 2006,⁶ Judge Mrosso of the Court of Appeal observed “that although the authority existed from 7 August 1995, it was an empty shell, a bus without a passenger”. He further observed that “the process of operationalisation commenced with the appointment of Board Members on 20 August 1995 and by 1 July 1996, the Authority was ready to commence business as an Authority”. Judge Mrosso also held that Judge Bubeshi erred in holding that TRA came into being on “1 July 1996”, rather it came into being on 7 August 1995 as per Section 4 of the TRA Act and that it was only the amendment of Subsection (2) which came into operation on “1 July 1996”.
11. On the second ground of appeal, Judge Mrosso held that this ground was misconceived as nowhere in the Ruling did Judge Bubeshi discuss Section 28(2) of the TRA Act, although she discussed Section 25(2) of the Act which was premature. He also held that Judge Bubeshi should have confined herself to considering the two preliminary objections raised by the 3rd respondent, TRA, rather than make a pronouncement on the provisions of the TRA Act, which action would prejudice the trial of the case on the merits.
12. The Court of Appeal, therefore, allowed the appeal on the second ground and ordered that TRA be reinstated as a defendant in the suit because there was no doubt that the plaintiff disclosed a cause of action against the 3rd respondent, TRA, and that it was rightly joined as a party in the suit.
13. The Court of Appeal further observed that the grounds of appeal as presented by the appellants did not clearly capture the crux of the matter, which was striking out TRA as a respondent in the suit. It noted that the appellants could be forgiven for this as the High Court judge had partially and prematurely strayed into the merits of the case. The Court of Appeal observed that it was nearly eight (8) years since the appellants had filed the suit, yet the case had not yet been considered on the merits. It therefore directed that the file be returned to the High Court for the resumption of

6 Date on the judgment is 27 March 2006; however, the cover page reads that the judgment was delivered on 31 March 2006 but hearing was concluded is 20 February 2006 – See p 1 of the judgment.

proceedings by another Judge.

14. On 19 September 2006, the case was returned to the High Court and assigned to Judge Mihayo for resumption of trial in *Civil Case No 361 of 1999*. The Court considered four (4) issues, namely, first, whether TRA existed as of 7 August 1995 and who was the plaintiff's employer; second, who actually retired the plaintiffs and who had the authority to do so; third, whether the plaintiff's retirement was lawful; and, fourth, the type of reliefs that the parties were entitled to. On 15 September 2009, the Judge delivered his judgment against the plaintiffs and dismissed the suit with costs. He observed that, TRA existed from "7 August 1995" but the employer of the plaintiff (Cleophas) remained the Ministry of Finance. Furthermore, that the plaintiffs were neither seconded to, nor employed by TRA. The Judge held that the plaintiffs were retired in public interest by the President vide the "*DOKEZO SABI*" of *Ref. No TYC/C/115/34* dated 17 /4/1996 (Government Retrenchment Circular) which was assented to on 19 April 1996, as empowered under the relevant laws. The Judge concluded by observing that since the plaintiff and others had no relation to the Ministry of Finance after the functions of the Ministry were subsumed by TRA, the only logical thing to do was to retire the plaintiffs.
15. In October 2010,⁷ the Applicant appealed the decision of the High Court before the Court of Appeal sitting at Dar es Salaam in *Appeal No 27 of 2010*. In its judgment, dated 15 December 2010, the Court of Appeal upheld the decision of the High Court.
16. Dissatisfied with the decision of the Court of Appeal, in 2011⁸ the Applicant filed *Civil Application No 13 of 2011 seeking a review of the judgment of the Court of Appeal*. On 15 February 2013, the Court of Appeal dismissed the application for review for lack of merit.
17. As a last resort, on 15 April 2015, the Applicant filed a complaint with Commission for Human Rights and Good Governance. On 20 April 2015, the Commission informed the Applicant that it had no jurisdiction to take up the matter as per Section 130(5) of the Constitution of the Respondent State.

7 Date is not disclosed.

8 Date is not disclosed.

B. Alleged violations

18. The Applicant alleges the violation of the following:
 - a. The right to work guaranteed under Article 15 of the Charter, by:
 - i. unlawfully terminating his employment from the TRA contrary to the provisions of the TRA Act N0.11 of 1995
 - ii. the failure of TRA to secure his employment status.
 - b. The right to fair trial guaranteed under Article 7 of the Charter by:
 - i. violating his right to be tried by an impartial court or tribunal
 - ii. violating his right to be tried within a reasonable time
 - iii. failing to consider the evidence adduced.
 - c. The right to equality before the law and equal protection of the law, guaranteed under Article 3(1) and (2) of the Charter through the decision of the domestic courts to declare that he was not an employee of TRA and by the failure of the High Court to hear his witness.
 - d. The right to freedom from discrimination guaranteed under Article 2 of the Charter by indiscriminately applying Section 16(2) of the TRA Act with regard to the status of commissioners and employees.

III. Summary of the Procedure before the Court

19. The Application was filed before the Court on 14 September 2016 and served on the Respondent State on 29 January 2017.
20. On 17 January 2017, the Court granted the Applicant's request for legal aid and both parties were informed of the Court's decision.
21. On 13 September 2017, the Respondent State's attention was drawn to Rule 55 on passing judgment in default after reminders to file its Response were sent on 6 February 2017, 9 February 2017 and 28 August 2017.
22. On 25 January 2018, the Court, decided to grant the Respondent State a final extension of forty-five (45) days to file its Response. This notwithstanding, the Respondent State failed to file its Response.
23. Pleadings were closed on 26 June 2018 and the Parties were duly notified.
24. On 17 August 2018, the Respondent State filed its Response to the Application out of time under Practice Direction No 38 citing the cause of delay as being consultation with various stakeholders. The Court decided in the interest of justice, to re-open pleadings and deem the Response as properly filed. Subsequently, it was notified to the Applicant on 29 August 2018.

25. The Applicant filed his Reply to the Respondent State's Response on 3 January 2019 and his submission on reparations on 20 March 2019. Both documents were notified to the Respondent State on 22 March 2019.
26. On 9 September 2019, the Applicant requested for a judgment in default with respect to reparations after the Respondent State failed to submit its response, after two reminders were sent.
27. Pleadings were once again closed on 8 October 2019.
28. On 18 December 2019, the Respondent State's attention was drawn to Rule 50 of the Rules on filing additional evidence after the close of pleadings⁹ but it did not take action.

IV. Prayers of the Parties

29. The Applicant prays the Court for the following measures and orders:
 - a. A Declaratory Order that the decisions of the Principal Secretary Establishment, BUBESHI J. and Judge MIHAYO and the decision of the Court of Appeal of Tanzania Civil Appeal Number 27/2010 at Dar-es-Salaam did not follow the law and did not consider my basic rights and the breach of the principle of natural justice which I suffered in the process of retrenchment, hence the decisions are a nullity.
 - b. The whole process of my retrenchment to be declared unfair as it denied me the possibility of obtaining employment elsewhere hence the respondent should be ordered to pay me compensation equivalent to the amount of salaries due me in respect of the period, taking into account the periodic salary increments.
 - c. I need legal aid because I have no money to employ an advocate. I have no job and my family depends on me so I need an Advocate to represent me in court.
 - d. The courts to appoint experts who can assist the court in order to determine proper my application.
 - e. The court to call witnesses who will be required by it and by the applicant.
 - f. Any other enabling provisions of the law in the Constitution of the United Republic of Tanzania in Criminal Appeal Number 60/2000.
30. The Applicant further prayed the Court for reparations as follows:
 - a. Order the Respondent State to pay the Applicant a sum of Tsh 500,000,000= (USD 200,000) as general damages for violations of the Charter and Constitution and as a result of the inconveniences and hardships suffered by the Applicant following unlawful

9 Rule 46(2) and (4) of the Rules of Court, 25 September 2020.

termination from employment and breach of employment contract.

- b. Order the Respondent State to pay the Applicant a sum of Tsh 8,406,300 as special damages for costs and expenses incurred and legal fees in respect of cases before the High Court, Court of Appeal of Tanzania and in this Court.
 - c. Order the Respondent State to pay the Applicant the pension on the total amount of salaries for the period of 20 years from 1996 to July 2016, when he would attain compulsory retirement age.
 - d. Order the Respondent State to pay the Applicant salaries for the period of 20 years from 1996 to July 2016.
 - e. Order the Respondent State to pay the Applicant gratuity based on the total income from employment for the period of 1996 to July 2016.
 - f. Any other reliefs the Court deems just and equitable to grant in the circumstance in the Application.
- 31.** In its Response, the Respondent State prays the Court for the following Orders with respect to its jurisdiction and the admissibility of the Application:
- a. That, the Honourable Court on Human and Peoples' Rights is not vested with jurisdiction to adjudicate the Application.
 - b. That, the Application has not met the admissibility requirements stipulated under Rule 40(5) and 40(6) of the Rules of Court.
 - c. That, the Application be declared inadmissible and duly dismissed.
 - d. That the costs of the Application be borne by the Applicants.
- 32.** With regard to merits of the Application, the Respondent State prays the Court to order:
- a. That, the Government of the United Republic of Tanzania did not violate the Applicant's right to equality before the law and equal protection of the law provided under Articles 31(2) and (2) of the African Charter on Human and Peoples' Rights.
 - b. That, the Government of the United Republic of Tanzania did not violate the Applicant's right to have his cause heard as provided by Article 7(1) of the African Charter on Human and Peoples' Rights.
 - c. That, the Government of the United Republic of Tanzania did not violate the Applicant's right to be tried within a reasonable time as provided by Article 7(1)(d) of the African Charter on Human and Peoples' Rights.
 - d. That, the matter has been concluded by the Court of Appeal of Tanzania.
 - e. That, the Application is totally void of merit.
 - f. That, the Applicants prayers be dismissed in their entirety.
 - g. That, the Application be dismissed in its totality for lack of a merit.
 - h. That, the cost of this Application be borne by the Applicant.

- 33.** With regard to Reparations, the Respondent State prays “[t]he Court to dismiss all of the Applicant’s prayers”.

V. Jurisdiction

- 34.** Article 3 of the Protocol provides that:

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

- 35.** The Court observes that pursuant to Rule 49(1) of the Rules, it “[S]hall conduct a preliminary examination of its jurisdiction [...] in accordance with the Charter, the Protocol and these Rules.”¹⁰

- 36.** In view of the foregoing, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

- 37.** The Court notes that the Respondent State has raised an objection to its material jurisdiction. It will, therefore, consider this objection before examining other aspects of its jurisdiction.

A. Objection to material jurisdiction

- 38.** The Respondent State raises an objection to the Court’s material jurisdiction on the grounds that it will be sitting as a court of first instance and as an appellate court should it adjudicate over matters already finalised by the highest court of Respondent State, and prays the Application to be dismissed.

- 39.** The Respondent State avers that the Court will be sitting as a court of first instance if it considers the following allegations: the provision of Article 36(2) of its Constitution was not cited in the Applicants’ termination letter; the “failure to include former employees into corporate setting”; the claim that the Applicant’s fundamental rights were not affected by retrenchment, since he was working in a corporate body, not the Government; the fact that the TRA should have been responsible for the welfare of its workers; that the failure of TRA to recognise the employment status of its employees was a violation of his rights; that the failure of domestic courts to rule on the failure to take into account Section 25 of the TRA Act No 11 of 1995, which constituted a violation of the Applicant’s rights; that the case took too long to be completed;

¹⁰ Rule 39(1), Rules of Court, 2 June 2010.

that both the High Court and the Court of Appeal violated his rights by not considering the evidence produced before them; and the allegation that it was discriminatory for TRA Commissioners to be deemed as TRA employees while the Applicant remained a government employee.

40. The Respondent State submits that the Court would be sitting as an appellate if it considers the following issues: whether the Applicant was not given reasons for the retrenchment or removal from employment; that TRA was in existence as of 7 August 1995; which entity had the authority to retrench the Applicant and whether the Applicant was retrenched lawfully; the witnesses called by the Applicant were not heard by the High Court; that the Applicant was not an employee of TRA and whether his retrenchment was done in accordance with Section 19(3) of Act No 16 of 1989 and Section 8(d) of the Respondent State's Pension Act.
41. The Applicant argues that the Court's material jurisdiction is established since the Respondent State is a party to the Charter, the Protocol and also deposited the Declaration under Article 34(6) of the Protocol. He also contends that he is a victim and a citizen of a State Party to the Charter in accordance with Article 5(1) of the Protocol, therefore, the Court has jurisdiction to entertain his Application in accordance with the Protocol.

42. The Court recalls that under Article 3(1) of the Protocol, it has jurisdiction to examine any application submitted to it, provided that the rights of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.¹¹
43. In the present Application, the Court notes that the Applicant has alleged violations of provisions of the Charter, specifically, Article 15 on the right to work, Article 7 on the right to a fair trial, Article 3(1) and (2) on the right to equality before the law and equal protection of the law and Article 2 on the right to freedom from discrimination. The Court notes that these rights are protected

¹¹ See, for instance, *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application No 028/2015, Judgment of 26 June 2020 (merits and reparations), § 18; *Gozbert Henrico v United Republic of Tanzania*, ACtHPR, Application No 056/2016, Judgment of 10 January 2022 (merits and reparations), §§ 38-40

by an international instrument to which the Respondent State is a party.

44. The Court recalls that, in accordance with its established case-law, it has jurisdiction to examine relevant proceedings before domestic courts to determine whether they comply with the standards set out in the Charter or any other instrument ratified by the State concerned.¹² Consequently, the claim that the Court would be sitting as a court of first instance in considering the Applicant's allegations is dismissed.
45. The Court further recalls that by examining whether or not the Respondent State's conduct is in consonance with the provisions of the earlier mentioned instruments, "the Court will be acting within its powers and neither will it be sitting as an appellate court nor will it be exercising power to revise the decision of the Court of Appeal".¹³ Consequently, the Court dismisses the objection alleging that it would be sitting to revise the decision of the Respondent State's Court of Appeal in hearing this Application.
46. As a consequence of the foregoing, the Court finds that it has material jurisdiction to consider the present Application and dismisses the Respondent State's objection.

B. Other aspects of jurisdiction

47. The Court notes that the Respondent State does not dispute its personal, temporal and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules,¹⁴ it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.
48. With regard to personal jurisdiction, the Court recalls, as indicated in paragraph 2 of this judgment, that on 21 November 2019, the Respondent State deposited the instrument of withdrawal of the Declaration under Article 34(6) of the Protocol. The Court has held that such withdrawal has no retroactive effect. Therefore, it has no bearing on matters pending before the Court prior to the filing of the instrument withdrawing the Declaration or new cases filed before the withdrawal took effect one (1) year after the notice

12 *Ernest Francis Mtingwi v Malawi* (jurisdiction) (15 March 2013), 1 AfCLR 190, § 14; *Kennedy Ivan v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 26; *Armand Guehi v Tanzania* (merits and reparations), § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35.

13 *Ernest Karatta, Wafafried Millinga, Ahmed Kabunga and 1744 Others v United Republic of Tanzania*, ACtHPR, Application No 002/2017, Judgment of 30 September 2021 (merits and reparations), § 33.

14 Rule 39(1) of Rules of Court, 2 June 2010.

- of withdrawal was deposited, which is on 21 November 2020.¹⁵
49. Accordingly, this Application having being filed before the Respondent State deposited its notice of withdrawal of the Declaration, is not affected by the said withdrawal. The Court, therefore, concludes that it has personal jurisdiction over this Application.
 50. The Court holds that it has temporal jurisdiction over this Application in so far as the alleged violations were committed before the Respondent State became a party to the Charter but continued after it became a party to the Protocol, namely, on the alleged violation of the right to work, when the Applicant's contract was terminated and on the right to a fair trial, the right to equality before the law and equal protection of the law and the right to freedom from discrimination arising out of the litigation process.¹⁶ The Court, therefore, finds, that it has temporal jurisdiction.
 51. The Court also holds that it has territorial jurisdiction over this Application given that the alleged violations occurred within the Respondent State's territory.
 52. In light of all the above, Court holds that it has jurisdiction to examine this Application.

VI. Admissibility

53. Article 6(2) of the Protocol provides that "[t]he Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter".
54. In line with Rule 50(1) of the Rules,¹⁷ "the Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules."
55. Further, Rule 50(2), which restates substantially Article 56 of the Charter, provides as follows:

Applications filed before the Court shall comply with all of the following conditions:

 - a. Indicate their authors even if the latter request anonymity;

15 *Andrew Ambrose Cheusi v Tanzania* (merits and reparations), §§ 35-39. See also, *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562, § 67.

16 *Jebra Kambole v United Republic of Tanzania*, ACTHPR, Application No 018/2018 Judgment of 15 July 2020 (merits and reparations), § 52 and *Almas Mohamed Muwinda & Others v United Republic of Tanzania*, ACTHPR, Application No 030/2017, Judgment of 24 March 2022 (merits and reparations), § 32 (iii).

17 Rule 40 of the Rules of Court, 2 June 2010.

- b. Are compatible with the Constitutive Act of the African Union and with the Charter;
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
 - d. Are not based exclusively on news disseminated through the mass media;
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 - f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter; and
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of African Union or the provisions of the Charter.
- 56.** The Court notes that the Respondent State has raised two objections to the admissibility of the Application. The first objection relates to the requirement of exhaustion of local remedies and the second relates to filing of the Application within a reasonable time. The Court will, therefore, consider these objections before examining other conditions of admissibility.

A. Objection based on non-exhaustion of local remedies

- 57.** The Respondent State avers that although the Applicant alleges that his right to equality before the law was violated, there is no evidence which shows that he instituted a constitutional petition at the High Court of Tanzania as provided for under Article 13 of its Constitution. Furthermore, Article 30(3) of the aforementioned Constitution provides that “any person claiming any provision in this Part of this Chapter or any law concerning his right or duty owed to him has been or is likely to be, violated by any person anywhere in the United Republic of Tanzania may institute proceedings for redress in the High Court” The Respondent State clarifies that the part of the Chapter referenced is the Bill of Rights duly enshrined in Part III of its Constitution. Furthermore, that the Respondent State enacted the Basic Rights and Duties Enforcement Act to provide the procedure for enforcement of constitutional basic rights, for duties and related matters.
- 58.** Citing the Commission's jurisprudence in *Communication No 263/02 Kenyan Section of the International Commission of Jurists, Law Society, Kituo cha Sheria vs Kenya*, the Respondent State avers that it was premature for the Applicant to seize the Court

before giving it an opportunity to address the alleged violation within the framework of its domestic legal system.

59. The Applicant states that he has met the requirement set out under Rule 40(5) of the Rules of Court.¹⁸ That he instituted a civil case in the High Court of Tanzania, whose decision he also challenged at the Court of Appeal of Tanzania, which is the apex court of the land. Citing the Court's jurisprudence in the Matter of *Kennedy Owino Onyachi and Charles John Mwanini Njoka vs Tanzania*, the Applicant argues that this Court has consistently held that the remedy of filing a constitutional petition before the High Court, as it applies in the judicial system of the Respondent State, is an extraordinary remedy.
60. The Applicant, therefore, submits that the Respondent State's objection in this regard has no legal basis and should be dismissed.

61. The Court notes that pursuant to Article 56(5) of the Charter, whose provisions are restated in Rule 50(2)(e) of the Rules, any application filed before it shall fulfil the requirement of exhaustion of local remedies, unless the same are unavailable, ineffective and insufficient or the proceedings in respect of the local remedies are unduly prolonged.¹⁹
62. In the present case, the Court notes that the Applicant approached the highest court in the Respondent State, which dismissed his application for review on the basis of lack of merit in "Civil Application No 27 of 2010" on 15 February 2013. The Court also observes that one of the main contentions by the Respondent State is that the Applicant never raised allegations, during the domestic proceedings, relating to the violation of his right to equal protection of the law and non-discrimination.
63. The Court reiterates its jurisprudence where it has held that :
...where an alleged human rights violation occurs in the course of the domestic judicial proceedings, domestic courts are thereby afforded an opportunity to pronounce themselves on possible human rights

18 Rule 50(2)(e) of the Rules of Court, 25 September 2020.

19 *Peter Joseph Chacha v United Republic of Tanzania* (admissibility) (28 March 2014) 1 AfCLR 398, §§ 142-144; *Almas Mohamed Muwinda & Others v United Republic of Tanzania*, ACtHPR, Application No 030/2017, Judgment of 24 March 2022 (merits and reparations), § 43.

breaches. This is because the alleged human rights violations form part of the bundle of rights and guarantees that were related to or were the basis of the proceedings before domestic courts. In such a situation it would, therefore, be unreasonable to require the Applicants to lodge a new application before the domestic courts to seek relief for such claims.²⁰

64. In respect of the Applicant's claims before this Court, it is to be noted that while the Applicant did not plead his case before the domestic courts in the same manner that was done before the Court, it is clear that the alleged violation of his rights was occasioned during the domestic proceedings.
65. A claim for the unlawful termination of his employment contract and subsequent violation of his right to work directly impacts on the realisation of various rights alleged under the bundle of labour rights.
66. In light of this, the Court observes that the Respondent State had the opportunity to address the possible human rights breaches before the domestic courts but it did not.
67. Regarding the filing of a constitutional petition before the Respondent State's High Court, as provided for under Article 13 of the Respondent State's Constitution, the Court has already held that this remedy, in the Tanzanian judicial system, is an extraordinary remedy that the Applicant is not required to exhaust prior to seizing this Court.²¹
68. In light of the foregoing, the Court dismisses the Respondent State's objection based on the non-exhaustion of local remedies.

B. Objection based on failure to file the Application within a reasonable time

69. The Respondent State claims that since the Application was

20 *Jibu Amir alias Mussa and another v United Republic of Tanzania*, ACtHPR, Application No 014/2015, Judgment of 28 November 2019, § 37; *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, §§ 60-65, *Kennedy Owino Onyachi and Another v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 54, *Jibu Amir alias Mussa and another v United Republic of Tanzania*, ACtHPR, Application No 014/2015, Judgment of 28 November 2019, § 37; *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, §§ 60-65, *Kennedy Owino Onyachi and Another v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 54; *Ernest Karatta, Wafafried Millinga, Ahmed Kabunga and 1744 Others v United Republic of Tanzania*, ACtHPR, Application No 002/2017, Judgment of 30 September 2021 (merits and reparations), § 57.

21 *Alex Thomas v Tanzama Judgment*, op.cit, §§ 60-62; Application No 007/2013. Judgment of 3 June 2016, *Mohamed Abubakari v United Republic of Tanzania*, §§ 66-70; Application No 011/2015. Judgment of 28 September 2017, *Christopher Jonas v United Republic of Tanzania*, § 44.

not filed within a reasonable time, the Court should find that the Application has failed to comply with the provisions of Rule 40(6) of the Rules.²²

70. The Respondent State submits that the judgment of the Court of Appeal was delivered on 28 October 2009, that its instrument accepting the jurisdiction of the Court under Article 5(3) of the Protocol was deposited on 29 March 2010 and that this Application was filed on 14 September 2016. Furthermore, that a period of seven (7) years and eight (8) months elapsed from when it accepted the jurisdiction of the Court to when the Applicant filed his Application at the Court.
71. The Respondent State argues that the Applicant's case was concluded by the Court of Appeal on 15 February 2013, when it ruled on the Applicant's application for review of the Court of Appeal Decision in "*Civil Appeal No 27 of 2010*". The Respondent State claims that the Applicant then filed his Application before the Court on 14 September 2016, which is three (3) years after the conclusion of his case at the local jurisdiction. It further observes that even though Rule 40(6)²³ of the Rules of Court does not prescribe the time limits within which individuals are required to file an application, a period of six months is reasonable time as established in other international jurisdictions.
72. Citing the decision of the African Commission on Human and Peoples' Rights in *Michael Majuru vs Zimbabwe* (308/05) and noting the Applicant's non-compliance with Rule 40(6) of the Rules, the Respondent State submits that the Application should be declared inadmissible. The Respondent State argues that the Application should be dismissed with costs, particularly since the Applicant has not stated any reasons that impeded him from lodging his application within six months.
73. Relying on the Court's jurisprudence in *Alex Thomas v Tanzania*,²⁴ and the European Commission of Human Rights' decision in *Hilton vs United Kingdom*²⁵ the Applicant submits that there is no fixed period of time within which to seize the Court and that each case should be decided based on its own facts and circumstances. The Applicant avers that he filed the Application on 14 September 2016, which is three (3) years after the Court of Appeal rendered

22 Rule 50(2)(f) of the Rules of 25 September 2020.

23 Rule 50(2)(f) of the Rules of Court, of 25 September 2020.

24 *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 56.

25 *Hilton vs United Kingdom*, Application No 12015/86.

its decision in *Civil Appeal No 27 of 2010*. Furthermore, that he was not aware of the Court's existence, until 2016 when he heard an announcement by the former President of the African Court regarding the Court being in Arusha, Tanzania. He submits, therefore, that the Respondent State's objection in relation to the admissibility of the application has no legal basis and should be dismissed.

74. The Court notes that neither the Charter nor the Rules specify the exact time within which Applications must be filed, after exhaustion of local remedies. Article 56(6) of the Charter and Rule 50(2)(f) of the Rules merely provide that Applications must be filed "...within reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter".
75. The Court has held "...that the reasonableness of the time frame for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."²⁶
76. The Court considers that the ordinary judicial remedies related to the present matter were exhausted on 15 December 2010, when the Court of Appeal rendered its judgment. However, the Court also recalls its jurisprudence, that "even if the review process is an extraordinary remedy, the time spent by the Applicant in attempting to exhaust the said remedy should be taken into account while assessing reasonableness within the meaning of Article 56(6) of the Charter."²⁷ In this Application, the Court takes notice of the fact that the Court of Appeal rendered its decision on the Application for review on 15 February 2013 and that the Applicant filed this Application before the Court on 14 September 2016.
77. The Court must thus assess whether the period from 15 February 2013, when the Court of Appeal rendered its decision on the

26 *Norbert Zongo and Others v Burkina Faso* (preliminary objections) (25 June 2013) 1 AfCLR 197, § 121.

27 See *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 61 and *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 16, § 56.

Application for review, to 14 September 2016, when the Applicant seized this Court, that is, three (3) years, six (6) months and 30 days, is reasonable in terms of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.

78. The Court recalls that some of the circumstances that it has taken into account in determining the reasonableness of time for filing an application include: the duration of time of the litigation procedure at the domestic courts involving several determinations both by the High Court and the Court of Appeal;²⁸ lack of awareness of the existence of the Court,²⁹ and the use of extraordinary remedies³⁰ and quasi-judicial proceedings.³¹ These circumstances, however, must be proved by an Applicant who seeks to rely on them.
79. The Court observes that a period of two (2) years, ten (10) months and seventeen (17) days had elapsed after the date the Respondent State deposited the Declaration accepting the jurisdiction of the Court to receive cases from individuals to the date the Court of Appeal rendered its decision on the Application for review. The Court surmises that by this time its existence was not well known within the Respondent State as well as across Africa, generally.
80. The Court also takes into account the personal circumstances of the Applicant and his claim that he had exhausted his resources during the litigation procedures at the domestic level, as a result of which he sought free legal representation from the Court.
81. The Court notes that after the decision of 15 February 2013, the Applicant spent more time pursuing extraordinary non judicial remedies when he filed the complaint with the Commission on Human Rights. The proceedings before the Commission, being quasi-judicial in nature, offered remedies that the Applicant was not required to exhaust. Nonetheless, he had a reasonable expectation that the Commission's findings would have resulted in a decision that was favourable to him and thereby dispensing with the need to file the Application before this Court. Although

28 *Ernest Karatta, Walafrid Millinga, Ahmed Kabunga and 1744 Others v United Republic of Tanzania*, ACTHPR, Application No 002/2017, Judgment of 30 September 2021 (merits and reparations), § 65.

29 *Amir Ramadhani v Tanzania* (merits), § 50; *Christopher Jonas v Tanzania* (merits), § 54.

30 *Armand Guehi v Tanzania* (merits and reparations) § 56; *Werema Wangoko Werema & Another v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520, § 49; *Alfred Agbes Woyome v Republic of Ghana* (merits and reparations) (28 June 2019) 3 AfCLR 235, §§ 83-86.

31 *Alfred Agbesi Woyome v Republic of Ghana*, ACTHPR, Application No 001/2017, Judgment of 28 June 2019 (merits and reparations), §§ 83-86.

these are extraordinary remedies, the Court takes this into account in computing the reasonableness of the period taken by the Applicant in filing the Application.

82. In the circumstances, the Court concludes that the period of three (3) years, six (6) months and 30 days, is not unreasonable within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.
83. In light of the above, the Court, dismisses the Respondent State's objection to the admissibility of the Application based on failure to file the Application within a reasonable time.

C. Other conditions of admissibility

84. The Court notes that there is no contention regarding compliance with the conditions set out in Rule 50(2)(a), (b), (c), (d), (e) and (g). Nonetheless, the Court must satisfy itself that these conditions have been met.
85. The record shows that the Applicant has been clearly identified by name, in fulfilment of Rule 50(2)(a) of the Rules.
86. The Court also notes that the claims made by the Applicant seek to protect his rights guaranteed under the Charter. Furthermore, one of the objectives of the Constitutive Act of the African Union, as stated in Article 3(h) thereof, is the promotion and protection of human and peoples' rights. Besides, the Application does not contain any claim or prayer that is incompatible with a provision of the said Act. Therefore, the Court considers that the Application is compatible with the Constitutive Act of the African Union and the Charter, and holds that it meets the requirement of Rule 50(2)(b) of the Rules.
87. The language used in the Application is not disparaging or insulting to the Respondent State or its institutions in fulfilment of Rule 50(2)(c) of the Rules.
88. The Application is not based exclusively on news disseminated through mass media as it is founded on court documents from the municipal courts, the TRA Act, and "*DOKEZO SABILI*" of the Respondent State in fulfilment with Rule 50(2)(d) of the Rules.
89. Further, the Application does not concern a case which has already been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union in fulfilment of Rule 50(2)(g) of the Rules.

90. The Court, therefore, finds that all the admissibility conditions have been met and that this Application is admissible.

VII. Merits

91. The Applicant alleges a violation of the following rights guaranteed under the Charter: the right to work, Article 15; the right to fair trial, Article 7; and the right to equality before the law and equal protection of the law and the right to freedom from discrimination Article 2.

A. Alleged violation of the right to work

92. The Applicant alleges that his right to work was violated when the Respondent State unlawfully “terminated” his employment and also when it failed to secure his employment status.

i. Unlawful termination of the Applicant’s contract

93. The Applicant states that he was a “Finance Manager Officer” employed by the Ministry of Finance on a permanent and pensionable basis in one of its three revenue departments. However, in 1995, the Respondent State converted the revenue departments to an independent public corporate entity known as the Tanzania Revenue Authority (TRA) by virtue of *TRA Act No 11 of 1995*. As a result, all former employees of the Ministry of Finance, including the Applicant, started serving under the authority of the TRA. Subsequently, TRA undertook a screening of all its staff leading to the unlawful “termination” of the Applicant on 30 June 1996 by the Permanent Secretary, Ministry of Finance. He alleges that no legal procedure was followed and the only reason given for his “termination” was that the Government had decided to reduce its workforce as a means of reducing the expenditure of its activities in order to increase office productivity.
94. The Applicant avers that the “termination” was done contrary to the principles of natural justice, since he was not informed of his shortcomings, or given an opportunity to defend himself and he did not belong to the two categories of persons to be retrenched. Furthermore, that the Permanent Secretary, Ministry of Finance had no power or authority to retrench him, because he was no longer a civil servant since TRA came into operation on 7 August 1995 and his employment contract was transferred to TRA by virtue of Section 28(2) No 11 of 1995. He submits that this was contrary to Section 5(3)(a) of the TRA Act. He also maintains that

TRA employees are not civil servants by virtue of Section 2 of the Civil Service Act of 1989.

95. The Respondent State contends that the reasons for the Applicant's "retrenchment/ removal from employment in public interest" were provided in his retrenchment letter which he tendered as evidence as illustrated in the judgment of the "Court of Appeal in *Criminal Appeal No 27 of 2010 of the judgment of 30 December 2010*". The reasons provided therein were that the Applicant was retrenched from employment in the public interest and because the Government had decided to reduce the number of Government employees in order to minimise Government expenditure and increase office productivity.

96. Article 15 of the Charter provides that "[e]very individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work".
97. The Court notes that the Applicant's contention is that even though he did not fall into the two categories of those to be retrenched in the public interest, that is, those who had a bad record in revenue collection, with doubtful integrity, and those whose performance was affected by advanced age, long sickness and low education, his contract was terminated.
98. The Court observes that in his judgment dated 15 September 2009, Judge Mihayo considered the evidence before the High Court by defence witnesses 1 and 2, which indicated that the plaintiff, and other similarly placed employees, were retired in the public interest by the Principal Secretary, Ministry of Finance on behalf of the President. Furthermore, the Court notes that the Court of Appeal in its judgment dated 27 March 2006³² in *Civil Appeal No 17 of 2003* observed that that the High Court considered Exhibit 2, which was the plaintiffs 'Removal Letters' which provided the reasons for removal in paragraph 1, being in the public interest to enable the reduction of the size of the Government workforce as a means of reducing its expenditure on activities and increasing office productivity.

32 Court of Appeal in its judgment dated 27 March 2006, Page 14, 15, 18.

99. The Court observes that in addition to the issuance of the “retrenchment letter”, dated 25 June 1996 notifying the Applicant of the “retrenchment” and the procedural steps to be undertaken for a successful “retrenchment” which included the payment of all his entitlements till 30 June 1996, the Applicant was also paid “*kifuta jasho*”, a payment amounting to a salary of four months per year of employment up to ten (10) years of service.³³
100. The Court observes that there is nothing on record to suggest that the Applicant’s termination was unlawful and not compliant with the laws, since he was terminated following issuance of a directive from the President of the Respondent State who is empowered to retire public servants in the public interest. Additionally, the Applicant was notified of the termination and reasons for his retrenchment were provided. Finally, he was paid all his entitlements including gratuity as communicated in the “*DOKEZO SABILILI*”. The Court further observes that the High Court analysed all the evidence produced before it and came to the conclusion that the Applicant was lawfully terminated, and its finding was upheld by the Court of Appeal.
101. The Court, therefore, finds that the Respondent State has not violated the Applicant’s right to work provided under Article 15 of the Charter, with regard to terminating the Applicant’s employment.

ii. Failure of Tanzania Revenue Authority to secure the Applicant’s employment status

102. The Applicant submits that at the time he was “terminated” from employment, he was an employee of TRA by direct transfer after the revenue departments were transformed to form an independent public body and as such TRA had the obligation to protect him. He avers that the Court of Appeal held that direct transfers in accordance with the Government Retrenchment Circular, only take place after an employee has completed his or her secondment as provided in Clause 5 of the Circular. He submits that the court however, overlooked Clause 11, paragraph 11 of the Circular which implies that direct transfers can be effected after secondment or without undergoing the secondment process, which was the applicable procedure in his case.
103. The Applicant further submits that the decisions of the High Court and Court of Appeal on the status of the TRA in relation to his contract of employment violate his rights.

33 Page 3, Paragraph 14 of the Application dated 14 September 2016.

104. The Respondent State disputes this allegation and calls for the Applicant to provide proof thereof. It further argues that the Applicant has not demonstrated how TRA failed to recognize the employment status of its employees. Moreover, that the Applicant never raised this complaint with TRA and therefore, cannot raise this concern at this juncture, especially since the Parties had already agreed in the “Memorandum of Agreed Facts” before the High Court proceedings that *“None of the Plaintiffs complain of their grievances with the TRA”*.
105. The Respondent State argues that the Applicant was never an employee of TRA as established by the Court of Appeal in its judgment delivered in *Civil Appeal No 27 of 2010*, rather he was an employee of the Ministry of Finance. It also cites the section of the Court of Appeal judgment that reads “The plaintiffs were never seconded to TRA and there is no evidence to that effect nor did they remain employees of the Ministry of Finance while doing work that was later taken over by the Authority”. It prays the Court to dismiss the Application for lack of merit.

106. The Court observes that the High Court in its judgment dated 27 February 2009, considered and determined the status of the plaintiffs in relation to the obligations of TRA to its employees. The High Court held that “while it was true that TRA became operational from the effective date of the Act establishing it, this did not mean that the plaintiffs automatically became employees of TRA by virtue of the Act establishing TRA”.³⁴ It further observed that there was no evidence to prove that the employees were seconded to TRA.
107. On its part, the Court of Appeal, in its judgment dated 30 December 2010,³⁵ held that “going by the terms of the Establishment Circular, clause 11,³⁶ it was unpersuaded that the appellants at the material time were employees of the TRA”. Furthermore, it observed that the circular established three categories of employees, namely, those

34 Page marked 000536 and 0000535.

35 Page 10 and 11.

36 Clause 11 is titled “*Utaratibu wa uhamisho wa moja kwa moja.*”

who were seconded, attached or directly transferred. It observed that the Applicant (PW 1) had neither a letter of appointment from the Ministry of Finance or TRA, which in itself was an anomaly, as it meant that the Ministry was paying someone who was not its employee. It further observed that by the appellant's own admission, he and his former colleagues complained about their retrenchment to the Ministry of Finance and not to TRA. The Court of Appeal observed that the evidence on record supported the finding of the High Court, that the appellants were removed in the public interest by the President vide the "*DOKEZO SABIL*" on 19 March 1996. The Court of Appeal, therefore, concluded "that the appellants were employees of the Ministry of Finance, within the meaning of Section 2 of the Civil Service Act and could be subject to removal in the public interest under Section 19(3) thereof".

108. From the foregoing analysis, it is clear that both the High Court and Court of Appeal made the same finding regarding the status of the Applicant in relation to his alleged employment status by TRA. Moreover, the Applicant did not provide any evidence to demonstrate that he was employed by TRA. Furthermore, the Court observes that in assessing the Applicant's status in relation to TRA, the High Court and Court of Appeal considered all the evidence adduced before them in this regard. The Court also notes that there is nothing on record to indicate that the domestic courts failed to adhere to the established laws and procedures.
109. In view of the above, the Court finds that the Respondent State did not violate the Applicant's' right to work as provided under Article 15 of the Charter in relation to the alleged failure to secure his employment status with TRA.

B. Alleged violation of the right to a fair trial

110. The Applicant alleges that the Respondent State committed three (3) acts which led to the violation of his right to a fair trial, namely: (i) the failure to try him before an impartial court or tribunal; (ii) the failure to try him within a reasonable time; and (iii) the failure to consider his evidence.

i. Alleged violation on the right to be tried by an impartial court or tribunal

111. The Applicant avers that the decisions of the Principal Secretary, Ministry of Finance, Judge Bubeshi of the High Court on the preliminary objections in *Civil Suit, Case No 361/1999*, Judge Mihayo of the High Court on the merits in *Civil Case No 361 of*

1999 and the decision of the Court of Appeal in *Civil Appeal No 27/2010* did not follow the law. He also states that these decisions did not consider his basic rights and they breached the principle of natural justice, causing him to suffer by upholding the legality of the retrenchment.

112. The Applicant also avers that he challenged the decision of the High Court by filing an appeal at the Court of Appeal in *Civil Appeal No 17/2003*, because Judge Bubeshi erred by holding that TRA came into operation on 1 July 1996; that TRA should be struck off from the Plaintiff; and that TRA did not inherit the former employees of revenue departments because they remained civil servants under the Ministry of Finance. Furthermore, after hearing the Appeal arising from the judgment of Judge Bubeshi, the Court of Appeal rendered its judgment to the effect that, the TRA came into operation on 7 August 1995 by virtue of Government Notice No 419 of 1995. He also held that the Plaintiffs (Appellants) remained employees of the former revenue departments and were not TRA employees by virtue of Section 25(2) of the TRA Act No 11 of 1995 and that TRA be “returned” to the case as third Defendant/ Respondent.
113. The Applicant states that, after hearing the case on the merits when it was returned to the High Court, Judge Mihayo still upheld the decision of Judge Bubeshi, that TRA came into operation on 1 July 1996. He argues that, this decision was contrary to the decision of the Court of Appeal that former revenue employees remained in the Ministry of Finance as civil servants.
114. The Applicant further alleges that Judge Mihayo held that by virtue of Section 25(2) of the TRA Act No. 11 of 1995, the Plaintiffs (Appellants) remained “employees of the Government. They were never employed by the Authority”. He also held that the Applicants did not have the same status as the Commissioners to be employed by TRA; It was unfair not to allow potential witness, Mr. Nyambere to give his evidence and that the Applicants were retired in the public interest.
115. The Applicant finally avers that the decision on his application for review was unfair because there was no evidence of names attached to the “*DOKEZO SABIL*” submitted in court by the Respondent State.
116. The Respondent State argues that the Applicant never raised this allegation before the domestic courts. It further avers that the Applicant’s case at the trial court as well as the Court of Appeal was not based on Section 25 of the TRA Act No 11 of 1995, hence the courts were not moved to adjudicate on whether the Section violated his rights as it did not include issues of contract

of employment. Moreover, that the Applicant had the opportunity to raise this allegation during his appeal at the Court of Appeal. Additionally, he could have filed a constitutional petition under the Basic Rights and Duties Enforcement Act Cap 3 for enforcement of the alleged violated rights.

117. Article 7(1)(d) provides that “[e]very individual shall have the right to be tried...by an impartial court or tribunal.”
118. The Court observes that the Applicant’s bone of contention is that the domestic courts did not consider his basic rights and breached the principle of natural justice, causing him to suffer a “retrenchment”. More specifically, that the relevant judicial hierarchies and the Principal Secretary, Ministry of Finance did not follow the established procedures and law in determining whether or not he was an employee of TRA in his retrenchment.
119. The Court further observes that the retrenchment was communicated to the Applicant through procedures established by law and he was paid four (4) months’ salary for every ten (10) years served. The Applicant being dissatisfied with the decision to terminate his employment, proceeded to file a suit before the domestic courts and pursued the judicial remedies available up to the Court of Appeal.
120. The Court notes that the domestic courts followed the procedures laid down by law. Moreover, in line with the Court of Appeal’s ruling/judgment on preliminary objections in Civil Appeal No 17 of 2003, when the case was returned to the High Court for consideration on the merits, it was heard by another Judge.
121. The Court also observes from the decisions of the domestic courts and the record before it, that the domestic courts considered the evidence adduced, heard the testimonies of the parties and the witnesses and relied on the applicable laws in making their decisions. Similarly, the retrenchment of the Applicant was done in line with the provisions of the Civil Service Act, since the Applicant was deemed a civil servant working in the Ministry of Finance.
122. The Court therefore finds that there is no basis to conclude that the decisions of the domestic courts, and of the Principal Secretary, Ministry of Finance, were taken in violation of the prescribed laws and procedures. In these circumstances, the violation of the Applicant’s right to be tried by an impartial court or tribunal has

not been established.

- 123.** In view of the above, the Court finds that the Respondent State did not violate the Applicant's right to be tried by an impartial court or tribunal as provided under Article 7(1)(d) of the Charter.

ii. Alleged violation of the right to be tried within a reasonable time

- 124.** The Applicant alleges that the Court of Appeal took too long to determine his case. That he filed the case at the High Court in 1999 and it was finalized after fourteen (14) years. During the entire trial, the proceedings were adjourned several times without any justification for a period of more than two months after it was presented for mention. He also avers that there was a time he complained to the High Court judge that the case had taken too long. The Applicant avers that the "last order was rendered on 19 September 2008, but the learned trial High Court Judge recorded that date of judgment as 20 December 2008. Furthermore, the trial Judge recorded the date of closing the hearing as 27 February 2009, instead of 15 September 2009, which is the correct date. He avers that the court took almost ten months (10) without delivering the judgment that is from "19 November 2008 to 15 September 2009".
- 125.** The Applicant avers that he filed a suit at the High Court on 1 October 1999, that is, Civil Suit, Case No 361/1999. The Applicant further avers that Court of Appeal, considered his application for review and dismissed the Application for lack of merit on 15 February 2013 in Civil Application No 13/2011.
- 126.** The Respondent State submits that the delay in completing the Applicant's case on merits at the trial court was caused by an appeal filed by the Applicant at the Court of Appeal, challenging the High Court's decision on the preliminary objections raised by the Respondent State. The Respondent State argues that both parties were exercising their fundamental rights to a fair trial in pursuit of justice.

- 127.** Article 7(1)(d) provides that "[e]very individual shall have the right be tried within a reasonable time ...".

128. The Court recalls its decision in *Wilfred Onyango and 9 others v Tanzania*, where it held that “...there is no standard period that is considered reasonable for a court to dispose of a matter. In determining whether time is reasonable or not, each case must be treated on its own merits.”³⁷ Furthermore it recalls, its earlier jurisprudence, where it held that various factors are considered in assessing whether a case was disposed of within a reasonable time within the meaning of Article 7(1)(d) of the Charter. These factors include the complexity of the matter, the behaviour of the parties, and that of the judicial authorities who have a duty of due diligence in circumstances where severe penalties apply.³⁸
129. The Court notes that the Applicant's contention with regard to being tried within a reasonable time pertains to the time it took the domestic courts to finalise his case. Consequently, this Court will assess the time when the Applicant filed a suit at the High Court on 1 October 1999, until his case was disposed of by the Court of Appeal on 15 February 2013, following his application for review of the judgment, which is thirteen (13) years, four (4) months and fourteen (14) days.
130. In the instant case, the Court observes that after the Applicant first filed the suit at the High Court in *Civil Suit, Case No 361/1999* on 1 October 1999, the Respondent State raised objections. The High Court rendered its Ruling on preliminary objections on 28 September 2001. The Court observes that it took the High Court one (1) year, eleven (11) months and twenty (27) days to render a decision on the preliminary objections.
131. The Applicant then appealed the High Court's ruling to the Court of Appeal by filing *Civil Appeal No 17 of 2003*. The Court of Appeal rendered its judgment on this appeal on 27 March 2006³⁹ and directed that the case be returned to the High Court to resume the trial on the merits of the case. The Court observes that this Judgment and other records on file do not indicate when the Applicant actually appealed the decision of the High Court. Therefore, the date that the Court will use to compute the time between the two procedures is when the High Court rendered its

37 *Wilfred Onyango Nganyi & 9 others v Tanzania* (merits), § 135.

38 See *Armand Guehi v Tanzania* (merits and reparations), §§ 122-124. See also *Alex Thomas v Tanzania* (merits), §104 *Wilfred Onyango Nganyi and Others v United Republic of Tanzania* (merits) (2016) 1 AfCLR 507, § 155; and *Norbert Zongo and Others v Burkina Faso* (merits) (2014) 1 AfCLR 219, §§ 92-97, 152; *Gozbert Henerico v United Republic of Tanzania*, ACTHPR, Application No056/2016, Judgment of 10 January 2022 (merits and reparations), § 82.

39 The hearing in matter judgment was concluded on 20/2/2006. The Judgment is dated 27/3/2006 but was delivered on 31/3/2006.

ruling on 28 September 2001, to the time when the Court of Appeal delivered its judgment on the appeal on preliminary objections on 27 March 2006, which is four (4) years, five (5) months and twenty-seven (27) days.

132. As directed by the Court of Appeal, the case was returned to the High Court on 19 September 2006 for determination of the merits of the case. The High Court rendered its judgment on the merits in Civil Case No 361 of 1999 on 15 September 2009. The period that the High Court took to determine this case on the merits was two (2) years, eleven (11) months and twenty (27) days.
133. Still being dissatisfied with the High Court's decision on the merits, the Applicant appealed to the Court of Appeal in *Civil Appeal No27 of 2010*. The Court of Appeal rendered its judgment on 15 December 2010 and upheld the decision of the High Court. The Court observes that the time frame from when the High Court considered the case on the merits to when the Court of Appeal rendered its decision on the Applicant's appeal is seven (7) months and nineteen (19) days.
134. Still aggrieved with the decision of the Court of Appeal, the Applicant filed an application for "Review in *Civil Application No 13 of 2011*". The Court of Appeal dismissed the Application for review for lack of merit on 15 February 2013. The Court observes that the Ruling of the Court of Appeal indicates that hearing of the Application was conducted on "11 April 2013", which is an erroneously recorded date, because this date is after the court had rendered its decision on the application for review of its judgment of 15 February 2013. Therefore, for computation purposes, the date which this Court will use is when the Court of Appeal rendered its judgment on the appeal on the merits of the case, which is 15 December 2010 to when the Court of Appeal delivered its judgment on the application for review, on 15 February 2013, which is two (2) years, one (1) month and sixteen (16) days.
135. The Court observes that on average it took less than three (3) years for domestic courts to finalise the different stages of procedures before them. The Court also observes that from the time the Applicant filed his case before the High Court on 1 October 1999, to the time his case was finally disposed of by the Court of Appeal following the review on 15 February 2013, a period of thirteen (13) years, four (4) months and fourteen (14) days had elapsed. The Court notes that although this time frame is long, it must be contextualised since both the Applicant and the Respondent State pursued the available judicial remedies at the national courts. The Court observes that there is no evidence

on record to suggest that either the Applicant or the Respondent State deliberately hampered the judicial procedures.

136. From the foregoing, the Court finds that the Respondent State did not violate the Applicant's right to fair trial as provided under Article 7(1)(d) by not trying the Applicant within a reasonable time.

iii. Alleged violation due to failure to consider evidence

137. The Applicant avers that both the High Court and Court of Appeal failed to consider evidence adduced before them as provided under Section 64(1) of the Evidence Act in *Civil Appeal No 27/2010*. He also states that these courts did not consider the TRA Act No 11 of 1995 and other laws, leading to the violation of his rights.

138. The Respondent State cites the decisions of the High Court and Court of Appeal and avers that both courts considered and concluded all relevant matters of evidence tendered before them. Additionally, that this allegation raised at this point is calling for the Court to sit as a court of first instance as well as an appellate court.

139. Article 7(1) of the Charter provides that "[e]very individual shall have the right to have his cause heard".

140. The Court has previously held that:

...domestic courts enjoy a wide margin of appreciation in evaluating the probative value of a particular evidence. As an international human rights court, the Court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings.⁴⁰

141. The above notwithstanding, the Court can, in evaluating the manner in which domestic proceedings were conducted, intervene to assess whether domestic proceedings, including the assessment of the evidence, was done in consonance with international human rights standards.

142. In relation to the Application before it, the Court observes that the Applicant does not point to the specific evidence adduced before

40 *Kijiji Isiaga v Tanzania*, § 65.

the domestic courts that was not considered. Regardless, it notes that the High Court considered *Government Notice No 419 of 1995*, and the Applicant's removal letter as part of the evidence. The Court of Appeal also made reference to the evidence adduced at the High Court, and the Applicant's "Removal letters" and "Circular No 7/95".

143. Accordingly, the Court holds that the Applicant has failed to demonstrate how the domestic courts failed to consider his evidence leading to the violation of his right to be heard as provided under Article 7(1) of the Charter.
144. The Court thus dismisses the Applicant's allegation of a violation of Article 7(1) of the Charter.

C. Alleged violation of right to equality before the law and equal protection of the law

145. The Court notes that the Applicant has raised two aspects on the violation of his right to equality before the law and equal protection of the law, namely: the decision of the domestic courts that he was not an employee of TRA and the failure of the High Court, to hear his witness. The Court will consider the alleged violations in that order.

i. Decision by the High Court and Court of Appeal that the Applicant was not an employee of Tanzania Revenue Authority

146. The Applicant alleges that he was not treated equally before the High Court and the Court of Appeal, when both courts held that he was not an employee of TRA, simply because he had no appointment letter from either the Ministry of Finance or TRA. Furthermore, that section 64(1) of the Evidence Act states that documents must be proved by primary evidence and defines primary evidence to mean a document produced for inspection of the Court. He avers that he submitted the TRA Act No 11 of 1995 and other laws as evidence but all these were not considered by the two courts other than during the consideration of *Civil Appeal No 17/2003* to decide and determine the issue of the termination of his employment contract.
147. The Respondent State submits that the Applicant was never an employee of TRA as established by the Court of Appeal, rather he was an employee of the Ministry of Finance as confirmed in the judgment of the Court of Appeal in *Civil Appeal No 27 of 2010*. The Court of Appeal upheld the decision of the High Court that

the “plaintiffs were never seconded to TRA, there is no evidence to that effect, nor did they remain employees of the Ministry of Finance while doing the work that was later taken over by the Authority”. Furthermore, the Respondent State observes that the Applicant never raised this issue before the Court of Appeal.

148. The Court observes that Article 3(1) and (2) of the Charter provide that:

1. Every individual shall be equal before the law
2. Every individual shall be entitled to equal protection of the law respectfully.

149. The Court notes that both the High Court and the Court of Appeal, determined the status of the Applicant vis-a-vis the TRA in *Civil Appeal No 27 of 2010*. Both courts also held that the Applicant was an employee of the Ministry of Finance rather than TRA in accordance with the provisions of the TRA Act.

150. The Court notes that the Applicant’s rejection of the domestic courts’ decision that he was not an employee of TRA does not mean that his right under Article 3 of the Charter was violated in relation to the status of his employment.

151. In view of the above, this Court finds that the Respondent State did not violate the Applicant’s right to equality before the law and equal protection of the law as provided under Article 3(1) and (2) of the Charter.

ii. The failure of the High Court to hear the Applicant’s witness

152. The Applicant avers that he was not treated equally before the law since his witness was not given an opportunity to address the trial court, simply because his witness was in court during the trial prior to the receipt of his testimony. He avers that the decision of the trial court not to permit his witness to testify was contrary to the decision of the Court of Appeal in *Civil Appeal No 27/2010*, where it held that “it is trite law that the presence of a potential witness in Court before the subsequent receipt of his testimony does not by that fact alone render him an incompetent witness under Section 127(1) of the Evidence Act Cap 6 R.E 2002 with

respect to that extent, the High Court erred”.

153. In response, the Respondent State avers that this issue was addressed by the Court of Appeal in Criminal Appeal No 27 of 2010 at page 22 of its judgment of 30 December 2010. It avers that the Court of Appeal considered this ground of appeal regarding the trial Judge who refused to allow one Juvenal Nyambele to testify since his evidence could not have been independent and could not have changed anything since the witness was in Court prior to the receipt of his testimony. The Court of Appeal held that the appellants were under an obligation to ensure that the witness was not in court during the trial if they had wanted him to testify. His presence prior to the receipt of his testimony affected his credibility so that the trial Court had no option but to disqualify the witness, who in any case, was not a party to the suit. Furthermore, the appellants had an option to produce the District Commissioner, which option they did not pursue. The Court of appeal concluded that “once the appellants surrendered their opportunity to call and examine the District Commissioner, the author of the Removal Letters, they could not be heard to validly complain”.
154. The Respondent State further avers that the Applicant never raised this allegation before the municipal courts, which have the judicial remedy as provided under Article 30(3) of the Constitution of the United Republic of Tanzania and Section 4 of the basic Rights and Duties Enforcement Act.

155. The Court recalls that Article 7(1) provides that “[e]very individual shall have the right to have his cause heard”.
156. The Court observes that the allegation that the High Court failed to hear the Applicant’s witness, Juvenal Nyambele, was raised as a ground of appeal in Criminal Appeal No 27 of 2010 in respect of the Court of Appeal Judgment rendered on 30 December 2010. The Court of Appeal considered this ground of appeal and held “that it is trite law that a potential witness in court before the subsequent receipt of his testimony does not by that fact alone render him an incompetent witness under Section 127(1) of the Evidence Act, as this may affect the weight to be attached to his testimony as credible”. The Court of Appeal, therefore, concluded that with respect to this issue, the High Court had erred. The Court

of Appeal also observed that once the appellants had surrendered their opportunity to call and examine the District Commissioner, the appellants could not be validly heard to complain. Finally, it observed, with regard to the impugned removal letters (EXH.2), that there was no apparent connection between Juvenal Nyambele and the appellants as he was not a-party to the suit. It therefore held that this ground of appeal was partially made out but in its final analysis dismissed the appeal with costs for lack of merit.

157. The Court observes that the High Court followed procedures established by law in disqualifying the Applicant's witness from testifying but the Court of Appeal held that the ground of appeal was partially made out although it eventually dismissed the Applicant's appeal.
158. In this regard, the Court concludes that the Applicant has failed to demonstrate how the disqualification of his witness was done in disregard of the prescribed procedures under the national laws and how this adversely affected his right to be treated equally before the law.
159. Accordingly, the Court finds that the Respondent State did not violate the Applicant's right to equality before the law or to equal protection of the law as provided under Article 3(1)(2) of the Charter.

D. Alleged violation of the right to non-discrimination

160. The Applicant alleges that the Court of Appeal in *Civil Appeal No 27/2010* held that the commissioners at the Ministry of Finance were deemed to be employees of TRA by virtue of Section 16(2) of the TRA Act, while the Applicant remained a Government employee, which act amounted to an indiscriminate application of Section 16(2) of the TRA Act. He avers that this particular provision is a violation of the Respondent State's Constitution and the Charter. He further avers that he was also an employee of the same department as the commissioners and therefore ought to have been treated in the same way. He further submits that the principle that all persons are equal before the law must be applied equally under existing laws and in the same manner to those subject to them. Therefore, both he and the commissioners were subject to the same provisions provided for under the TRA Act.
161. The Applicant avers that the Principal Secretary, Ministry of Finance issued "*DOKEZO SABILI*", which was specifically for TRA employees, and it provided for termination of employees at two levels: those who had a bad record in revenue collection with

doubtful integrity and those with advanced age, long sickness and low education, were retired in the public interest. He avers that this retrenchment was discriminatory because his employment was terminated although he did not fall under any of these categories.

- 162.** The Respondent State avers that Section 20(3) of the TRA Act is a provision that absorbed all commissioners including the revenue commissioners from the Ministry of Finance to be Commissioners of TRA. That Section 20(3) of the TRA Act states that “[e]very Revenue Commissioner or any other commissioner appointed under revenue law before the commencement of this Act, notwithstanding anything in this Act, shall be deemed to have been appointed under this Act until another appointment is made to fill the appointment of such revenue commissioner of any other commissioner”.
- 163.** The Respondent State argues that the Court of Appeal addressed this issue in *Appeal No 27 of 2010* at page 13 of its judgment when attempting to differentiate the employment status of the commissioners from that of the employees such as the Applicant who was never incorporated into TRA by law or letter of appointment. The Respondent State further avers that the Applicant is raising this issue for the first time before the Court.

- 164.** Article 2 of the Charter provides that “Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status”.
- 165.** The Court observes that the national courts followed procedures established by law by considering evidence adduced before them by interpreting the provisions of the TRA Act and “*DOKEZO SABI*” in terminating the Applicant’s contract. The domestic courts held that the TRA Act provided for the direct absorption of the commissioners to the TRA and not all the Ministry of Finance employees. As a government employee, he was not entitled to the same privileges as the commissioners.
- 166.** Accordingly, the Court finds that the Respondent State did not violate the Applicant’s right to non-discrimination as provided for

in Article 3(1)(2) of the Charter.

VIII. Reparations

- 167.** The Court notes that Article 27(1) of the Protocol stipulates that “[i]f the Court finds that there has been violation of a human or peoples’ right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.”
- 168.** The Applicant avers that he, his wife and five (5) children are the direct victims of the alleged violations. He cites the Court’s jurisprudence in the *Zongo*⁴¹ and *Mtikila* case and claims reparations in form of compensation and restitution for material and moral damages occasioned by the Respondent State’s agents.
- 169.** The Applicant claims that he has suffered loss of actual expected income from employment arising from the loss of his salaries from the date at which his employment was unlawfully “terminated”. He further claims that he endured emotional distress, inconvenience and economic hardship. He argues that there is a causal link and nexus between the violations caused by the Respondent State and the prejudice he suffered as a result of the Respondent State’s violations of the Charter.

- 170.** In the instant case, the Court has established that the Respondent State did not violate any of the Applicant’s rights as alleged.
- 171.** In view of the foregoing, the Applicant’s prayers for reparations are dismissed.

IX. Costs

- 172.** Rule 32(2) of the Rules provides that, “unless otherwise decided by the Court, each Party shall bear its own costs.”
- 173.** The Applicant avers that he incurred litigation costs both before domestic courts and before this Court, which include those incurred in respect of travel, court appearances, accommodation

41 Paragraphs 26, 29, 156.

while in Arusha as well as food and personal effects.

174. The Respondent State prays that costs be borne by the Applicant.

175. The Court reiterates its settled jurisprudence and reaffirms that reparations may include costs and other expenses incurred in international proceedings. Further, it is up to the Applicant to provide evidence in support of the sums claimed.

176. The Court considers that transport costs incurred for travel within Tanzania, fall under the “categories of expenses that will be supported under the Legal Aid Policy of the Court.”⁴² Since the Court granted legal assistance to the Applicant on a *pro bono* basis, the sums claimed are unjustified and hence, the prayer is dismissed.

177. Consequently, the Court orders that each Party shall bear its own costs.

X. Operative part

178. For these reasons,

The Court

Unanimously,

On jurisdiction

- i. *Dismisses* the objection to its jurisdiction;
- ii. *Declares* that it has jurisdiction.

On admissibility

- iii. *Dismisses* the objections to the admissibility of the Application.
- iv. *Declares* the Application admissible.

On merits

- v. *Finds* that the Respondent State has not violated the Applicant’s right to work, guaranteed under Article 15 of the Charter.
- vi. *Finds* that the Respondent State has not violated the Applicant’s right to fair trial guaranteed under Article 7(1) and 7(1)(d) of the Charter.
- vii. *Finds* that the Respondent State has not violated the Applicant’s

42 Article 3(a) Legal Aid Policy 2016.

right to equality before the law or to equal protection of the law guaranteed under Article 3(1) and (2) of the Charter.

- viii. *Finds* that the Respondent State has not violated the Applicant's right to non-discrimination guaranteed under Article 2 of the Charter.

On reparations

- ix. *Dismisses* the Applicant's prayers for reparations

On costs

- x. *Orders* that each Party shall bear its own costs.

Noudehouenou v Benin (ruling) (2022) 6 AfCLR 694

Application 032/2020, *Houngue Éric Noudehouenou v Republic of Benin*

Ruling, 22 September 2022. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

The Applicant, a citizen of the Respondent State, brought this Application alleging that the Respondent State had violated his human rights in relation to a civil judgment rendered against him by a domestic court. Upholding the objection by the Respondent State, the Court held that the Applicant had not exhausted available local remedies. Accordingly, the Court declared the Application inadmissible.

Jurisdiction (personal jurisdiction, 18)

Admissibility (exhaustion of local remedies, 39-43, 48-52)

I. The Parties

1. Mr. Houngue Éric Noudehouenou (hereinafter, “the Applicant”) is a national of Benin. He alleges, in particular, the violation of his right to property in connection with a civil judgment rendered against him by the Cotonou Court of First Instance (hereinafter, “the Cotonou CFI judgment”).
2. The Application is filed against the Republic of Benin (hereinafter, “the Respondent State”), which on 21 October 1986 became a party to the African Charter on Human and Peoples’ Rights (hereinafter, “the Charter”) on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (hereinafter, “the Protocol”) on 22 August 2014. The Respondent State further deposited, on 8 February 2016, the Declaration provided for in Article 34(6) of the said Protocol by virtue of which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations (hereinafter, “the Declaration”). On 25 March 2020, the Respondent State deposited with the African Union Commission the instrument of withdrawal of its Declaration. The Court has ruled that this withdrawal has no effect on pending cases and on new cases filed before the entry into force of the withdrawal, that is one year

after its deposit, which is on 26 March 2021.¹

II. Subject of the Application

A. Facts of the matter

3. It emerges from the Application that the Applicant alleges that in a civil procedure between Collectivité Houngue Gandji represented by Houngue Clément and Houngue Gabriel Akomagnon, plaintiff, and Akobande Bernard, Amasse Hilaire, Kouto Gabriel, Mrs Anne Pogle, née Kouto and Houenou Eleuthère, defendants, before the Cotonou Court of First Instance, he had filed a voluntary intervention. Collectivité Houngue Gandji sought confirmation of their ownership of Sixteen Hectares Forty-One Ares and Eighty-Four Centiares (16ha 41 84ca) situated in the Agla district of Cotonou, while the Applicant intervened in the relation to the confirmation of ownership of a two-and-a-half-hectare (2.5 ha) parcel of that land.
4. He maintains that, in the said case, the Cotonou CFI on 5 June 2018, rendered a judgment “without his knowledge”, the operative part of which reads:

The Court,

For these reasons

Ruling publicly, in adversarial proceedings, in civil, land and property law matters and at first instance;

(...)

Finds that Mrs Anne Pogle née Kouto and Gabriel Kouto are the presumed owners of plot “S” of lot number 3037 of Agla subdivision plotted under number 1392 and “R” of Lot No 3037 of Agla estate, plotted under number 1462 F;

Finds that DJA-VAC association represented by Koty Bienvenue has acquired an estate of 4ha 62a 58ca from collectivité Houngue Gandji;

- Confirms Pedro Julie’s ownership of the parcels identified in the survey as 403h and EL 404h in the Agla subdivision;
- Confirms Mrs Anne Pogle née Kouto’s ownership of Plot “S” of lot 3037 of Agla subdivision plotted under 1392 F;
- Confirms Kouto Gabriel’s ownership of plot “R” of Lot 3037 of Agla subdivision plotted as 1462 F;

1 *Houngue Éric Noudehouenou v Republic of Benin*, ACtHPR, Application No 003/2020, Order (5 May 2020) (provisional measures), § 4-5 and Corrigendum of 29 July 2020.

- Confirms DJA-VAC ownership of an area of 4ha 62a 58ca;
 - Dismisses the claims of Trinnou D. Valentin, Houenou Eleuthère, Alphonse Adigoun and Houngue Éric and orders them to pay the costs;
 - Notifies the parties that they have one (1) month to file an appeal.
5. The Applicant contends that by the said decision, he was “arbitrarily” deprived of his property rights over his two-and-a-half-hectare (2.5 ha) estate located in Cotonou.

B. Alleged violations

6. The Applicant alleges violation of the following rights:
- i. The right to property, protected by Article 14 of the Charter;
 - ii. The rights to equality before the law and equal protection of the law, protected by Article 3(1) and (2) of the Charter and Article 26 of the International Covenant on Civil and Political Rights (hereinafter “the ICCPR”);
 - iii. The right to have one’s cause heard, protected by Articles 7 of the Charter, 14(1) of the PDCIP and 8 of the Universal Declaration of Human Rights (hereinafter “the UDHR”).

III. Summary of the Procedure before the Court

7. The Application was filed on 15 October 2020 together with a request for provisional measures. It was served on the Respondent State on 20 October 2020, for its responses within, ninety (90) days and fifteen (15) days, respectively, from receipt.
8. On 16 November 2020, the Respondent State filed its response to the request for provisional measures. Although the response was filed out of time, the Court decided in the interest of justice, to deem it as properly filed. On 27 November 2020, the Court issued a Ruling dismissing the request for provisional measures. It was served on the Parties on 8 December 2020.
9. On 16 December 2020, the Applicant filed a second request for provisional measures, which was served on the Respondent State on 17 December 2020 for its response within fifteen (15) days. The Respondent State did not file its response. By a Ruling of 29 March 2021, the Court dismissed the request for provisional measures. The said Ruling was served on the Parties the same day.
10. On 8 June 2021, the Applicant filed a third request for provisional measures which was served on the Respondent State for its response within fifteen (15) days. The Respondent State did not file its response. On 22 November 2021, the Court issued

a ruling by which it ordered stay of execution of the judgment of the Cotonou CFI. This Ruling was served on the Parties on 30 November 2021.

11. Pleadings were filed within the time limits set by the Court.
12. Pleadings were closed on 22 August 2022 and the Parties were duly notified.

IV. Prayers of the Parties

13. The Applicant prays the Court to:
 - i. Declare that it has jurisdiction;
 - ii. Find and draw all the consequences of the fact that the Applicant is unable to produce the certificate of non-appeal in the docket before the Appeal Court insofar as, in violation of Article 30 of the Protocol and Article 2(3)(c) of the International Covenant on Civil and Political Rights, the Respondent prevented him from doing so by not executing the decisions of 6 May 2020 – Application No 004/2020, 25 September 2020, and 4 December 2020, Application No 003/2020 – *Houngue Eric Noudehouenou v Republic of Benin*;
 - iii. Exempt the Applicant from the exhaustion of local remedies on the grounds that the exercise of all local remedies was impeded by a violation of the decisions of this Court, on the grounds of lack of reasonable prospect of success due to the existence of impediments to the rights of defence and the right to be present at the trial, on the grounds that the procedures were unduly prolonged, and on the grounds of the unsatisfactory and ineffective nature of the local remedies, in the instant case;
 - iv. Declare the Application admissible;
 - v. Find that Article 14 of the Charter applies to the instant case and that his property rights in respect of his 2.5-ha-estate situated at Agla in the Commune of Cotonou are protected by the Article 14 of the Charter;
 - vi. Find that the Respondent State has effectively violated his human rights protected by Articles 3, 7(1) and 14 of the Charter; 2(3), 14(1) and 26 of the ICCPR; 8 of the UDHR;
 - vii. Find that the Respondent State has violated Article 7(1)(a) of the Charter in that fourteen (14) years without a final verdict is already a violation of the right to be tried within a reasonable time, within the meaning of Rule 50(2)(e) of the Rules of Court, Articles 7(1)(d) and 56(5) of the Charter;
 - viii. Declare and rule that by preventing the Applicant from producing the certificate of no-appeal to this Court, the Respondent violated his right to an effective remedy and the right to obtain provisional measures, in view of the Ruling of 19 March 2021, which dismissed the measure requested by the Applicant for lack of said certificate.

- ix. Note and draw the legal consequences of the fact that the Respondent State has not provided, before this Court, any evidence that he was informed of the date of closure of pleadings, the date of delivery of Judgment No 006/2DPF/-18 of 5 June 2018 of the Court of Cotonou, or any evidence that this contentious judgment was notified to him, or any proof that he is not thus arbitrarily deprived from the right of appeal, the time limit for which has expired since 5 July 2018, or any proof that the Respondent State annulled this contentious judgment as required by Article 547 of the Code of Procedure, or proof that this judgment against him is not final, or any proof of execution of the previous decisions of this Court rendered in his favour ;
 - x. Order all reparation measures it deems appropriate, in particular to order the Respondent State to:
 - Cease without delay, any disruption of the peaceful enjoyment of his property right;
 - Annul Decision No 006/2DPF/-18 of 5 June 2018 of the Cotonou Court of First Instance as soon as this Court renders its judgment
 - Pay him the financial damages for loss of income on his property right of which he was arbitrarily deprived by the decision of the Cotonou Court of First Instance, to the tune of 1,250 CFA francs per m² and per year, multiplied by the area of 2.5h over the period from 5 June 2018, until the date of effective enforcement of the decision of this Court;
 - Pay him the following amounts: Seven Million (7,000,000) CFA francs as cost of legal representation before the Cotonou Court of First Instance, Fourteen Million (14,000,000) CFA francs as cost of legal representation before this Court and One Million Five Hundred (1,500,000) CFA francs for postage and travel expenses before this Court, payable on presentation of an invoice;
 - Pay him an amount of money as the Court shall determine, as reparation for moral damage;
 - Pay him compound interest at the legal rate per year on the financial compensation awarded, until it is paid in full;
 - Pay him an amount of Three Hundred Million (300,000,000) CFA francs for each month of non-execution of the non-financial measures;
 - Pay the costs of the proceedings.
- 14.** In response, the Respondent State prays the Court:
- Primarily, to*
- i. Note that the Applicant did not appeal the contested Judgment No 006/2DPF/-18 of 5 June 2018;
 - ii. Find that the Applicant did not pursue the legal remedies in respect of the civil procedure;
 - iii. Hold that the Applicant did not exhaust local remedies;

- iv. Consequently, declare the Application inadmissible;
- v. Hold that the courts are not required to give notice of an adversarial judgment;
- vi. Hold that the submission alleging failure to notify the judgment is irrelevant;
- vii. Note that the Applicant was represented by Mr. Laurent BOGNON during the proceedings;
- viii. Find that the proceedings were thus adversarial in relation to the Applicant;

Accordingly,

- ix. Find that the submission of unavailability of remedies is specious
- x. Rule out the possibility of a cassation appeal;
- xi. Note that the Constitutional Court of Benin has the power to recognize the right to compensation for damage resulting from human rights violations;
- xii. Find that based on such a decision, a person may be awarded damages before a court of ordinary law;
- xiii. Accordingly, find that the Applicant's interpretation of the provisions of Article 410 of the Penal Code is erroneous and subjective;
- xiv. Declare that this article in no way prohibits the exercise of remedies;
- xv. Accordingly, reject the plea alleging the threat of deprivation of liberty;
- xvi. Find that all the grounds for exemption from exhaustion of remedies are specious;
- xvii. Hold that the Applicant is subject to compliance with the requirement of exhaustion of local remedies;
- xviii. Finally, declare the Application inadmissible for failure to exhaust local remedies;
- xix. Find that the case was brought before the Court more than two (2) years after the judgment in question was handed down;
- xx. Hold that procedure in respect of the matter before the Court has been unduly prolonged;
- xxi. Consequently, declare the Application inadmissible;

In the alternative,

- xxii. Note that the Applicant was represented in the proceedings by Laurent BOGNON, Esquire.;
- xxiii. Find that all acts done in the course of the impugned proceedings are enforceable against the Applicant;
- xxiv. Find that the contested judgment is indeed adversarial;
- xxv. Hold that the Court of First Instance of Cotonou is under no obligation to notify the parties of such a judgment;
- xxvi. Find and rule that the alleged human rights violations are ill-founded;

xxvii. Accordingly, dismiss all his requests and submissions;

xxviii. Dismiss the request for damages;

V. Jurisdiction

15. The Court notes that Article 3 of the Protocol provides:

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the States concerned
2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

16. Under Rule 49(1) of the Rules of Court,² “The Court shall conduct preliminary examination of its jurisdiction ... in accordance with the Charter, the Protocol and these Rules”.

17. Based on the above provisions, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

18. The Court notes that the Respondent State does not raise any objection to its jurisdiction. Having established that nothing on record indicates that it lacks jurisdiction, the Court finds that it has:

- i. Material jurisdiction, insofar as the Applicant alleges a violation of the right to equality before the law, the right to equal protection of the law, the right to have one's cause heard and the right to property, protected by Articles 3(1) and (2), 7 and 14 of the Charter, corresponding to Articles 2(3), 14(1) and 26 of the ICCPR, respectively,³ instruments ratified by the Respondent State.
- ii. Personal jurisdiction, in so far as the Respondent State is a Party to the Charter, the Protocol and has deposited the Declaration. The Court recalls, as indicated in paragraph 2 of this Ruling, that on 25 March 2020 the Respondent State deposited the instrument of withdrawal of the Declaration. In this regard, the Court reiterates its position that the withdrawal of the Declaration has no retroactive effect and has no bearing on cases pending at the time the instrument of withdrawal was deposited or on new cases brought before the Court before the withdrawal took effect. Since the withdrawal of the Declaration took effect on 26 March 2021, one (1) year after the deposit of the instrument of withdrawal, it therefore has no effect on the instant Application which was filed on 15 October 2020.

² Rule 39(1) of the Rules of Procedure of 2 June 2010.

³ The Respondent State became a Party to the ICCPR on 12 March 1992.

- iii. Temporal jurisdiction, insofar as the alleged violations occurred after the entry into force of the above-mentioned instruments, in relation to the Respondent State.
 - iv. Territorial jurisdiction, insofar as the facts of the case and the alleged violations took place in the territory of the Respondent State.
- 19.** Consequently, the Court finds that it has jurisdiction to hear the instant Application.

VI. Admissibility

- 20.** Article 6(2) of the Protocol provides that “[t]he Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.
- 21.** Rule 50(1) of the Rules ⁴ provides that “The Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules”.
- 22.** Rule 50(2) of the Rules, which essentially restates the provisions of Article 56 of the Charter, reads as follows
- Applications to the Court shall comply with all of the following conditions:
- a. Indicate their authors even if the latter request anonymity;
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter;
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
 - d. Are not based exclusively on news disseminated through the mass media;
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 - f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter; and
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the Charter.
- 23.** The Court notes that the Respondent State raises two objections to admissibility based on (a) non-exhaustion of local remedies and secondly (b) the fact that the Application was not filed within

4 Rule 39 of the Rules of Procedure of 2 June 2010.

a reasonable time.

A. Objection based on non-exhaustion of local remedies

24. The Respondent State contends, firstly, that the Applicant did not appeal the judgment of the Cotonou Court of First Instance. In this regard, it points out that Article 412 of its Land and Property Code (LPC) provides that “the decision rendered shall be subject, in accordance with ordinary law, to opposition, appeal, third-party opposition, appeal or review, as the case may be”.
25. The Respondent State submits that under Article 621(2), (1), of the Code of Civil, Commercial, Social, Administrative and Auditing Procedure (hereinafter “the CPC”) in the Republic of Benin, an appeal must be lodged within one (1) month, except in commercial matters, where the time limit for lodging an appeal is fifteen (15) days. The Respondent State argues that this remedy of civil appeal was available to the Applicant.
26. The Respondent State further argues that, there was a criminal remedy available to the Applicant to hold the representatives of the Houngue Gandji community liable by using three (3) options.
27. The Respondent State asserts that firstly, the Applicant could have filed a complaint with the public prosecutor, pursuant to Article 38 of the Code of Criminal Procedure (hereinafter “the CCP”), under which “the public prosecutor shall receive complaints and denunciations and shall determine the action to be taken thereon”. Secondly, he could have initiated civil proceedings, on the basis of Article 90 of the same code, which provides: “any person claiming to have been injured by a crime or offence may file a complaint with civil party status with the president of the court, who shall refer the matter without delay to an investigating judge”. Thirdly he could have filed referral at the criminal court, as provided for in Article 443 of the CCP, which provides “the civil party who initiates the public prosecution must, if he or she has not obtained legal aid and on penalty of inadmissibility of the summons, deposit with the Clerk of the court the sum presumed necessary for the costs of the proceedings. The court shall determine the amount and the time limit for payment of the deposit the first the case is called”.
28. The Respondent State further explains that these judicial remedies are available, effective and satisfactory, in accordance with this Court’s judgment in *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher Mtikila v United Republic of Tanzania*.
29. The Respondent State further asserts, that the Applicant’s submission is contradictory, as he was represented by Mr. Laurent

BOGNON, who filed a voluntary intervention and thus, received a mandate *ad litem* to represent him before the domestic courts for the purpose of carrying out the procedural acts on his behalf.

30. The Respondent State further submits that its constitution provides for a remedy before the Constitutional Court in case of human rights violations, which was also available to the Applicant. The Respondent State notes that this remedy is available, effective and satisfactory, especially since the Constitutional Court sanctions human rights violations and recognises the right to reparation.

31. In reply, the Applicant submits that the objection raised should be rejected and that the Court should exempt him from the requirement of exhaustion of local remedies. He contends, to that effect, that these remedies are unavailable insofar as he was arbitrarily deprived of them, that there is an absence of effective remedies and that he faces an impediment in exercising them.
32. As regards the unavailability of local remedies, the Applicant underlines that although domestic law provides for the remedy of appeal, he was arbitrarily deprived of it. This was “since he was not invited to the deliberations” and owing to the failure to notify the Cotonou Court of First Instance’s decision to him. According to Article 81(1), of the CCP, “judgments shall be notified to the parties themselves” and that, according to Article 83 of the CCP, “the act of notifying or serving a judgment on a party must, under penalty of nullity, clearly state the time limit for opposition, appeal or cassation in the event that one of these remedies is available, as well as the methods by which the appeal may be exercised”.
33. He further submits that regarding the appeal, until the proceedings were instituted before this Court, he had no reason to exercise any local remedy as long as the judgment of the Cotonou Court of First Instance had not been executed. He states that, by law, specifically Article 547 of the Code of Criminal Procedure read together with Articles 56, 101, 122, 123(1), and 540 of the CCP, and in the light of the bailiff’s summons produced in the pleadings, the judgment had lapsed.
34. He explained that the words “subject to the special provisions” of Article 621(1) of the CPC indicate that the appeal is not automatically obligatory and that there are exceptions thereto. The said exceptions apply notably when the decision was rendered

without his knowledge, without any prior summons to appear and without any notification of the judgment.

35. With regard to the cassation appeal, the Applicant underlines that this remedy is ineffective insofar as it is a matter of assessing the merits of the case and examining the evidence relating to his property rights. He states that, whereas in these two matters the Supreme Court has already ruled that it has no jurisdiction, this remedy is therefore not effective even if it is available.
36. Regarding the remedy before the Constitutional Court, the Applicant submits that in its Decision DCC 04-051 of 18 May 2004, the said court found a violation of the right to a fair trial and the right to appeal insofar as the Cotonou Court of First Instance (CFI) disposed of a case without his knowledge and without notifying its decision to him. Despite these findings, the Constitutional Court did not award any reparations, therefore this remedy is unsatisfactory.
37. With regard to the automatic deprivation of liberty, the Applicant argues that, if he challenged the decision of the CFI before the domestic courts, as he is doing before this Court, he would have exposed himself to an illegal and arbitrary deprivation of his liberty. The Applicant refers in this regard, to Article 410⁵ of the CCP which prohibits, under penalty of deprivation of liberty, criticising judicial decisions in the exercise of remedies even in matters of human rights violations, except in the case of review. The Applicant recalls that the review remedy, is an extraordinary remedy, whereas “before the Court, the remedies to be exhausted are ordinary remedies”.

38. The Court notes that, in accordance with Article 56(5) of the Charter and Rule 50(2)(e) of the Rules of Court, applications must be filed after the exhaustion of local remedies, if any, unless

5 Article 410(1), provides: “Anyone who publicly, by acts, speech or writings, seeks to discredit a judicial act or decision, under conditions likely to undermine the authority of justice or its independence, shall be liable to one (1) month to six (6) months’ imprisonment and a fine of One Hundred Thousand (100,000) to One Million (1,000,000) CFA francs, or one of these two penalties only”; article 410, paragraph 2 “The foregoing provisions may not, under any circumstances, be applied to purely technical comments in specialized journals, or to acts, speech or writings calling for the review of a conviction.”

the proceedings in respect of such remedies are being unduly prolonged.

39. The Court underlines that the local remedies to be exhausted are those of a judicial nature, which must be available, that is, they must be available to the applicant without impediment, effective and satisfactory in the sense that they are “found satisfactory by the complainant or are capable of redressing the complaint”.⁶
40. The Court also underlines, regarding the effectiveness of local remedies, that it is for the Applicant to take all necessary steps to exhaust, or at least to attempt to exhaust, local remedies. It will not suffice for an applicant to simply question the effectiveness of those remedies.⁷
41. The Court notes that to determine whether the requirement of exhaustion of local remedies has been met, it is necessary that the domestic proceedings to which the Applicant was a party should have been completed at the time of filing the Application before it,⁸ which presupposes that all possible proceedings in respect of the said procedure have been completed.
42. The Court notes, in this regard, that the Applicant was a party to the domestic civil proceedings that gave rise to the judgment of the Cotonou Court of First Instance. On this issue, the Court notes that in the Respondent State’s judicial system, civil proceedings end, in principle, taking into account existing remedies, with the judgment of the Judicial Chamber⁹ of the Supreme Court.¹⁰
43. In the circumstances, the Court observes that in the present case, although the Respondent State submits that several remedies are available and effective, the Court must first determine if the appeal was exhausted, since it is the most immediate remedy

6 *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema dit Ablassé, Ernest Zongo, Blaise Iboulo and Mouvement burkinabé des droits de l’homme et des peuples v Burkina Faso*, Judgment (5 December 2014) (merits), 1 AfCLR 219, § 68; *Ibid. Konaté v Burkina Faso* (merits), § 108; *Sébastien Germain Marie Ajavon v Republic of Benin*, ACTHPR, Application No 027/2020, § 73.

7 *Komi Koutché v Republic of Benin*, ACTHPR; Application No 020/2019, Judgment of 25 June 2021, § 92;

8 *Idem*, § 61; *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*, ACTHPR, Application No 027/2020, Judgment of 2 December 2021 § 74; *Yacouba Traoré v Republic of Mali*, ACTHPR, Application No 010/2018, Judgment of 25 September 2020, § 41.

9 Article 40 of Law 2004-07 of 23 October 2007 states: “the Judicial Chamber shall rule on cassation appeals (...) against rulings and judgments handed down at last instance by all the courts of the judicial order (...).

10 Article 1 of Law 2004-07 of 23 October 2007 states: “In accordance with Article 131 of the Constitution (...) the Supreme Court is the highest court of the State in judicial matters (...).

available within the framework of the civil proceedings which gave rise to the judgment of the Cotonou CFI. The Court notes that the examination of the other remedies is subject to whether or not there is need to exhaust the appeal remedy.

i. Civil Appeal

44. The Court notes that in the judicial system of the Respondent State, the appeal in civil matters is governed by the provisions of the CPC and the CFD.
45. The Court further notes that, it emerges from Articles 397¹¹ 412¹² of the CFD, 608¹³ and 621¹⁴ and 623¹⁵ of the CPC, that in contentious matters, the appeal against any civil judgement rendered in first instance in matters of land and property, is filed by any interested party. For contested judgments, the time limit for appeal is one month, from the date of pronouncement. It follows that the appeal is an available remedy. Furthermore, within the meaning of Article 621¹⁶ of the CPC, the appeal seeks to have the Court of Appeal amend or annul a judgment handed down by a lower court. It follows that the appeal is an effective and satisfactory remedy.
46. The Court takes note that, the judgment of the CFI, referred to in paragraph 3 of this Ruling is a civil judgment in matters of land and property ownership, rendered in adversarial proceedings and at first instance.
47. The Court finds on the basis of the said judgment, that the Applicant was represented by an Advocate of the Benin Bar. The Court considers, in this respect, that the mandate of legal

11 Article 397 of the CFD provides: "The provisions of the Code of Civil, Commercial, Social, Administrative and Accounts Procedure, insofar as they are not contrary to the provisions of the articles below, are applicable to litigation relating to the protection of rights *in rem* relating to immovable property."

12 Article 412 of the CFD provides: "The decision rendered (in real estate matters) is subject, in accordance with the common law, to opposition, appeal, third party opposition, appeal or review, as the case may be."

13 Article 608 of the CPC provides: "The time limit at the expiry of which an appeal may no longer be lodged runs from the date of delivery, in the case of contested decisions; from the date of notification or service in the case of decisions by default and decisions deemed to be adversarial".

14 The appeal is aimed at having the Appeal Court reform or amend a judgment rendered by a lower court. Subject to specific provisions, in contentious matters, the time limit for filing an appeal is one (1) month.

15 Article 623 of the CPC states: "The right of appeal is available in all matters, even those of a minor nature, against judgments of the first instance, unless otherwise provided for.

16 Article 621 of the CPC states: "The appeal is aimed at having the Court of Appeal amend or annul a judgment rendered by a lower court".

representation carries with it the power and duty “to undertake on behalf of the principal, the acts of the proceedings”,¹⁷ “to advise the party and to represent its defence (...)”¹⁸ and “to assist, unless otherwise provided for or agreed”.¹⁹

48. The Court notes that in the instant case, the Applicant acknowledges that he did not appeal the judgment of the CFI. Even more importantly, he states that he could not exercise this remedy, because firstly, he was not served with the said judgment and secondly, he could have been deprived of his liberty based on Article 410 of the Penal Code.
49. As regards the Applicant’s first argument that he was not served with the said judgment, the Court notes that the Applicant was represented by a lawyer during the civil proceedings that resulted in the judgment of the CFI. It follows that the lawyer had an obligation, within the meaning of Articles 20 to 22 of the CPC, to perform all the necessary procedural acts and to keep his client abreast with the progress of the proceedings, including the date of the delivery of the judgment.²⁰
50. The Court considers that, in any event, the judgment of the CFI was adversarial,²¹ so that the time limit for appeal ran from the date of its delivery, that is, from 5 June 2018.
51. Regarding the second argument that the Applicant would be deprived of his liberty under Article 410²² of the Criminal Code if he lodged an appeal, the Court underlines that this provision penalises the discrediting of a judicial decision, by acts, speech or writing. It cannot be applied to the exercise of the remedies provided by law. The Court therefore considers that this argument

17 Article 20 of the CPC.

18 Article 21 of the CPC.

19 Article 22 of the CPC.

20 “When the judgment cannot be delivered immediately, the delivery shall be postponed, for purposes of further deliberation, to a reasonable date not exceeding two (2) months and which the president shall indicate to the parties.

21 Article 536 of the CPC provides: “The judgment is adversarial, when the parties appear, in person or by proxy, according to the procedures specific to the court before which the case is brought.

22 Article 410, paragraph 1, provides: “Anyone who publicly, by acts, speech or writings, seeks to discredit a judicial act or decision, under conditions likely to undermine the authority of justice or its independence, shall be liable to one (1) month to six (6) months’ imprisonment and a fine of One Hundred Thousand (100,000) to One Million (1,000,000) CFA francs, or one of these two penalties only”; article 410, paragraph 2 “The foregoing provisions may not, under any circumstances, be applied to purely technical comments in specialized journals, nor to acts, words or writings calling for to the review of a conviction.”

is inapplicable.

52. In view of the foregoing, the Court considers that the remedy of a civil appeal is an available, effective and satisfactory one which the Applicant should have exhausted, but he did not.

ii. Other remedies

53. Having noted that the Applicant did not file an appeal, in the civil courts, the Court finds that he did not exhaust local remedies. Consequently, the Court considers it superfluous to rule on the other aspects of the objection to admissibility raised by the Respondent State as the remedies in the constitutional and criminal courts do not arise.
54. In view of the foregoing, the Court holds that the Applicant did not exhaust local remedies.

B. Other admissibility requirements

55. Having found that the present Application does not meet the requirement of Article 56(5) of the Charter and Rule 50(2)(e) of the Rules, and in view of the cumulative nature of the admissibility requirements,²³ the Court considers it superfluous to rule on the compliance with the other admissibility conditions.
56. Accordingly, the Court declares the Application inadmissible and dismisses it.

VII. Costs

57. Each Party prays that the other be ordered to bear the costs.

23 *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (21 March 2018) (jurisdiction and admissibility), 2 AfCLR 237, § 63; *Rutabingwa Chrysanthé v Republic of Rwanda* (11 May 2018) (Jurisdiction and Admissibility), 2 AfCLR 361, § 48; *Collectif des anciens travailleurs ALS v Republic of Mali* (28 March 2019) (Jurisdiction and Admissibility), 3 AfCLR 73, § 39.

- 58.** Rule 32(2) of the Rules provides that “[u]nless otherwise decided by the Court, each party shall bear its own costs, if any “.
- 59.** The Court decides that, in line with this provision, it orders that each Party shall bear its own costs.

VIII. Operative part

60. For these reasons,
The Court

Unanimously

On jurisdiction

- i. *Declares* that it has jurisdiction.

On admissibility

- ii. *Upholds* the objection based on non-exhaustion of local remedies;
iii. *Declares* the Application inadmissible.

On costs

- iv. *Orders* that each Party shall bear its own costs.

Noudehouenou v Benin (ruling) (2022) 6 AfCLR 710

Application 004/2020, *Houngue Éric Noudehouenou v Republic of Benin*

Ruling, 22 September 2022. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

The Applicant, a citizen of the Respondent State, brought this Application alleging that his arrest, detention, trial, and conviction by a special criminal tribunal amounted to a violation of his human rights by the Respondent State. He brought this Application while his appeal was pending before the Supreme Court of the Respondent State and requested for provisional measures against the Respondent State. Upholding objection by the Respondent State, the Court held that the Applicant had not exhausted local remedies. Accordingly, the Court declared the Application inadmissible and the request for provisional measures moot.

Jurisdiction (material jurisdiction, 29-32)

Admissibility (exhaustion of local remedies, 50-57, 59-63)

Provisional measures (mootness, 67)

I. The Parties

1. Mr. Houngue Éric Noudehouenou (hereinafter “the Applicant”) is a national of Benin and manager of \ Fisc Consult Sarl. He alleges a violation of his rights in connection with criminal proceedings initiated against him before the Court for the Repression of Economic and Terrorist Offences (hereinafter “CRIET”).
2. The Application is filed against the Republic of Benin (hereinafter “the Respondent State”), which became a party to the African Charter on Human and Peoples’ Rights (hereinafter “the Charter”) on 21 October 1986 and the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (hereinafter “the Protocol”) on 22 August 2014. On 8 February 2016, the Respondent State deposited the Declaration provided for in Article 34(6) of the said Protocol (hereinafter “the Declaration”) by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and Non-governmental Organisations. On 25 March 2020, the Respondent State deposited with the African Union Commission, an instrument of withdrawal of the said Declaration. The Court has held that this withdrawal has no bearing on any

pending and new cases filed before the withdrawal came into effect, that is, one year after the deposit of the instrument of withdrawal, which is, on 26 March 2021.¹

II. Subject of the Application

A. Facts of the matter

3. The Applicant avers in the Application that on 20 February 2018, he was arrested by unidentified individuals without a warrant and taken by force, to a police station where he was informed of the reason for his arrest, namely, embezzlement of public funds by producing inflated invoices to *Conseil National des Chargeurs du Bénin* (hereinafter referred to as the “CNCB”), an entity of the Respondent State and by subsequently cashing, two cheques drawn by CNCB, in the name of the company *Fisc Consult Sarl*.
4. He submits that on 26 February 2018, he was presented before the public prosecutor, who charged him with abetment of misappropriation of public funds and placed him under a detention order on 27 February 2018 in the Cotonou prison. Pursuant to the law establishing the CRIET, the case was subsequently referred to the investigating committee of the CRIET in view of the preferred charge. It emerges from the records that the Applicant escaped from detention on 31 October 2018.
5. He contends that the alleged facts of which he is accused are totally fictional and that during the preliminary investigation he explained that he had not submitted any invoice in his personal name to the CNCB and that all the invoices submitted by *Fisc Consult Sarl* to the CNCB mention all the services provided and the methods of determining the fees.
6. He further avers that, during the investigation, he provided evidence that *Fisc Consult Sarl* faithfully fulfilled its obligations to the CNCB and was partially and regularly paid by the latter.
7. He avers that despite these facts, the CRIET Investigating Committee, by Judgment No 001/CRIET/COM-I/2019 of 20 March 2019 (hereinafter referred to as “the judgment of 20 March 2019”) committed him to the CRIET Correctional Chamber for trial. He states that on 15 June 2019 he filed a cassation appeal against

¹ *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No 003/2020, Order (Provisional Measures), 5 May 2020, §§ 4-5 and Corrigendum of 29 July 2020.

the CRIET's decision.

8. The Applicant submits that the Correctional Chamber of the CRIET rendered a judgment on 25 July 2019 (hereinafter referred to as "the judgment of 25 July 2019"), which found him guilty of the offences of misappropriation of public funds, abetment of abuse of office as well as usurpation of title and sentenced him to ten (10) years' imprisonment and ordered him to pay an amount of One Billion, Two Hundred and Seventy-Seven Million, Nine Hundred and Ninety-Five Thousand, Four Hundred and Seventy-Four (1,277,995,474) CFA francs to CNCB as compensation for the damage caused. He further avers that on 26 July 2019, he filed a cassation appeal against the said judgment and as at the date of filing the Application, the Supreme Court had not ruled on the said appeal.

B. Alleged violations

9. The Applicant alleges a violation of the following rights:
 - i. The rights to be tried by a competent court, to equality of all before the courts, to an impartial tribunal, to a reasoned decision in line with the adversarial principle, to protection against arbitrariness and to legal certainty, all protected by the purpose of the Charter and Article 10 of the Universal Declaration of Human Rights (hereinafter referred to as the "UDHR") and Article 14(1) of the International Covenant on Civil and Political Rights (hereinafter referred to as the "ICCPR"); the principle of legality of offences and penalties and the prohibition of retroactive application of criminal laws and penalties;
 - ii. The right to defence, including equality of arms, representation by a lawyer, the facilities necessary for the organisation of one's defence, notification of the indictment and the charges, participation in one's trial, respect for the adversarial principle, presentation of evidence and arguments, and cross-examination of prosecution witnesses, protected by Article 14(3) of the ICCPR and Article 7(1)(c) of the Charter;
 - iii. The right to appeal against judgments, protected by Article 10 of the UDHR, Article 7(1)(a) of the Charter and Article 2-3 of the Covenant;
 - iv. The right to have one's conviction and sentence reviewed, protected by article 14(5) of the ICCPR;
 - v. The right to the presumption of innocence, protected by Article 7(1) of the Charter;
 - vi. The right to gainful employment, the right to property and the right to an adequate standard of living, protected by Articles 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), 15 and 14 of the Charter, and 23 of the UDHR;

- vii. The right to reputation and dignity, the right to health, to be free from inhuman and degrading treatment, protected by Article 7 of the ICCPR and Article 5 of the Charter, and the right to freedom of movement, protected by Articles 12, 14(5) and 17 of the ICCPR.
- viii. The right to suspension of enforcement of the sentence as guaranteed by Article 15 § 5 of the ICCPR and Chapter N § 10(a) point (2) of the Guidelines and Principles on the Right to a Fair Trial and Legal Assistance in Africa.

III. Summary of the Procedure before the Court

- 10.** On 21 January 2020, the Applicant filed the Application together with a request for provisional measures. These were served on the Respondent State on 18 February 2020.
- 11.** On 6 May 2020, the Court issued a Ruling for provisional measures ordering the Respondent State to "... to stay the execution of the judgment of 25 July 2019 of the CRIET against the Applicant, Houngue Eric Noudehouenou, until the final judgment of this Court is rendered on the merits". The Order was served on the Parties on 6 May 2020.
- 12.** On 20 July 2021 and 10 August 2021, the Applicant filed two additional requests for provisional measures, on which the Court ruled by a single ruling, the operative part of which reads:
 - i. Dismisses the requests for provisional measure relating to obstacles to medical care and protection;
 - ii. Dismisses the requested provisional measures to unfreeze the Applicant's bank account and to remove obstacles to his presence before the Cotonou Court;
 - iii. Dismisses the request to stay execution of the arrest warrant pursuant to the CRIET's judgment of 25 July 2019;
 - iv. Dismisses the request for a public apology;
 - v. Dismisses the request regarding observance of the Applicant's rights by the Cotonou Court;
 - vi. Orders the Respondent State to disclose to the Applicant or his Counsel the expert report referred to in the CRIET judgment of 25 July 2019';
 - vii. Orders the Respondent State to take all measures to issue a valid national identity card to the Applicant;
 - viii. Orders the Respondent State to report to the Court on the implementation of the measures ordered in (vi) and (vii) above, within fifteen (15) days of notification of this Ruling.
- 13.** The ruling was served on the Parties on 30 November 2021.
- 14.** On 14 May 2022, the Applicant filed a fourth request for provisional measures on which the Court issued, on 15 August 2022, a Ruling

served on the Parties on 16 August 2022, the operative part of which reads as follows:

- i. Orders the Respondent State to take all measures to remove all impediments to the Applicant's access to medical care and to provide him with a copy of his medical file held by the *Centre National Hospitalier Universitaire de Cotonou*;
 - ii. Orders the Respondent State to report to the Court on the implementation of the measures ordered above, within fifteen (15) days of the service of this Order.
 - iii. Dismisses the other measures requested.
15. The Parties filed their submissions on the merits and reparations within the time limits stipulated by the Court.
 16. Pleadings were closed on 15 July 2022 and the Parties were duly notified.
 17. On 12 August 2022 the Applicant filed a request for reopening of pleadings and for a public hearing, which was served on the Respondent State for its observations within fifteen (15) days of receipt. The Respondent State did not submit any observations. After examining the request, the Court rejected it.
 18. On 5 September 2022, the Applicant filed another request for provisional measures. It was served on the Respondent State for information purposes, as the Court had decided to deal with the request together with the merits.

IV. Prayers of the Parties

19. The Applicant prays the Court to:
 - i. Find that it has jurisdiction;
 - ii. Declare the application admissible;
 - iii. Find that the violations of his human rights protected by Articles 2, 11, 14, 15, 16, 17 and 26 of the ICCPR; articles 1, 2, 3, 7, 12, 14 and 26 of the Charter; articles 1, 3, 6, 7, 8, 10, 11, 14, 17, 19, 20 and 23 of the UDHR; and articles 2, 6 and 7 of the ICESCR are well-founded, and that the Respondent State is responsible for these violations;
 - iv. Declare that the fact that the CRIET convicted him by judgment of 20 March 2019, based on false charges, constitutes a serious attack on his honour, dignity, reputation, health and his right to protection against arbitrariness;
 - v. Declare that he is subject to arbitrary judicial practices and persecution within the meaning of Articles 12 of the Charter and 14 of the UDHR, for having ensured the exercise of the rights of defence in tax matters in Benin in his capacity as manager of Fisc Consult Sarl and for having ensured the exercise of the rights of

defence in tax matters for the benefit of Sébastien Germain Ajavon and the companies in which he has interests;

- vi. Declare that the arrest warrants issued against him constitute a violation of the right to freedom of movement guaranteed by Article 12 of the ICCPR, of the right to stay the execution of the sentence guaranteed by Article 15(5) of the ICCPR;
- vii. Order the Respondent State to take all appropriate measures to annul the judgment of 25 July 2019 and the judgment of referral to the correctional chamber of 20 March 2019 rendered by the CRIET against him and erase all the effects of the two judgments and their subsequent acts within one month of the delivery of the judgment;
- viii. Order the Respondent State to take all steps to restore his reputation damaged as a result of the decisions rendered against him;
- ix. Order the Respondent State to amend Articles 189 and 190 of the Criminal Procedure Code so as to be in compliance with Article 7(1)(c) of the Charter with regard to the rights of the defence and equality of arms, within three months; to amend Articles 481 and 594 of the Criminal Procedure Code so as to be in compliance with Articles 14(5) and 9(1) of the ICCPR without delay by removing the requirement of detention prior to the exercise of the right of appeal;
- x. Order the Respondent State to take all measures to avoid any form of reprisal against him, his family and his counsel in relation to this case and/or the persons involved;
- xi. Order the Respondent State to pay a monthly sum of Three Hundred Million (300,000,000) CFA francs for failure to comply with the measures of satisfaction, restitution and guarantee of non-repetition pronounced by the Court;
- xii. Order the Respondent State to pay him the following sums: Four Hundred and Fourteen Billion, Seven Hundred and Seventy-Seven Million, Eight Hundred and Thirteen Thousand, Four Hundred and Fifty (414,770,813,450) FCFA for losses incurred and loss of future earnings; Thirty-Three Million, Seven Hundred and Eighty-Four Thousand, Three Hundred and Sixty-Three (33,784,363) FCFA for loss of salaries and salary benefits from 2018 to 2022; Three Hundred and Four Million, One Hundred and Twenty-Four Thousand, One Hundred and Ninety (385,124,190) FCFA for actual loss of dividends incurred at the level of the Fisc Consult Sarl; Twenty-Three Billion, Four Hundred and Sixteen Million, Five Hundred and Sixty-Two Thousand, Eight Hundred and Fifty-Four (23 416 562 854) FCFA with respect to loss of income accruing from fees in respect of the companies COMON SA, JLR SAU, SCI L'ELITE, MAERS BENIN SA, CMA-CGM BENIN SA, MSC BENIN SA, EREVAN, ECOBANK, Three Hundred and Seventy-Six Billion, Eight-Hundred and Forty Seven Million, Three Hundred and Forty-two thousand and Forty-Three (376, 847, 342, 043) FCFA in respect of loss of dividends in the company HEMOS SA; Twelve Billion (12,000,000,000) FCFA for lost earnings opportunities for activities as a teacher, trainer and

consultant; Seventy-Nine Million (79,000,000) FCFA for lawyers' fees and legal advice; Two billion (2,000,000,000) FCFA for all other moral prejudices;

- xiii. Order the Respondent State to pay the material and moral damages of One Billion Seven Hundred Million (1,700,000,000) FCFA, including Four Hundred Million (400,000,000) FCFA for his adoptive mother, Four Hundred Million (400,000,000) FCFA for his wife and Three Hundred Million (300,000,000) FCFA for each of his three children;
 - xiv. Order the Respondent State to pay the costs of these proceedings.
- 20.** The Respondent State prays the Court to:
- i. Declare that it lacks jurisdiction to order the necessary measures to annul the CRIET's judgment of 25 July 2019 and judgment No 001/ CRIET/COM-I/2019 of March 2019;
 - ii. Declare the application inadmissible for failure to exhaust local remedies;
 - iii. Find that the State of Benin did not violate the Applicant's human rights;
 - iv. Dismiss all the Applicant's claims and order him to pay the costs.

V. Jurisdiction

- 21.** Article 3 of the Protocol provides:
- 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
 - 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
- 22.** Furthermore, under Rule 49(1) of the Rules of Court, "The Court shall conduct preliminary examination of its jurisdiction ... in accordance with the Charter, the Protocol and these Rules".²
- 23.** Based on the above provisions, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.
- 24.** The Court notes that the Respondent State raises an objection to its material jurisdiction.

A. Objection to the material jurisdiction of the Court

- 25.** The Respondent State notes that the Applicant seeks the

² Rule 39(1) of the Rules of Court of 2 June 2010.

annulment of the CRIET's judgment of 25 July 2019 and that of 20 March 2019. It submits that the Court is not an appellate court of the decisions of domestic courts. The Respondent State therefore prays the Court to declare that it lacks jurisdiction.

26. The Applicant, referring to the case of *Abubakari v the Republic of Tanzania*, submits that the Court has jurisdiction to examine whether the determination of a case by the domestic courts was consistent with the requirements of the Charter and any other applicable international human rights instruments.
27. He contends that he sought the annulment of the judgments rendered by the CRIET against him, for violation of the rights protected by Articles 2, 11, 14, 15, 16, 17 and 26 of the ICCPR; Articles 1, 2, 3, 7, 12, 14 and 26 of the Charter; Articles 1, 3, 6, 7, 8, 10, 11, 14, 17, 19, 20 and 23 of the UDHR; and Articles 2, 6 and 7 of the ICESCR.
28. The Applicant therefore asserts that the Court has material jurisdiction in the instant case and requests that the Respondent State's objection be dismissed.

29. The Court considers that, under Article 3(1) of the Protocol, it has jurisdiction to hear all cases brought before it which relate to alleged violations of the Charter, the Protocol and any other human rights instrument ratified by the Respondent State.³
30. The Court underscores, in line with its jurisdiction, that it is not an appellate court in relation to the decisions given by domestic courts. However, "that does not preclude it from assessing whether domestic proceedings were conducted in accordance with international standards set out in the Charter and other international human rights instruments ratified by the State

3 *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015), 1 AfCLR 465, § 45; *Kennedy Owino Onyachi and another v United Republic of Tanzania* (merits) (28 September 2017), 2 AfCLR 65, § 34-36; *Jibu Amir aka Mussa and another v United Republic of Tanzania* (merits and reparations) (28 November 2019), 3 AfCLR 629, § 18; *Masoud Rajabu v United Republic of Tanzania*, ACtHPR, Application No 008/2016, Judgment of 25 June 2021 (merits and reparations), § 21;

concerned.”⁴

31. The Court notes, in the present case, that the Applicant alleges violation of rights protected by the Charter, the ICCPR, the ICESCR and the UDHR, the interpretation and application of which fall within its material jurisdiction. It further observes that the Applicant requests it to examine whether the criminal proceedings against him before the CRIET are compatible with the above-mentioned human rights instruments ratified by the Respondent State.
32. Accordingly, the Court is not called upon to sit as an appellate or cassation court but rather to act within the limits of its material jurisdiction. It follows that the objection raised by the Respondent State is untenable.
33. Accordingly, the Court finds that it has material jurisdiction.

B. Other aspects of jurisdiction

34. The Court notes that no objections have been raised to its personal, temporal and territorial jurisdiction. Nevertheless, in accordance with Rule 49(1) of the Rules, it must ensure that the requirements relating to all aspects of its jurisdiction are met before proceeding to examine the application.
35. With regard to personal jurisdiction, the Court notes that the Respondent State is a party to the Charter, the Protocol and has deposited the Declaration. The Court recalls, as stated in paragraph 2 of this Judgment, that on 25 March 2020 the Respondent State deposited the instrument of withdrawal of the Declaration. In this respect, the Court recalls its jurisprudence that the withdrawal by the Respondent State of its Declaration has no retroactive effect, nor does it affect either cases pending at the time of the said withdrawal or new cases brought before it before the entry into force of the withdrawal, one (1) year after the deposit of the instrument, that is, on 26 March 2021. The present Application, which was filed before the instrument of withdrawal was deposited by the Respondent State, is therefore not affected by it.⁵

4 *Kenedy Ivan v United Republic of Tanzania* (merits) (March 2019), 3 AfCLR 48, § 26; *Armand Guéhi v United Republic of Tanzania* (merits and reparations) (7 December 2018), 2 AfCLR 477, § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018), 2 AfCLR 287, § 35; *Sébastien Ajavon v Republic of Benin*, ACTHPR, Application No 027/2020 (jurisdiction and admissibility), § 46.

5 See paragraph 2 of this Ruling.

36. With regard to temporal jurisdiction, the Court considers that it is established as the alleged violations occurred after the Respondent State became a party to the Charter, the Protocol and had deposited the Declaration.
37. As regards its territorial jurisdiction, the Court finds that it is also established since the facts of the case and the alleged violations took place in the territory of the Respondent State.
38. Accordingly, the Court finds that it has jurisdiction to consider the Application.

VI. Admissibility

39. Article 6(2) of the Protocol provides that “The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.
40. In accordance with Rule 50(1) of the Rules of Court,⁶ “The Court shall proceed to an examination of admissibility (...) in accordance with Article 56 of the Charter and Article 6(2) of the Protocol and the (...) Rules of Court”.
41. Rule 50(2) of the Rules, which in substance restates Article 56 of the Charter, provides:
Applications filed before the Court shall comply with all of the following conditions:
 - a. Indicate their authors even if the latter request anonymity;
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter;
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
 - d. Are not based exclusively on news disseminated through the mass media;
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 - f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter, and;
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the Charter.

6 Rule 40 of the Rules of 2 June 2010.

42. The Court notes that the Respondent State raises an objection to the admissibility of the Application based on non-exhaustion of local remedies.

A. Objection based on non-exhaustion of local remedies

43. The Respondent State submits that the Applicant filed a cassation appeal against the judgment of the Correctional Division of the CRIET of 25 July 2019, and that the case is pending before the Supreme Court, which must rule on the merits of this appeal and decide whether the CRIET applied the law correctly or made an error in its application of the law.
44. The Respondent State avers that without awaiting the Supreme Court's decision, the Applicant filed the matter before this Court on 21 January 2020. It therefore argues that the Applicant did not exhaust local remedies under Article 56(5) of the Charter.
45. The Respondent State therefore prays the Court to declare the Application inadmissible.
46. In his reply, the Applicant submits that he is not required to exhaust local remedies since the judicial remedy available in this case is ineffective. He explains that, as the Supreme Court is the judge of the law and not of the facts, it is impossible for it to establish the veracity of the facts.
47. He further submits that the cassation appeal procedure before the Supreme Court is unduly prolonged.
48. The Applicant therefore prays the Court to dismiss the objection to the admissibility of the Application.

49. The Court recalls that, in accordance with Article 56(5) of the Charter and Rule 50(2)(e) of the Rules of Court, applications can only be filed after the exhaustion of local remedies, if any, unless it is clear that the proceedings in respect of those remedies are unduly prolonged.
50. The Court underscores that the local remedies to be exhausted are those of a judicial nature, which must be available, that is, they must be available to the Applicant without hindrance, effective and satisfactory in the sense that they are "found satisfactory by

the complainant or is capable of redressing the complaint”.⁷

51. In any case, the Court notes that compliance with the requirement of Article 56(5) of the Charter and Rule 50(2)(e) implies that the Applicant not only initiates local remedies, but also that he awaits their outcome.⁸ In the same vein, the Court also notes that in order to determine whether the requirement of exhaustion of local remedies has been met, it is necessary that the domestic proceedings to which the Applicant was a party be completed at the time of filing the Application before the Court.⁹
52. The Court notes, in the present case, that it is not disputed that on 26 July 2019, the Applicant filed a cassation appeal before the Supreme Court of the Respondent State against the judgment rendered on 25 July 2019 by the Correctional Chamber of the CRIET and filed the present Application, on 21 January 2020, while the appeal proceedings were pending.
53. It notes that to file this Application before the Court without having awaited the decision of the Supreme Court, the Applicant advances two arguments, namely the ineffectiveness and the undue prolongation of the cassation appeal before the Supreme Court.
54. Regarding the Applicant’s first argument, namely, the ineffectiveness of the cassation remedy, the Court observes that in the Beninese legal system, a cassation appeal is a remedy which seeks to have a final judgment or ruling set aside on the grounds of a breach of the law.¹⁰ Thus, in the present case, there is no doubt, *a priori*, that the Supreme Court has the ultimate capacity to bring about a change in the Applicant’s situation, on the merits of the case, if it finds that the correction chamber of the CRIET erred in law in relation to the way in which the case was handled by the CRIET.
55. In this regard, the Court notes that under Article 41 of Law No 2004-20 of 17 August 2007 on the rules of procedure applicable before the judicial panels of the Supreme Court (hereinafter referred to as the “Law of 17 August 2007”), the Judicial Division,

7 *Beneficiaries of late Norbert Zongo, Aboulaye Nikiema dit Ablassé, Ernest Zongo and Blaise Ilboudo and Mouvement Burkinabè des droits de l’homme et des peuples v Burkina Faso*, Judgment (5 December 2014) (merits), 1 AfCLR 219, § 68 ; *Ibid.* *Konaté v Burkina Faso* (merits) §108.

8 *Yacouba Traoré v Republic of Mali*, ACtHPR, Application No 010/2018, judgment of 25 September 2020 (jurisdiction and admissibility) §§ 46 and 47.

9 *Komi Koutché v Republic of Benin*, ACtHPR, Application 020/2019, Judgment of 25 June 2021, §61; *Sébastien Marie Aikoué Ajavon v Republic of Benin*, ACtHPR, Application 027/2020, Judgment of 2 December 2021, §74

10 Article 577 of Law No 2012-15 on the Code of Criminal Procedure.

should it set aside the judgments or rulings submitted to it, shall refer the merits of the case to another court of the same order or to the same court otherwise composed. Furthermore, in accordance with Article 42 of the said law, the judgments delivered by the Judicial Division of the Supreme Court are binding on the referring court.

56. The Court therefore finds that the cassation appeal is not an ineffective remedy, as the Cassation Court can lead to the reversal of the contested decision.
57. With regard to the second argument, namely, the undue prolongation of proceedings before the Supreme Court, the Court recalls its jurisprudence that assessing whether or not the duration of the proceedings relating to local remedies is unduly prolonged must be made on a case-by-case basis, taking into account the circumstances of each case.¹¹ In its analysis, the Court “takes into account, in particular, the complexity of the case or of the procedure relating to it, the conduct of the parties themselves and that of the judicial authorities in determining whether the latter have shown a degree of passivity or clear negligence”.¹²
58. The Court observes in the present case that the Applicant filed the cassation appeal by letter of 26 July 2019 pursuant to Article 581¹³ of Law No 2012-15 on the Criminal Procedure Code.
59. The Court also notes that, in accordance with Article 14 of the Law of 17 August 2007, the proceedings before the Judicial Chamber are deemed to be in progress when the pleadings and documents have been submitted, or when the time-limits for submitting them have elapsed. It further notes that Article 52 of the said law provides that the appellant must file, in support of the said appeal, an amplifying memorandum containing the legal arguments relied on against the contested decision, thereby enabling the Supreme Court to initiate the determination of the case.
60. Finally, the Court notes that in cassation proceedings before the Supreme Court, the parties receive copies of documents and

11 *Beneficiaries of Norbert Zongo, Abdoulaye Nikiema dit Ablasse, Ernest Zongo and Blaise Ilboudo and Mouvement Burkinabé des droits de l'homme et des peuples v Burkina Faso* (merits) (28 March 2014) 1 AfCLR 226, § 92.

12 See *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (merits) (21 March 2018) 2 AfCLR 237, § 38; *Wilfred Onyango Nganyi and 9 others v Tanzania* (merits), § 136.

13 Article 47 of Act No 2004-20 of 17 August 2007 on the rules of procedure applicable before the judicial panels of the Supreme Court: “The appeal shall be lodged by means of a written or oral statement which the appellant himself or herself, or a lawyer or any agent with special authority, shall have delivered or sent to the registry of the court which handed down the decision...”.

pleadings in order to make their observations. However, they are also heard by the Judicial Chamber, which may take some time. Moreover, when the case is ready, the Judge-Rapporteur drafts his report and his draft judgment, and then sends the docket to the Public Prosecutor's Office,¹⁴ which must in turn produce a report. The Court notes, moreover, that the complexity of the case is not in dispute with regard to the nature of the offences being prosecuted, in particular, embezzlement of public funds, abetment, abuse of office and usurpation of title.

61. The Court recalls that between 26 July 2019, the date of the appeal in cassation filed by the Applicant, and 21 January 2020, the date of the filing of the Application before this Court, five (5) months and twenty-five (25) days elapsed. The Court considers, with regard to the formalities relating to the processing of the appeal in cassation by the Supreme Court, that the Applicant's case could not reasonably have taken less than six (6) months and that therefore the procedure was not unduly prolonged.
62. Based on the above, the Court finds that the Applicant's arguments are not well-founded and that he should have awaited the outcome of his cassation appeal before filing the instant Application before this Court. The Court therefore finds that the Applicant filed the Application prematurely.
63. Accordingly, the Court upholds the objection based on non-exhaustion of local remedies and finds that the Application does not meet the requirement of Rule 50(2)(e) of the Rules.

B. Other admissibility requirements

64. Having concluded that the Application does not meet the requirement of Rule 50(2)(e) of the Rules and that the admissibility requirements are cumulative,¹⁵ the Court does not need to rule on the admissibility requirements set out in paragraphs 1, 2, 3, 4, 6, and 7 of Article 56 of the Charter as restated in Rule 50(2)(a)(b)

14 Article 16 of Law No 2004-20 of 17 August 2007 on the rules of procedure applicable before the judicial panels of the Supreme Court.

15 *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (jurisdiction and admissibility) (21 March 2018), 2 AfCLR 237, § 63; *Rutabingwa Chrysanthé v Republic of Rwanda* (jurisdiction and admissibility) (11 May 2018), 2 AfCLR 361, § 48; *Collectif des anciens travailleurs ALS v Republic of Mali*, ACtHPR, Application No 042/2015, Judgment of 28 March 2019 (jurisdiction and admissibility), § 39.

(c)(d)(f) and (g) of the Rules.¹⁶

65. Based on the foregoing, the Court declares the Application inadmissible and dismisses it.

VII. Request for provisional measures

66. The Court recalls that on 5 September 2022, the Applicant filed a request for provisional measures.
67. However, in the present case, the Court has declared that the objection based on non-exhaustion of local remedies is founded and find that the Application does not meet the requirements of rule 52(2)(e) of the Rules, which renders the provisional measures requested moot.

VIII. Costs

68. Each Party prays the Court that the other party bear the costs.

69. Under Article 32(2) of the Rules,¹⁷ “[u]nless otherwise decided by the Court, each party shall bear its own costs, if any”.
70. The Court finds that nothing in the circumstances of the present case warrants a departure from that provision.
71. The Court therefore declares that each Party shall bear its own costs.

IX. Operative part

72. For these reasons,
The Court
Unanimously,
On jurisdiction

- i. *Dismisses* the objection to its jurisdiction;
- ii. *Declares* that it has jurisdiction.

16 *Ibid.*

17 Rule 30(2) of the Rules of 2 June 2010.

On admissibility

- iii. *Upholds* the objection based on non-exhaustion of local remedies;
- iv. *Declares* the Application inadmissible.

On costs

- v. *Orders* that each Party shall bear its own costs.

Kouassi & Anor v Côte d'Ivoire (ruling) (2022) 6 AfCLR 726

Application 015/2021, *Kouassi Kouamé Patrice and Baba Sylla v Republic of Côte d'Ivoire*

Judgment, 22 September 2022. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA, SACKO and ADJEI

The Applicants, both citizens of the Respondent State, were candidates in parliamentary elections in that State. They brought this Application alleging that some of their human rights were violated in connection with the conduct of the said elections. They had unsuccessfully challenged the declaration of results before the national courts. The Court held that the Respondent State had violated some of the rights claimed by the Applicants. Accordingly, the Court awarded the Applicants reparations for pecuniary damages but dismissed their request to annul the elections.

Jurisdiction (personal jurisdiction, 19-21, 33-36; material jurisdiction, 23, 84)

Admissibility (disparaging or insulting language, 43-46; exhaustion of local remedies, 49-51)

Fair trial (independent and impartial court, 64-69, 70-76, 84-92)

Political participation (conduct of public affairs, 99-103; credible elections, 112-116, 124-126)

Liberty (security of the person, 137-140, 141-143)

Reparations (basis of, 148; onus to provide evidence for, 149; scope of, 150; material prejudice, 154-157; moral prejudice, 158-161; non-pecuniary reparation, 163)

I. The Parties

1. Mr Kouassi Kouamé Patrice and Mr Baba Sylla (hereinafter, "the Applicants") are nationals of the Republic of Côte d'Ivoire. They were candidates of the *Parti Démocratique de Côte d'Ivoire-Rassemblement Démocratique Africain* (hereinafter, "the PDCI-RDA") in the parliamentary elections held on 6 March 2021 in Electoral District No 053, Yamoussoukro Commune 2. They allege the violation of their rights in connection with the said election.
2. The Application is filed against the Republic of Côte d'Ivoire (hereinafter, "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter, "the Charter") on 31 March 1992 and to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter,

“the Protocol”) on 25 January 2004. The Respondent State also deposited on 23 July 2013 the Declaration provided for under Article 34(6) of the Protocol (hereinafter, “the Declaration”), by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 29 April 2020, the Respondent State deposited with the Chairperson of the African Union Commission, an instrument of withdrawal of its Declaration. The Court has held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect, that is, one year after its deposit, which is on 30 April 2021.¹

II. Subject of the Application

A. Facts of the matter

3. From the Application before the Court, it emerges that following the declaration of the provisional results of the 6 March 2021 parliamentary election, the Applicants, who were candidates in the said election, brought an action before the Constitutional Council seeking to invalidate the provisional results in Electoral District No 053, Yamoussoukro Commune 2. The Applicants contended that the election in the said electoral district was marred by material irregularities and violations of electoral laws during voting and collation of results and during the compilation of collation sheets.
4. On 22 March 2021, the Constitutional Council dismissed the Applicants’ appeal on the ground that they did not produce evidence in support of the irregularities they alleged.
5. Believing that their rights guaranteed by domestic laws and international instruments were violated, the Applicants brought proceedings before this Court.

B. Alleged violations

6. The Applicants allege violation of the following rights:
 - i. The right to an independent and impartial tribunal guaranteed in Articles 7 of the Charter, 14 of the International Covenant on Civil and Political Rights (hereinafter, “the ICCPR”)² and 10 of the Universal Declaration of Human Rights (hereinafter, “the UDHR”);

¹ *Suy Bi Gohoré Émile and Others v Republic of Côte d'Ivoire*, ACtHPR, Application No 044/2019, Judgment of 15 July 2020 (merits and reparations), § 67.

² The Respondent State became a State Party to the ICCPR on 26 March 1992.

- ii. The right of political parties to freely engage in political activities and the right of everyone to vote freely guaranteed by Articles 13(1) of the Charter, 2(1)(3),³ 3(1)(4)(7)⁴ and 4⁵ of the African Charter on Democracy, Elections and Governance (hereinafter, “the ACDEG”)⁶ as well as Articles 6 and 19(2)⁷ of the ECOWAS Protocol on Democracy and Good Governance (hereinafter, “the ECOWAS Democracy Protocol”);⁸
- iii. The right to credible elections guaranteed by Articles 13(1) of the Charter, 25(a) and (b) of the ICCPR, 21(3) of the UDHR, 2(1)(3) and 3(1)(4)(7) and 4 of the ACDEG and Articles 6 and 19(2) of the ECOWAS Democracy Protocol;
- iv. The right to liberty and security of the person, protected by Article 6 of the Charter.

III. Summary of the Procedure before the Court

- 7. The Application was filed at the Registry on 23 April 2021 and was served on the Respondent State on 21 May 2021.
- 8. On 16 July 2021, the Respondent State filed its Response, which was served on the Applicants on the same date for their observations.

3 Article 2(1) & (3) of the ACDEG provides as follows: “Promote adherence, by each State Party, to the universal values and principles of democracy and respect for human rights. [...] (3) Promote the holding of regular free and fair elections to institutionalize legitimate authority of representative government as well as democratic change of governments.”

4 Article 3(1), (4) & (7) of the ACDEG provides as follows: “State Parties shall implement this Charter in accordance with the following principles: (1) respect for human rights and democratic principles [...] (4) Holding of regular, transparent, free and fair elections. [...] (7) Effective participation of citizens in democratic and development processes and in governance of public affairs.”

5 Article 4 of the ACDEG provides as follows: “State Parties shall commit themselves to promote democracy, the principle of the rule of law and human rights; (2) State Parties shall recognize popular participation through universal suffrage as the inalienable right of the people.”

6 The Respondent State became a party to the ACDEG on 28 November 2013.

7 Articles 6 and 19(2) of the ECOWAS Democracy Protocol provide as follows: “The preparation and conduct of elections and the announcement of results shall be done in a transparent manner. The police and other security agencies shall be responsible for the maintenance of law and order and the protection of persons and their properties.”

8 The Respondent State became a party to the ECOWAS Democracy Protocol on 31 July 2013.

9. On 31 August 2021, the Applicants filed their Reply. On the same date, the Registry acknowledged receipt and served it on the Respondent State.
10. Pleadings were closed on 9 May 2022 and the Parties were duly notified.

IV. Prayers of the Parties

11. The Applicant prays the Court to:
 - i. Find the violation by the Respondent State of their rights guaranteed by domestic laws and human rights instruments;
 - ii. Amend the results of Electoral District No 053, Yamoussoukro commune 2 and invalidate seventy-six (76) collation sheets in (15) polling stations;
 - iii. Declare the Applicants, who stood on the ticket of PDCI-RDA, winners of the 6 March 2021 parliamentary election or
 - iv. Order the Respondent State to rerun the parliamentary election in District No 053, Yamoussoukro Commune 2;
 - v. Order the Respondent State to pay the Applicants the sum of One Hundred and Fifty Million (150,000,000) CFA francs as reparation for campaign and legal costs.
12. The Respondent State prays the Court to:
 - i. Rule the Application inadmissible;
 - ii. Dismiss all of the Applicants' requests as unfounded.

V. Jurisdiction

13. The Court notes that Article 3 of the Protocol provides:
 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
14. Under Rule 49(1) of the Rules of Court, "[t]he Court shall conduct a preliminary examination of its jurisdiction [...] in accordance with the Charter, the Protocol and these Rules."
15. Based on the above-mentioned provisions, the Court must, in each application, ascertain its jurisdiction and rule on objections thereto, if any.
16. The Court notes that, in the present case, the Respondent State raises an objection to its personal jurisdiction.

A. Objection to the personal jurisdiction of the Court

17. The Respondent State disputes the personal jurisdiction of the Court and submits that after the withdrawal of its Declaration under Article 34(6) of the Protocol on 29 April 2020, it is no longer subject to the jurisdiction of the Court after the withdrawal took effect on a date set by the Court, that is, on 30 April 2021. The Respondent State contends that it can no longer be served an application since its decision to withdraw the Declaration took effect on 30 April 2021. It submits that by serving this Application on it by a letter dated 12 May 2021, the Court overstepped its personal jurisdiction.

18. For their part, the Applicants affirm that the fact that the Respondent State deposited the instrument withdrawing its Declaration, which took effect on 30 April 2021, does not in any way affect the personal jurisdiction of the Court to receive an application filed before the effective date of the withdrawal. They submit in support of their claim that their Application was filed with the Court by e-mail on 22 April 2021 and by DHL courier on the same date, and that as of that date, the Respondent State was still subject to the jurisdiction of the Court. The Applicants request the Court to find that it has personal jurisdiction to hear their Application.

19. The Court recalls that in its judgment in *Suy Bi Gohoré Emile and 3 Others v Côte d'Ivoire*, it held that the withdrawal of the Declaration made by the Respondent State under Article 34(6) of the Protocol has no effect on pending cases and on new cases filed before the effective date of the withdrawal, that is, one year after its deposit, on 30 April 2021.
20. In the present case, the Court notes that the Application was received at the Registry on 23 April 2021, eight (8) days before the effective date of the withdrawal of the Declaration, and it was

served on the Respondent State on 21 May 2021. The Court notes that the deadline of 30 April 2021 only relates to the date of filing an application before it. Thus, the Court has personal jurisdiction insofar as the Application was filed prior to the said date. Accordingly, there is no basis to consider that, by serving the Application received on 23 April 2021, on the Respondent State on 21 May 2021, the Court overstepped its personal jurisdiction.

21. In view of the foregoing, the Court finds that the objection based on personal jurisdiction raised by the Respondent State is unfounded and therefore dismisses it.

B. Other aspects of jurisdiction

22. The Court notes that no objections have been raised in relation to its material, temporal and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules, it must satisfy itself that these aspects of its jurisdiction are fulfilled.
23. As regards its material jurisdiction, the Court observes that, under Article 3(1) of the Protocol, it has jurisdiction to hear all cases before it insofar as they relate to allegations of violation of the Charter, the Protocol and any other human rights instrument ratified by the Respondent State.⁹ The Court notes that the Applicants allege a violation of their rights guaranteed and protected by the Charter, the ICCPR, the ACDEG and the ECOWAS Democracy Protocol, instruments to which the Respondent State is a party. Consequently, the Court finds that it has material jurisdiction to examine this Application.
24. Regarding its temporal jurisdiction, the Court notes that the violations alleged by the Applicants occurred after the Respondent State became a party to the Charter and the Protocol. Consequently, the Court holds that it has temporal jurisdiction to consider the Application.
25. Regarding its territorial jurisdiction, the Court notes that the violations alleged by the Applicants occurred within the territory of the Respondent State. In these circumstances, the Court holds that it has territorial jurisdiction.

9 *Alex Thomas v Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 45; *Owino Onyachi and Njoka v Tanzania* (merits) (28 September 2017) 2 AfCLR 65, §§ 34-36; *Masoud Rajabu v United Republic of Tanzania*, ACtHPR, Application No 008/2016, Judgment of 25 June 2021 (merits and reparations), § 21.

26. In light of the foregoing, the Court holds that it has jurisdiction to hear this Application.

VI. Objection based on the Respondent State's lack of standing

27. The Respondent State submits that it was erroneously called to respond to challenges arising from proceedings before the Constitutional Council between the Applicants and the Independent Electoral Commission (hereinafter referred to as "the IEC"), and between the Applicants and the candidates on the ticket of *Rassemblement des Houphouëtistes pour la Démocratie et la Paix* (hereinafter, "the RHDP").
28. The Respondent State further submits that the IEC is an independent administrative authority with a legal personality distinct from that of the Respondent State and that at no time did it intervene in relation to the facts of the contested election or the alleged violations of the Applicants' rights.
29. For the Respondent State, even though the Constitutional Council is a state institution which does not have a legal personality distinct from that of the State, the case before the Court is not between the Applicants and the Respondent State.
30. The Respondent State contends that under these conditions, it does not have standing as a Respondent in the present case, in lieu and place of the parties to the trial before the Constitutional Council.
31. The Applicants submit that although the elections were organised by the IEC, the violations of their rights arise from the decision of the Constitutional Council which, by dismissing their motion to annul the provisional results, erred in relation to the irregularities which marred voting in their electoral district.
32. For the Applicants, the Respondent State is logically the respondent in their Application before the Court insofar as it acknowledges and affirms in its Response that the Constitutional Council is a constitutional court which the State represents. The Applicants further submit that it is the Respondent State, like all other Member States, which is a Party to the Protocol and not the body whose acts are the cause of the violations committed.

33. The Court recalls its constant jurisprudence which holds that that only States Parties to the Protocol can be Respondents before it¹⁰ and that this exclusive jurisdiction is grounded on the principle that respect for, and implementation of, the rights guaranteed by international human rights instruments are first and foremost the responsibility of the State Parties. The Court further clarified that the said principle emanates from Articles 5 and 34(6) of the Protocol, which provide, respectively, as follows: “[...] the State Party against which the complaint has been lodged at the Commission [...]; the Court shall not receive any petition under Article 5(3) involving a State Party which has not deposited the Declaration provided for in Article 5(3) of the Protocol”.¹¹
34. In light of the elements set out in its jurisprudence referred to above, the Court clarifies that under no circumstances can its jurisdiction extend to entities other than a State Party to the Protocol. Consequently, the Independent IEC or the Constitutional Council cannot be respondents before the Court.
35. In the instant case, the Court notes that the Application was filed against the Respondent State, which is the main guarantor of respect for human rights and is responsible under international law for the acts of its officials, whether or not they have legal personality by virtue of the principle of the unity of the legal personality of the State in international law.
36. In view of the foregoing, the Court finds that the Respondent State’s objection that it cannot be a respondent in the instant case is baseless and is therefore dismissed.

VII. Admissibility

37. Pursuant to Article 6(2) of the Protocol, “the Court shall rule on the admissibility of cases taking into account to the provisions of Article 56 of the Charter”.
38. Furthermore, according to Rule 50(1) of its Rules of Court, “The Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules”.

10 *Akwasi Boateng & 351 others v Republic of Ghana*, ACTHPR, Application 059/2016, Judgment of 27 November 2020 (jurisdiction), §§ 32 and 34; *Femi Falana v African Union* (jurisdiction) (26 June 2012) 1 AfCLR 121, §§ 63, 70 and 71; *Atabong Denis Atemnkeng v African Union* (jurisdiction) (15 March 2013) 1 AfCLR 182, § 40.

11 *Femi Falana v African Union* (20 November 2015) (jurisdiction) 1 AfCLR 499, §§ 7 and 9; *Femi Falana v African Union* (jurisdiction) (26 June 2012), op cit., §§ 63, 70 and 71;

39. Rule 50(2), which in essence restates Article 56 of the Charter provides as follows:

Applications filed before the Court shall comply with all of the following conditions:

- a. Indicate their authors even if the latter request anonymity,
- b. Are compatible with the Constitutive Act of the African Union and with the Charter,
- c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union,
- d. Are not based exclusively on news disseminated through the mass media,
- e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
- f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter;
- g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the Charter.

40. The Court notes that in the instant case, Respondent State raises two objections based on (a) the use of disparaging and abusive language and (b) the non-exhaustion of local remedies.

A. Objection based on the use of disparaging and abusive language

41. The Respondent State submits that, the fact that the Applicants affirm that the members of the Constitutional Council are ardent supporters of the RHDP political party, fully committed and submissive to the President of the Executive of the said party, is defamatory and impugns the honour and dignity of the personalities appointed to the Constitutional Council. It submits that such charges are serious and injudicious with respect to the Respondent State and its institutions and requests the Court to dismiss the Application.

42. The Applicants submit that their claim does not discredit the

members of the Constitutional Council who have publicly and openly admitted to being affiliated with the RHRDP party. They further contend that this is information in the public domain that highlights the link between some members of the Constitutional Council and the RHDP party.

43. The Court recalls that it has already established that outrageous or insulting language are those that are said with the aim of undermining the dignity, reputation or integrity of a person. To be considered offensive, the statements must be used for the purpose of slandering or discrediting the person or institution with the intention to pollute the minds of the public or of any reasonable person.¹²
44. In the present case, the Court notes that by claiming that the members of the Constitutional Council are ardent supporters of the RDHP political party, fully committed to the President of the Executive, the Applicants merely indicate the political leaning of the members of the Constitutional Council without any intention, real or supposed, to disparage them or to undermine their integrity.
45. The Court also observes that the expressions “supporter or committed” describe the behaviour of belonging, activism or courteous reverence that cannot be interpreted as insults on the part of the Applicants.
46. Consequently, the Court finds that objection raised by the Respondent State is unfounded and dismisses it.

B. Objection based on non-exhaustion of local remedies

47. The Respondent State submits that the Applicants request the Court to find and sanction the violation of their rights whereas they have never initiated a procedure at the domestic level in this regard. The Respondent State therefore requests the Court to dismiss the Application for non-exhaustion of local remedies.

12 *Lohé Issa Konaté v Burkina Faso* (merits) (5 December 2014) 1 AfCLR 310, § 70; *Ajavon v Benin* (merits) (29 March 2019) 3 AfCLR 130, § 72.

48. The Applicants maintain that, insofar as they have referred the irregularities found during voting to the Constitutional Council, they no longer have any remedy to exhaust in relation to the irregularities. They further submit that it is indeed the decision of the Constitutional Council that leads to the violations of their rights for which they have brought a case before this Court. The Applicants state that as the decisions of the Constitutional Council were final and not subject to appeal, they had no other remedy to exhaust.

49. The Court recalls that under Article 56(5) of the Charter and Rule 50(2)(e) of the Rules of Procedure, for an application to be admissible, local remedies must have been exhausted, unless such remedies are unavailable, ineffective, inadequate or that the procedure is unduly prolonged.¹³
50. In the present case, the Court notes that in relation to the alleged irregularities of the 6 March 2021 election, the Applicants seized the Constitutional Council, the only body with jurisdiction over the presidential and parliamentary elections.¹⁴ Moreover, it emerges from the provisions of the Constitution and the Organic Law on the organisation and functioning of the Constitutional Council that decisions rendered by the Constitutional Council are binding on all and are not subject to appeal.¹⁵ Therefore, the Applicants

13 *Norbert Zongo and Others v Burkina Faso* (preliminary objections) *Op. cit.*, § 84.

14 See Articles 126.4 and 127 and 138 of the Constitution which provide as follows:

Article 126: 4. The Constitutional Council is a judge of the monitoring of presidential and parliamentary elections.

Article 138: Decisions of the Constitutional Council are not subject to appeal. They are binding on the public authorities, on any administrative, judicial, military authority and on any natural or legal person.

15 Article 15 paragraph 2 of Organic Law No 2001-303 of 5 June 2001 determining the organization and functioning of the Constitutional Council provides as follows: "Decisions of the Council are rendered at a public hearing upon a report by one of its members and are not subject to appeal. They are binding on public authorities, all administrative, judicial, military authorities and any natural or legal persons."

exhausted the only remedy available, that is, the remedy before the Constitutional Council.

51. Accordingly, the objection based on non-exhaustion of local remedies is dismissed.

C. Other conditions of admissibility

52. The Court notes that, in the present case, the Respondent State does not challenge the compliance of the Application with Rule 50(2)(a)(b)(d)(f)(g) of the Rules. Nonetheless, the Court must satisfy itself that these conditions have been met.
53. The Court observes that, in accordance with Rule 50(2)(a), the Applicants have clearly indicated their identity.
54. The Court notes that the requests of the Applicants seek to protect their rights as guaranteed under the Charter. It further notes that one of the objectives of the Constitutive Act of the African Union as stated in Article 3(h) thereof is the promotion and protection of human and peoples' rights. Furthermore, the Application does not contain any request that is incompatible with any provision of the Constitutive Act. Accordingly, the Court considers that the Application is compatible with the Constitutive Act of the African Union and the Charter, and therefore holds that it meets the requirement of Rule 50(2)(b) of the Rules.
55. With regard to the condition set out in Rule 50(2)(d) of the Rules, the Court notes that the Application is not based on information disseminated by the mass media, but rather on challenges relating to a judicial procedure involving the Applicants. The Application therefore meets this requirement.
56. Moreover, as regards the requirement relating to the filing of the application within a reasonable time, the Court considers that the period of one (1) month and two (2) days which elapsed between the Constitutional Council's Decision CI-2021-EL-094/22-03/CC/SG of 22 March 2021 and the filing of the Application before it on 23 April 2021, is a reasonable period of time under Rule 50(2)(f) of the Rules.
57. Finally, the Court considers that the requirement set out in Rule 50(2)(g) is met insofar as there is no indication that the present Application concerns a matter already settled by the parties, in accordance with either the principles of the United Nations Charter or the Constitutive Act of the African Union, or the provisions of the Charter.
58. In view of the foregoing, the Court finds that all admissibility conditions under Rule 56 of the Charter and Rule 50 of the Rules have been met and declares the Application admissible.

VIII. Merits

59. The Applicants allege the violation by the Respondent State of (a) their right to an independent and impartial tribunal, (b) their right to the free exercise of political activities, (c) their right to vote and the right to credible elections, and (d) their right to the security of their person.

A. Alleged violation of the right to an independent and impartial tribunal

60. The Applicants allege that the Constitutional Council is neither independent nor impartial. They aver that this lack of independence vis-a-vis the Executive and impartiality of the Constitutional Council stems from (i) its structural composition and (ii) is reflected in the absence of grounds in its decision of 22 March 2021.

i. Alleged lack of independence of the Constitutional Council in relation to its composition

61. The Applicants submit that although the Constitution and the Organic Law determining the organisation and functioning of the Constitutional Council state that it is an independent body, its composition and the method of appointment of its members do not offer any guarantee of independence and impartiality. They contend that the structure of the Constitutional Council, four (4) of whose members are appointed by the President of the Republic and three (3) by the President of the National Assembly who belongs to the same political party as the President of the Republic, does not offer sufficient guarantees in terms of dispelling any legitimate doubt about its independence and inspiring trust in the eyes of court users. The Applicants submit that the composition of the Constitutional Council does not meet the requirements of independence and impartiality as guaranteed by Article 7 of the Charter, Article 14 of the ICCPR and Article 10 of the UDHR.
62. In the Applicants' view, the influence of the executive branch on the President of the Constitutional Council as well as on three other members appointed by the President of the Republic, the political leaning of these members, who have famously admitted to sharing the Head of State's political convictions, and the previous political offices they held, clearly cast doubt on their independence and impartiality. They further contend that the same lack of independence also characterises the members

appointed by the President of the National Assembly who belongs to the same political party as the President of the Republic.

63. The Respondent State submits that the Constitutional Council is independent and impartial and relies on Article 126 of its Constitution, which provides as follows: "The Constitutional Council is a constitutional court. It is independent and impartial." It submits that the Applicants who seized the Constitutional Council seeking to invalidate the provisional results cannot rely on the lack of independence and impartiality of its judges, given that they neither requested their recusal nor challenged their appointment.

64. The Court notes that the issue is whether the composition of the Constitutional Council, the method of appointing, and the profile, of its members are of a nature to guarantee its independence and its impartiality.
65. The Court recalls that it has already established that the notion of judicial independence essentially involves the ability of the courts to discharge their functions, without outside interference and without dependence on any other authority, be it legislative, executive or the parties to the dispute.¹⁶ Independence thus has two aspects: institutional and individual.¹⁷
66. From the institutional point of view, the Court notes that Article 126(1) of the Constitution as well as the Organic Law provide that the Constitutional Council is a constitutional court that is independent and impartial. The Constitution further states that

16 ACtHPR, Application No 029/2018, *Oumar Mariko v Republic of Mali*, Judgment of 24 March 2022(merits and reparations), § 73; *XYZ v Republic of Benin*, ACtHPR, Application No 010/2020, Judgment of 27 November 2020, § 61 *Sébastien Germain Marie Aikoué Ajavon v Republic of Benin*, ACtHPR, Application No 062/2019, Judgment of 4 December 2019 (merits), § 277.

17 *Idem. XYZ v Republic of Benin*, § 62.

every member of the Constitutional Council undertakes to fulfil his function diligently and faithfully, to exercise it with independence and impartiality in accordance with the Constitution.¹⁸ Under these constitutional provisions and the Organic Law, the functions of members of the Constitutional Council are incompatible with the holding of any political office, any public employment or elective office and any professional activity.¹⁹

67. Moreover, the Constitutional Council enjoys administrative and financial autonomy, and the Court has already considered that the administrative and financial autonomy of a body is also an indicator of its independence.²⁰
68. The Court further notes that the power to discipline the members of the Constitutional Council is vested with the President of the Constitutional Council in accordance with Article 8 of Organic Law No 2001-303 of 5 June 2001. The members of the Council are irremovable.²¹
69. In view of the above provisions, the Court finds that the institutional independence of the Constitutional Council is guaranteed by the laws in force.
70. As regards individual independence, the Court has already established that it relates to the personal independence of judges and their ability to perform their duties without fear of reprisal or without bias.²² In this regard, the Court takes into account both subjective and objective considerations, in this case, the profile of members, the method of their appointment, the duration of their term of office, the removability of members, the existence of protection against external pressures and whether or not there is an appearance of independence or impartiality.
71. In the present case, as regards the composition and the method of appointing the members of the Constitutional Council, the Court notes that under the terms of constitutional and legal provisions, in this case Article 128 of the Constitution and Article 2 of the Organic Law, “the Constitutional Council is composed of a President, former Presidents of the Republic who are members

18 See Articles 130, paragraph 3, of the Constitution and 5 of the Organic Law.

19 See articles 131 first paragraph of the Constitution and 6 of the Organic Law.

20 *Idem. XYZ v Republic of Benin*, § 65.

21 Article 5 of the Organic Law n°2001-303 of 5 June 2001 determining the organisation and functioning of the Constitutional Council, states that “During their term of office, the members of the Constitutional Council shall have the status of magistrates of the judicial order.

22 *Oumar Mariko v Republic of Mali*, *Op. cit.*, § 73.

by right, unless they expressly waive their right to membership, and six councillors, three of whom are appointed by the President of the Republic, two by the President of the National Assembly and one by the President of the Senate". As for Article 129 of the Constitution, it stipulates that "The President of the Constitutional Council is appointed by the President of the Republic for a non-renewable term of six years from among persons recognised for their competence and proven expertise in legal or administrative matters..."

72. The Court observes that the trust of court users depends in large part on the fact that the composition, the appointment of the members of the Constitutional Council gives no cause to doubt the independence or the partiality of its members.
73. In the instant case, the Court notes, on the one hand, that the members of the Constitutional Council were appointed in accordance with the provisions of the Constitution and the Organic Law and, on the other hand, that their appointment by the President of the Republic and by the President of the National Assembly is not a form of mandate that binds the Councillors to the appointing authorities. Furthermore, the Court notes that the security of tenure enjoyed by the members of the Constitutional Council and the non-renewable nature of their mandate are such as to strengthen their individual independence.²³
74. Based on these findings, the Court considers that the composition of the Constitutional Council and method of appointment of the councillors do not compromise their independence.
75. The Court further notes that the Applicants aver that four (4) members of the Constitutional Council have publicly admitted to being affiliated with the RHDP party. The Court notes that the Applicants do not provide evidence that the members of the Constitutional Council concerned are affiliated to the RHDP party, or evidence of what they describe as a lack of independence "well known to the public". They provide no evidence that in the instant case there was any direct or indirect interference by other powers in the functioning of the Constitutional Council, particularly in the processing of their appeal before it. Moreover, the Court notes that there is no evidence that the Constitutional Council was subject to inappropriate interference directly or indirectly coming

23 *XYZ v Republic of Benin*, ACtHPR, Application No 010/2020, Judgment (merits and reparations) of 27 November 2020, § 70; *Sébastien Marie Aïkoué Ajavon v Republic of Benin*, ACtHPR, Application No 062/2019, Judgment of 4 December (merits and reparations) 2020, § 287.

from the executive, the legislative power or the RHDP party.²⁴

76. Based on these findings, the Court considers that the Applicant's doubts in relation to the independence and impartiality of the Constitutional Council are not justified and finds that the Respondent State did not violate the provisions of Article 7(1)(d) and 26 of the Charter, Article 17 of the ACDEG and Article 3 of the ECOWAS Democracy Protocol.

ii. **Alleged absence of grounds in the decision of the Constitutional Court**

77. The Applicants allege that in the course of the proceedings to challenge the election of RDHP candidates in Electoral District No 053 Yamoussoukro Commune 2, the Constitutional Council "in relation to the first ground of infringement of the law, responded in a laconic manner...and on all five aspects of the second ground of annulment, the Council responds in a vague and undocumented manner... The Council did not therefore respond to the specific questions and the multiple violations of the rights of voters and candidates in the 6 March 2021 election, neither did it respond to the violations of the electoral law and procedure".
78. They aver that, first, they contested the general tallying of votes and the collation sheets compiled in violation of the laws in force, in this case, Article 86 of the Electoral Code²⁵ and Article 9 of Deliberation No 002/EC/CC of 28 January 2021 on the collation and declaration of parliamentary results.²⁶
79. The Applicants submit that before the Constitutional Council, they raised the fact that the Chairperson of the Electoral Commission of the Autonomous District of Yamoussoukro, in violation of the above provisions, took upon himself to single-handedly finalise the collation of the results of Communes 1 and 2, the electoral districts, and to confirm the collation of the results by signing on

24 *Oumar Mariko v Republic of Mali*, op.cit., § 78.

25 Article 86 of the Ivorian Electoral Code provides as follows: "The Elections Commission shall carry out a general tallying of the votes and a transcript of the provisional results of the ballot at the level of each administrative district in the presence of the representatives present of the candidates or lists of candidates."

26 Article 9 of the Deliberation No 002/EC/CC of 28 January 2021 stipulates that "the collation sheets of the general vote count, the CD containing the completed Excel sheet and the inviolable envelopes [] shall be transmitted by the CESP/CEC to the Headquarters of the Commission (Local Electoral Commission of the seat of the competent electoral district)."

his own behalf and on behalf of the Vice-President.

80. They submit that in response to these material irregularities in the authentication of the collated results raised before the Constitutional Council, the latter knowingly did not reply and suggested that the mere fact that their representatives were present at the time of vote tallying and the collation of results, is sufficient to cover substantial irregularities which are contrary to the legislation in force.
81. The Applicants further state that the Constitutional Council responded in a hostile manner to their allegation that a violation was committed in barring emergency personnel from voting, by simply stating that it was not established that the emergency personnel who voted did so in favour of RHDP candidates.
82. The Applicants therefore request the Court to find that the Constitutional Council provided no grounds for its decision and that gave rise to the violation of their rights guaranteed by Articles 7 of the Charter, 10 of the UDHR and 14 of the ICCPR.

83. The Respondent State refutes the Applicants' allegations and describes them as serious and unfounded accusations. The Respondent State submits that the Constitutional Council's decision of 22 March 2021 was independent and impartial. It requests the Court to consider the Applicants' allegations as unjustified and to dismiss them.

84. The Court recalls its jurisdiction that it is not an appellate court in relation to the decisions rendered by domestic courts, including those not subject to any local remedy. However, it has stated that this does not preclude it from examining whether domestic courts have rendered their decisions in accordance with international standards established by the Charter or by any other human

rights instruments to which the Respondent State is a party.²⁷

85. The Court also observes that it is in the interest of justice that judicial decisions sufficiently state the grounds on which they are based. The obligation to state the grounds of its decision implies that a court bases its decision on objective and sufficiently clear arguments to give the parties the assurance that they have been heard.
86. In the present case, the Court notes that the Applicants submit that the Constitutional Council did not state the grounds for its decision with regard to their grievances in relation to the fact that the President of the Electoral Commission of the Autonomous District of Yamoussoukro counted, compiled and finalised the election results in the absence of their representatives, on the one hand, and the fact that on-call staff were prohibited from voting, on the other.
87. On the claim that the President of the Electoral Commission of the Autonomous District of Yamoussoukro counted, compiled and finalised the election results in the absence of the Applicants' representatives, the Court notes that the Constitutional Council responded as follows: "Considering that the applicants, who complain that the President of the Electoral Commission of the Autonomous District of Yamoussoukro unilaterally finalised the compilation of the results, do not provide evidence that this action took place without the knowledge of their representatives; that failing to provide such evidence, this argument cannot succeed, especially since all the representatives of the candidates signed the collation sheet in respect of the vote count without having expressed any reservation, complaint or observation". The Constitutional Council then concluded that the presence of the Applicants' representatives during the collation was sufficient to satisfy the requirement of Article 86 of the Electoral Code and Article 18 of Law No 2001-634 of 9 October 2001.
88. Based on these findings, the Court considers that the Constitutional Council adequately stated the grounds for its decision on this issue.
89. With regard to the question whether the Constitutional Council met the requirement to state the ground of its decision with regard to irregularities relating to the vote of emergency personnel, the

27 *Godfred and Kisite v Tanzania* (jurisdiction and admissibility) (26 September 2019) 3 RJCA 470, § 11; *Alex Thomas v Tanzania* (merits), *Op. cit.*, § 130. See also *Christopher Jonas v Tanzania* (28 September 2017) (merits) 2 AfCLR 101, § 28; *Ingabire v Rwanda* (merits) (24 November 2017) 2 RJCA 165, § 52; *Abubakari v Tanzania* (merits) (3 June 2013) 1 AfCLR 599, § 29.

Court notes that the Constitutional Court decided as follows: "Considering, in relation to the complaint about the vote of on-call staff and election officials, that according to the combined reading of Article 34 of the Electoral Code and Article 1 of Ordinance No 008/CEI/PDT of 4 March 2021, on-call staff and election officials are not prohibited from voting unless they are not registered in the polling stations where they are assigned. In the present case, the Applicants allege that the persons concerned voted in their assigned polling stations without proving that they are not registered there; moreover, assuming that the on-call staff concerned voted under these conditions, it is not demonstrated that they voted only in favour of RHDP candidates".

90. In these circumstances, the Court observes that by holding that the Applicants do not provide evidence that the staff in question were not registered in their assigned stations and especially that it was not demonstrated that the emergency staff voted solely in favour of RHDP candidates, the Constitutional Council stated the grounds for its decision.
91. It follows that the Applicants' allegation that their right to a reasoned decision was violated lacks merit and is dismissed.
92. The Court therefore finds that the Respondent State did not violate the Applicants' right to an independent and impartial tribunal guaranteed in Articles 7 of the Charter, 10 of the UDHR and 14 of the ICCPR.

B. Alleged violation of the right to undertake political activities

93. The Applicants allege that their delegates were excluded and driven out of several polling stations at the instruction of the Chairperson of the Electoral Commission of Commune 2, thus preventing them from monitoring voting operations, checking the identity of voters and vote counting at polling stations. They contend that in order to carry out such activities, they had requested and obtained from the IEC the duplicate of the biometric voters' signatures sheet and that the said duplicates were simply confiscated from their delegates.
94. They state that before the Constitutional Council they argued that in many polling stations, election officials prevented voters of their PDCI-RDA party from voting, even though they were entitled to vote, while supporters from the RHDP party voted several times in several polling stations. The Applicants submit that all these actions constitute impediments to their rights guaranteed by the Constitution.

- 95.** The Respondent State did not respond to these allegations. However, it cautions the Court against influential actors who, acting as the opposition or holders of political power, misconstrue their experiences as new cases of human rights violations. The Respondent State submits that the Court is besieged by politicians of all kinds and of all persuasions who only care about their own person and therefore urges the Court not to be distracted at the risk of relegating the real thorny cases of peoples' rights to the background.

- 96.** Article 13(1)(b) of the Charter provides:
Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.
- 97.** Articles 2(3), 3(1)(4)(7) and 4 of the ACDEG provide, respectively, as follows:
- The objectives of this Charter are to [...] (3) Promote the holding of regular free and fair elections to institutionalize legitimate authority of representative government as well as democratic change of governments. (Article 2(3));
 - States Parties undertake to implement this Charter in accordance with the principles set out below: (1) Respect for human rights and democratic principles; [...] (4) Holding of regular, transparent, free and fair elections; [...] (7) Effective participation of citizens in democratic and development processes and in governance of public affairs. (Article 3(1)(4)(7));
 - State Parties shall commit themselves to promote democracy, the principle of the rule of law and human rights. (2) State Parties shall recognize popular participation through universal suffrage as the inalienable right of the people. (Article 4(1)(2)).
- 98.** Articles 6 and 19(2) of the ECOWAS Democracy Protocol provide as follows:
- The preparation and conduct of elections and the announcement of results shall be done in a transparent manner (Article 6).
 - The police and other security agencies shall be responsible for the maintenance of law and order and the protection of persons and their properties (Article 19(2)).

99. The Court notes that Article 13(1) of the Charter and the texts that the Applicants rely on above guarantee citizens of States parties the right to participate in the conduct of public affairs as voters or as candidates for elections, in total freedom and in accordance with legal rules previously established. It follows that all acts of intimidation, coercion or exclusion are prohibited and discrimination based on party membership or any other consideration violates the rights guaranteed.²⁸
100. In the present case, the Court notes that the Applicants aver, respectively, that their delegates were driven out of the polling stations, that the duplicates of collation sheets were confiscated from them, and that their party supporters were prevented from voting.
101. The Court also notes that the Respondent State does not dispute the Applicants' allegations. Moreover, it emerges from the records that, on the morning of the voting day, the Applicants drew the attention of the IEC Supervisor of the Yamoussoukro Autonomous District to the fact that their representatives had been expelled from polling stations and prohibited from using duplicates and, at around 16 hours GMT, lodged a complaint to denounce these acts.
102. The Court finds that under the provisions of Ordinance No 2020-356 of 8 April 2020 amending the Electoral Code, "Any candidate or candidate at the top of the list has free access to all polling stations. They have the right by themselves, or acting through one of the candidates on the list or by one of its delegates, to monitor all voting operations, ballot tallying and vote counting in the premises where these operations are carried out and to demand...".²⁹ The Court therefore finds that the confiscation of duplicates of the signature sheet and the expulsion of the Applicants' representatives from polling stations constitute impediments to the exercise of the right of suffrage guaranteed under Article 13(1) of the Charter and to the effective participation of the Applicants' representatives in the democratic processes guaranteed by Article 3 and 4 of the ACDEG.
103. Consequently, the Respondent State violated the Applicants' rights to monitor voting operations as well as the right of their representatives to vote freely in the election of 6 March 2021 in

28 See General Comment HRI/GEN/1/Rev.1 (1994) adopted by the Human Rights Committee, paragraphs 10 and 11.

29 See Article 38 of Decree No 2020-356 of 8 April 2020 amending the Electoral Code.

Electoral District No 053 of Yamoussoukro Commune 2.

C. Alleged violation of the right to credible elections

104. The Applicants allege that the results of the vote in Electoral District No 053 of Yamoussoukro Commune 2 do not reflect the actual votes cast. They allege that numerous and serious irregularities marred voting operations, vote monitoring, vote tallying and collection of collation sheets. For the Applicants, the results submitted to the Constitutional Council by the IEC were neither authentic, insofar as (i) they did not comply with the formal requirements laid down in the rules, nor credible, insofar as (ii) they did not reflect the exact vote count.

i. Alleged violations of regulatory requirements

105. The Applicants submit that the regulatory requirements emanating from the first Articles of the Ordinances N°035/IEC/PDT and N°036/IEC/PDT of 17 February 2021 on securing collation sheets and ballot papers were not complied with. They contend that, contrary to the requirements of the two ordinances, the collation sheets of the fifty (52) polling stations did not have the sticker or the signatures of polling station election officers. They allege that in some polling stations, less than five (5) collation sheets were drawn up while other polling stations had more.

106. The Applicants submit that, clearly, placing a *sticker* on collation sheets is not only a formal requirement, but is of public order and is prescribed in the interest of the public in order to attest to the authenticity and credibility of the vote, so that any alteration or omission undermines the credibility of the vote and should lead to its cancellation.

107. They contend that by refusing to annul the vote in the CEC 2 on the grounds that these irregularities are merely formal and do not arithmetically alter the data on the collation sheets, the Constitutional Council is making a distinction where the law does not consider certain requirements as optional or facultative and others as mandatory. The Applicants argue that, under these conditions, their right to credible elections, guaranteed in Articles 13(1) of the Charter, 25(a) and (b) of the ICCPR, 21 of the UDHR, 3 and 4 of the ACDEG, 6 and 19 of the ECOWAS Democracy Protocol, was violated.

108. The Respondent State submits that, the good faith of its judges notwithstanding, the Court, has been distracted by selfish politicians, many of whom are working solely to challenge the sovereignty of States and the credibility of their institutions. It submits that it is urgent for the Court to distance itself from such delaying tactics that have ended up causing discord between it and the States parties.

109. Article 13(1)(b) of the Charter provides that:

Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

110. Article 25(a) and (b) of the ICCPR provides that:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- a. To take part in the conduct of public affairs, directly or through freely chosen representatives;
- b. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

111. Article 6 of the ECOWAS Democracy Protocol provides that “The preparation and conduct of elections and the announcement of results shall be done in a transparent manner”.

112. The Court observes that in order to ensure the credibility of elections, Governments are required to take legislative, regulatory or practical measures to ensure that results collated and published after voting are exactly those expressed by all voters without any alterations that understate or exaggerate the votes cast.

113. The Court notes that the Applicants challenge the credibility of the vote because of the fact that some collation sheets did not bear a hologram (*sticker*) contrary to the relevant regulation which provides that a *sticker* be “placed on the collation sheet after it has been filled in and signed by the polling officials and the

candidates' representatives present."³⁰

114. The Court also notes that the Respondent State does not contest that some collation sheets did not bear stickers and that placing stickers on collation sheets is a requirement under Article 1 of Ordinance No 035/CEI/PDT of 17 February 2021, which provides as follows: "A hologram (sticker), made available to the polling station by the IEC, shall be put at a place indicated on the collation sheet after the latter has been filled in and signed by the members of the polling station and candidates' representatives present".
115. In the present case, the Court notes that placing *stickers* on ballot papers and collation sheets is a way of substantially authenticating these documents, with a view to avoid the risk of alteration or substitution of votes. The Court considers that the absence of a "sticker" on the collation sheets undermines the authenticity of the collation sheets.
116. The Court finds that electoral laws and the Applicants' right guaranteed under Article 13 of the Charter and Article 6 of the ECOWAS Democracy Protocol were violated.

ii. Alleged material irregularities affecting the credibility of the election

117. The Applicants allege that they identified fifty-nine (59) electoral or emergency officers assigned to the CEC 2 polling stations who voted in thirteen (13) polling stations where they were not registered as voters. They contend that, as a result, they requested the Constitutional Council to exclude from the vote count three hundred and seventy five (375) votes being the total number of votes cast by electoral officers and emergency persons assigned to the one hundred and twenty five (125) offices of the CEC 2.
118. They also allege that in several polling stations, their representatives saw people who voted more than once (on several occasions) and that at the end of the vote count, the number of voters exceeded those mentioned, by fifty-five (55) votes on the collation sheets of thirteen (13) polling stations in their possession.
119. The Applicants further submit that during the 6 March 2021 vote, there were eight hundred and eighty (880) spoilt ballots in Electoral District No 053 of Yamoussoukro Commune 2. They state that this large number of spoilt ballots was due to the discrepancies in the collation sheets of fourteen (14) polling stations, so that there

30 See Article 1 of Decree No 035/IEC/PDT of 17 February 2021.

were discrepancies between the number of ballots supplied to polling stations, those counted in the ballot box and the unused ballots

120. They further submit that all of these numerous irregularities they found in electoral district No 053 of Yamoussoukro Commune 2 contributed to the fourteen thousand (14,000) extra ballots fraudulently granted to RHDP candidates, who were declared winners of the election.
121. Finally, the Applicants submit that in several polling stations the copies of the collation sheets were either fewer or more than the number five (5) provided for in the rules.

122. The Respondent State submits that contrary to the alleged violations of the Applicants' rights, the present case is nothing more than a political gimmick like many others filed before this Court since its judgment in 2016 against the Respondent State on the independence and impartiality of the electoral body and on the right to participate in the conduct of public affairs. The Respondent State calls on the Court to distance itself from these political battles, whose sole purpose is to conquer power, in order to avert the risk of becoming mired in politicians' ambitions and of deviating from its core mandate.

123. The Court notes that the Applicants challenge the results of the 6 March 2021 election by arguing that polling staff and emergency staff assigned to some polling stations voted in polling stations where they were not registered and that there were discrepancies in the vote count in terms of the difference between the number of ballots supplied to polling stations, those counted in the ballot box and the unused ballots.
124. As regards the allegations relating to the vote of polling officials and emergency staff, the Court notes that the ban on voting in their assigned polling stations is not absolute insofar as Article 1 of

Deliberation No 008/CEI/PDT of 4 March 2021 states that: “For the elections of deputies to the National Assembly on 6 March 2021, the on-call personnel consisting of IEC central commissioners on mission, polling station officials and electoral police officers on mission, are not allowed to vote in their assigned polling stations, unless they are registered there”.

125. In the present case the Applicants do not provide evidence that the fifty-nine (59) election officials who voted were not registered on the voters’ list of the polling stations in question. Moreover, the Court notes that the Constitutional Council noted the same lack of evidence and admitted the vote of the fifty nine (59) officials concerned.
126. In conclusion, the Court considers that in the absence of evidence, the Applicants’ allegation is dismissed.
127. With regard to the allegations that the vote lacked credibility in relation to the difference between the Applicants’ votes and those of RHDP candidates, the Court notes that the Applicants affirm that by their count, there was a difference of eight hundred and eighty (880) votes between the combined number of ballots supplied to the polling stations, those counted in the ballot box and the unused ballots, on the one hand, and fourteen thousand (14,000) votes which they consider were fraudulently granted to RHDP candidates, on the other.
128. It emerges from the documents on record that, in order to obtain the number of votes cast, the Independent Electoral Commission proceeded, as it did for all electoral districts, to deduct spoilt ballots and blank ballots from the total number of ballots in the ballot boxes. In Electoral District No 053 Yamoussoukro Commune 2, total number of blank and spoilt ballots was one thousand one hundred and forty-five (1145), a number well over the eight hundred and eighty (880) considered irregular by the Applicants.
129. On this issue, the Court finds that the vote count took into account what should normally be excluded from the count of votes cast.
130. The Court further notes that the Applicants consider irregular all the results shown on the seventy-six (76) collation sheets without *stickers* totalling fourteen thousand (14,000) votes. In this respect, the Court considers that before considering the fourteen thousand (14,000) votes null and void, it is incumbent on it to investigate whether this number of votes is different from the one counted and collated by the parties’ representatives at the close of voting. On this issue, the Court observes that even if, from a formal point of view, the absence of a sticker violates regulatory requirements, as stated in paragraph 113 above, the Applicants do not prove that the number of votes captured on the seventy six

(76) collation sheets do not correspond to the actual votes cast and which were collated in the presence of all of the candidates' representatives at the close of voting.

131. In view of the foregoing, the Court considers that the credibility of the election was not in doubt insofar as the results communicated by the IEC correspond to those counted and collated in the presence of the candidates' representatives, and which are the expression of the voters' will.
132. With regard to the challenges raised in relation to the fact that there were sometimes fewer than five (5) copies of the collation sheet and sometimes more, the Court considers that credibility of the vote is not compromised as long as the Applicants do not dispute that the collation sheets for every polling station shows the same number of votes as cast.
133. Based on the foregoing, the Court finds that the Applicants' right to credible elections guaranteed by Article 13 of the Charter, Article 25 of the ICCPR and Article 6 of the ECOWAS Democracy Protocol is not violated.

D. Alleged violation of the right to the “security of the person”

134. The Applicants submit that in the 6 March 2021 elections, although all candidates were entitled to the protection of the Security Forces (FDS) during the campaign, they addressed a request to police and gendarmerie commanders on 17 February and on 3 and 4 March 2021 respectively, seeking protection for their headquarters, their homes and for their persons, but to no avail. They further aver that the security officials did not respond to their request until the fire at the first Applicant's home had begun.

135. The Respondent State did not respond on this issue.

136. Article 6 of the Charter provides:

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

- 137.** The Court observes that the arrest and detention of a person must be based on plausible suspicion that the person has committed an offence and must be brought before a court of competent jurisdiction which shall decide on the legality and merits of his arrest and/or detention. Arrest or detention without a legal basis is arbitrary.³¹ The jurisprudence of the African Commission also holds that detention is arbitrary whenever it is not based on any grounds or where the person detained is not brought before a judge.³²
- 138.** In the present case, the Court notes that the Applicants claim that the fire that occurred in the home belonging to one of them, and the administration's silence in response to a request for close protection constitute a violation of their right to security.
- 139.** With regard to the allegation that a fire broke out at the first Applicant's home although they requested for the protection of security forces, the Court notes that the Applicants state neither the circumstances nor the date of the fire or whether it was related to the organisation and conduct of the election. The Court further notes that nothing in the Application indicates the nature of the fire, its extent and whether it was of criminal origin.
- 140.** Accordingly, the Court considers that the Applicants' allegation that a fire in the home belonging to one of them constitutes a violation of their right under Article 6 of the Charter is unfounded and dismisses it.
- 141.** The Applicants further aver that they repeatedly requested that two "units of public forces" be dispatched to ensure their security during the election campaign until the results were announced, but to no avail. It emerges from the documents on record that the said requests were made at the beginning of the election campaign on 17 February 2021 and during the campaign on 3 and 4 March 2021 without any reply from the authorities.
- 142.** The Court notes that, before and during the elections period, the Security Forces (SDF) in charge of securing the electoral process

31 *Onyachi v Tanzania* (28 September 2017) (merits) 2 AfCLR 65, § 132.

32 *Ouko v Kenya*, Communication 232/99 (2000), AHRLR 135 (ACHPR 2000), § 20. See also *Institute for Human Rights and development in Africa and others v Democratic Republic of the Congo*, Communication 393/10. (ACHPR 2016) 20th Extraordinary Session, June 2016, § 117.

had been tasked to take all measures to maintain public order in relation to the organisation of the elections; ensure safety of public meetings or campaign rallies, polling stations, candidates, electoral commissions, political party leaders and electoral materials, in all neutrality. Denying the Applicants the State protection they were entitled to violates their right to security of their person.

- 143.** Accordingly, the Court finds that the Applicants' right to security of their person, guaranteed by Article 6 of the Charter, was violated.

IX. Reparations

- 144.** The Applicants request the Court to consider the numerous irregularities that marred voting in Electoral District No 053 Yamoussoukro Commune 2 in order to annul seventy-six (76) collation sheets from fifteen (15) polling stations and declare them winners of the election in the said electoral district, or failing that, order the Respondent State to rerun the parliamentary elections in Electoral District No 053 of Yamoussoukro Commune 2.

- 145.** The Applicants also request the Court to award them the sum of One Hundred and Fifty Million (150,000,000) CFA francs as reparation for campaign and legal costs.

- 146.** The Respondent State prays the Court to dismiss all of the Applicants' requests as unfounded.

- 147.** Article 27(1) of the Protocol provides that:

If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation including the payment of the fair compensation or reparation.

148. The Court recalls its earlier judgments on reparations³³ and restates its position that, to examine and assess Applications for reparation of prejudices resulting from human rights violations, it takes into account the principle according to which the State found guilty of an internationally wrongful act is required to make full reparation for the damage caused to the victim.
149. The Court also takes into account the principle that there must be a causal link between the violation and the alleged injury and places the burden of proof on the applicant who must provide evidence to justify his request.³⁴
150. The Court has also established that reparation must, as far as possible, erase all the consequences of the wrongful act and restore the state which would presumably have existed if that act had not been committed. Moreover, reparation measures must, depending on the particular circumstances of each case, include restitution, compensation, rehabilitation of the victim and measures to ensure the non-repetition of violations, taking into account the circumstances of each case.³⁵
151. In the present case, the Court finds that the Respondent State violated the Applicants' rights guaranteed by Articles 6, and 13(1) of the Charter, as well as those guaranteed by Articles 6 and 19(2) of the ECOWAS Democracy Protocol.
152. In the present case, the Court notes that the Applicants are seeking pecuniary and non-pecuniary reparations.

A. Pecuniary reparations

153. The Applicants request the Court to order the Respondent State to pay them the sum of One Hundred and Fifty Million (150,000,000) CFA francs as compensation for campaign and procedural costs. The Court will examine the Applicants' claim for reparation for (i) material and (ii) moral prejudice they allegedly suffered.

33 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (preliminary objections) (21 June 2013) Sébastien Germain Marie Aikoué Ajavon v Bénin 065/2019 (merits and reparations) (29 March 2021) 1 AfCLR, § 139.

34 *Reverend Christopher Mtikila v Tanzania* (reparations) (13 June 2014) 1 AfCLR 72, § 31.

35 *Ingabire v Rwanda* (reparations) (7 December 2018) 2 AfCLR 165, § 20.

i. Material Prejudice

- 154.** The Court recalls its consistent jurisprudence that any material prejudice must be proven by supporting documents and the causal link between the alleged prejudice and the violation found must be established.
- 155.** In the present case, the Court notes that the Applicants' request for reimbursement of the sum of One Hundred and Fifty Million (150,000,000) CFA francs is not based on any supporting document with the exception of a "bon à tirer", the duplicate of the biometric electoral register in the amount of One Million Four Hundred and Eighty-Five Thousand (1,485,000) CFA francs paid on 25 February 2021 by the Applicants.
- 156.** The Court recalls its jurisprudence that if the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation including the payment of fair compensation or reparation.³⁶
- 157.** In the present case, the Court finds that the withdrawal of the duplicate biometric voter register violated the Applicants' rights guaranteed under Article 13(1) of the Charter. Accordingly, based on the documents attached to the docket, it awards them the reimbursement of the amount of One Million Four Hundred and Eighty-Five Thousand (1,485,000) CFA francs.

ii. Moral prejudice

- 158.** The Court recalls its jurisprudence that there is a presumption of moral injury suffered by the applicant as soon as the Court has found a violation of the applicant's rights, so that it is no longer necessary to look for evidence to establish the link between the violation and harm.³⁷ The Court also held that the assessment of the amounts to be awarded as reparation for moral prejudice should be made on the basis of fairness, taking into account the circumstances of each case.³⁸
- 159.** The Court notes that in the present case it finds that the fact that the Applicants were prevented from verifying the vote based on

³⁶ *Ingabire v Rwanda* (reparations) (7 December 2018) 2 AfCLR, 165, § 19.

³⁷ *Oumar Mariko v Republic of Mali*, op.cit, § 184; *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*, 168; *Armand Guehi v United Republic of Tanzania* (merits and reparations), § 55; *Lohe Issa Konaté v Burkina Faso* (reparations) (2016) 1 AfCLR 358, op cit., § 41.

³⁸ *Ingabire v Rwanda*, Op. cit. § 59; *Beneficiaries Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo and Burkinabè Movement for*

the duplicate biometric voters' register and the absence of a sticker on the collation sheets constituted a violation of the regulations in force Article 6 of the ECOWAS Democracy Protocol.

160. Furthermore, the Court considers that the administration's failure to respond to the Applicants' multiple requests for close protection placed them in a situation of fear and anxiety during the electoral process. In the end, the Court considers that a lump sum compensation can be awarded to the Applicants.
161. The Court, ruling in equity and in accordance with its inherent power under the Protocol, awards the Applicants the lump sum of Two Million (2,000,000) CFA francs as reparation for the moral prejudice they suffered.

B. Non-pecuniary reparations

162. The Applicants request the Court to annul the votes of fifty nine (59) election officials assigned to some polling stations as well as collation sheets of seventy six (76) polling stations. They pray the Court to amend the results of Electoral District No 053, Yamoussoukro Commune 2 and declare them winners of the 6 March 2021 election in electoral district 053 Yamoussoukro Commune 2 or to order the Respondent State to rerun the vote in that electoral district.
163. The Court emphasises that it cannot order reparation measures based on allegations for which no human rights violations have been established.³⁹ In the present case, the Court finds in this judgment that although the absence of a sticker on the collation sheets of the seventy-six (76) polling stations constitutes a formal irregularity, it did not result in any material alteration of the results of the vote count, so that the votes remain credible.
164. As regards the cancellation of the votes of fifty-nine (59) electoral officers on duty, the Court recalls that it found that the Applicants did not provide any evidence that the said election officials were not registered in the places where they voted and dismisses this allegation.
165. The Court finds that the Applicants' request to annul the collation sheets as well as the votes of fifty nine (59) election officials and declare them winners or to order the rerun of the 6 March 2021

Human and Peoples' Rights v Burkina Faso op cit., § 20; *Lohe Issa Konaté v Burkina Faso* Op. cit., § 61.; *Ajavon v Benin* (reparations) (3 November 2019)3 AfCLR 196, § 89.

39 *Sébastien Germain Marie Elégué Ajavon v Benin*, ACTHPR, Application No 065/2019, Judgment of 29 march 2021(merits and reparations), § 169.

elections in Electoral District No 053 Yamoussoukro commune 2 lacks merit and dismisses it.

X. Costs

- 166.** The Applicants request the Court to order the Respondent State to pay them the sum of One Hundred and Fifty Million (150,000,000) CFA francs as reparation for campaign and procedural costs.

- 167.** The Respondent State prays the Court to dismiss all the Applicants' claims as unfounded.

- 168.** The Court notes that the Applicants' request for reparation for procedural costs is vague. The Court notes that this request is not supported by any documentary evidence of the said costs.

- 169.** The Court recalls that it has held that any claim for pecuniary reparation or reimbursement of expenses must be supported by documentary evidence, failing which it will be rejected. In particular, the Court has established that "the Applicant has to remit probative documents and to develop arguments relating the evidence to the facts under consideration and, when dealing with alleged financial disbursements, clearly describe the items and justification thereof".⁴⁰

- 170.** In the present case, the Court finds that the Applicants have not submitted any supporting documents in respect of the costs of the proceedings. Accordingly, their request for reimbursement of the costs of the proceedings is therefore dismissed.

⁴⁰ *Reverend Christopher R. Mtikila c. Tanzanie* (réparations) (2014) 1 AfCLR 72, § 40.

171. Under Article 32(2) of the Rules, “[u]nless otherwise decided by the Court, each party shall bear its own costs, if any”.

172. In the present Application, the Court decides that each Party shall bear its own costs.

XI. Operative part

173. For these reasons,

The Court

Unanimously,

On jurisdiction

- i. *Dismisses* the objection based on lack of personal jurisdiction
- ii. *Declares* that it has jurisdiction.

On the Respondent State's lack of standing

- iii. *Dismisses* the objection based on the Respondent State's alleged lack of standing;
- iv. *Finds* that the Respondent State has standing.

On admissibility

- v. *Dismisses* the objections based on the use of insulting language and the non-exhaustion of local remedies;
- vi. *Declares* the Application admissible.

On merits

- vii. *Finds* that the Respondent State did not violate the Applicants' right to a reasoned decision guaranteed by Article 7(1) of the Charter;
- viii. *Finds* that the Respondent State did not violate the Applicants' right to credible elections guaranteed by Article 13 of the Charter and Article 6 of the ECOWAS Democracy Protocol;
- ix. *Finds* that the Respondent State did not violate the Applicants' rights to an independent tribunal guaranteed by Article 26 of the Charter;
- x. *Finds* that the Respondent State violated the Applicants' right to transparent elections guaranteed under Article 6 of the ECOWAS Democracy Protocol by failing to comply with the regulatory requirements regarding the authentication of some of the collation sheets;
- xi. *Finds* that Respondent State violated the Applicants' rights to engage in political activity guaranteed by Article 13 of the Charter;
- xii. *Finds* that the Respondent State violated the Applicants' rights to security of the person guaranteed by Article 6 of the Charter.

On reparations

Pecuniary reparations

- xiii. *Awards* the Applicants the sum of Three Million Four Hundred Eighty-Five Thousand (3,485,000) CFA francs which breaks down as follows:
- 1,485,000 CFA Francs as reimbursement of the costs of obtaining duplicates of the voter register;
 - 2,000,000 CFA francs as reparation for the moral prejudice that they suffered.

Non-pecuniary reparations

- xiv. *Dismisses* the request for the annulment of the legislative election of 6 March 2021 in electoral district N°053 053 Yamoussoukro, Commune 2.

On implementation and reporting

- xv. *Orders* the Respondent State to pay the amounts indicated under (xiii) above free from taxes within six (6) months from the date of notification of this Judgment, failing which it will pay interest on arrears calculated on the basis of the applicable rate of Banque Centrale des Etats de l'Afrique de l'Ouest (BCEAO) throughout the period of delayed payment until the amount is fully paid.
- xvi. *Orders* the Respondent State to report to it on the implementation of item (xiii) of this operative part within three (3) months from the date of notification of this judgment.

On costs

- xvii. *Orders* that each Party shall bear its own costs.

Podiougou & Ors v Mali (ruling) (2022) 6 AfCLR 762

Application 004/2019, *Ibrahima Podiougou and 300 Others v Republic of Mali*

Ruling, 22 September 2022. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM and NTSEBEZA

Recused under Article 22: SACKO

The Applicants are all nationals of the Respondent State who were seconded to a company involved in the mining of gold. The Applicants brought this Application alleging that the Respondent State violated their human rights in relation to the process leading to their retrenchment. Upholding the Respondent State's objection, the Court held that the Applicants had not exhausted local remedies. Accordingly, the Court declared the Application inadmissible.

Admissibility (exhaustion of local remedies, 31-37, 39-41, 45-46)

I. The Parties

1. Ibrahima Podiougou and three hundred (300) others (hereinafter, "the Applicants"),¹ are all Malian nationals and former employees of *Société Mines d'Or de Loulo* (SOMILO SA Loulo) seconded to Société Universal Prestation Services (UPS-RH) under the terms of a staff provision contract with Société BCM Mali. They allege a violation of their right to work due to the failure to pay their retrenchment entitlements.
2. The Application is filed against the Republic of Mali (hereinafter, "the Respondent State") which became a party to the African Charter on Human and Peoples' Rights (hereinafter "the Charter") on 21 October 1986 and to the Protocol on 20 June 2000. The Respondent State also deposited, on 19 February 2010, the Declaration provided for in Article 34(6) of the Protocol (hereinafter, "the Declaration") by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and non-governmental organisations.

1 See List of Applicants Annexed.

II. Subject of the Application

A. Facts of the matter

3. The Applicants aver that they were employed by Universal Prestation Services (UPS), which is in charge of subcontracting staff and human resources, and were placed at the disposal of BCM Mali, the company in charge of operations at the *Société des Mines d'Or de Loulo* (SOMILO SA Loulo) gold mine.
4. The Applicants state that on 3 February 2009, the Director of BCM Mali SA addressed correspondence to UPS by which it served notice of termination of the staff supply and management contract between them, for economic reasons.
5. The Applicants aver that on 6 March 2009, UPS notified the Kayes Regional Director of Labour of a request for staff retrenchment addressed to BCM. A total of three hundred and one (301) workers, including twenty (20) staff representatives were concerned by the said request. They aver that on 19 February 2009, the Regional Director of Labour, by Letters No 0055/DRTEFP and N°0056/DRTEFP dated the same 19 February 2009, authorised the retrenchment of the workers concerned and also recommended the payment of their entitlements, in particular, salaries and benefits due to them until the date of effective retrenchment, comparative holiday allowance, redundancy allowance, issuance of work certificates and transportation of families for all staff recruited outside the usual place of employment at the time they were hired. They further aver that each worker was given notice of retrenchment.
6. The Applicants also aver that a list of the workers who were to face retrenchment was drawn up for this purpose. A specific amount was allotted to each worker, with the whole amount totalling One Billion Six Hundred and Ninety-Eight Million Four Hundred and Twenty-Five Thousand Eight Hundred and Seventy francs (1,698,425,870) FCFA for Two Hundred and Seventy-Five (275) workers.
7. They further consider that this amount paid by BCM Mali to cover the workers' entitlements was misappropriated by UPS, which paid only part of the said entitlements. According to the Applicants, out of the three hundred and one (301) workers initially concerned, only twenty-five (25) were paid some of their entitlements.
8. Finally, they aver that UPS allegedly laid off workers for economic reasons and then rehired the same workers while getting rid of the union leaders and other workers it had targeted.

9. In order to obtain relief, the Applicants initiated several legal proceedings before domestic courts. Believing that the domestic courts did not uphold their claims in the said proceedings, they brought the case before this Court.

B. Alleged violations

10. The Applicants allege:
 - i. A violation of Convention No 87 of the International Labour Organisation (ILO) on freedom of association;²
 - ii. A violation of Article L 257 of the Labour Code of Mali.³

III. Summary of the Procedure before the Court

11. The Application was received at the Registry on 14 January 2019 and served on the Respondent State on 20 May 2019.
12. On 20 June 2019, the Registry received the Respondent State's Response which was notified to the Applicants on the same day.
13. All pleadings and documents in the proceedings were duly notified to the Parties and they filed their pleadings within the time-limits prescribed by the Court.
14. Pleadings were closed on 30 June 2022 and the Parties were duly notified.

IV. Prayers of the Parties

15. The Applicants pray the Court to:
 - i. Order the payment of One Billion Six Hundred and Ninety-Eight Million Four Hundred Thousand Eight Hundred and Seventy francs (1,698,425,870) FCFA to two hundred and seventy-five (275) workers in accordance with the agreement signed between the UPS and the workers' representatives;
 - ii. Order the payment of Ten Million (10,000,000) FCFA to each employee as damages;

2 Ratified by Mali on 22 September 1960.

3 Article L.257: "All employers are prohibited from taking into consideration opinions, membership in a trade union or the exercise of trade union activity in making decisions concerning, in particular, hiring, the conduct and distribution of work, vocational training, promotion, remuneration and the granting of social benefits, and disciplinary and dismissal measures.
The company manager or his representatives shall not use any means of pressure in favour of or against any trade union organisation.
Any measure taken by the employer contrary to the provisions of the preceding paragraphs shall be considered abusive and shall give rise to damages.

- iii. Order the payment of Three Million (3,000,000,000) FCFA as damages;
 - iv. Order the issuance of work certificates for each ex-worker;
 - v. Order the payment of all arrears of contributions to the National Social Security Institute (NSSI) in respect of the three hundred and one (301) workers;
 - vi. Order the Republic of Mali to pay the Applicants an amount of One Billion (1,000,000,000) FCFA as arrears of the housing allowances, in accordance with the agreement signed on 8 December 2011 between the National Federation of Mines and Energy (FENAME) and the Mining Operators under the auspices of the Ministry of Mines;
 - vii. Order a penalty of Two Million (2,000,000) CFA francs per day of delay as from the pronouncement of the decision; and
 - viii. Order the provisional execution of the decision to be taken on half of the entitlements.
- 16.** The Respondent State prays the Court to take the following measures:
- i. Primarily, declare the Application inadmissible; and
 - ii. In the alternative, declare the Application unfounded and dismiss it.

V. Jurisdiction

- 17.** The Court recalls that Article 3 of the Protocol provides as follows:
1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
- 18.** Furthermore, under Rule 49(1) of the Rules of Court, “the Court shall ascertain its jurisdiction and the admissibility of an Application in accordance with the Charter, the Protocol and these Rules”.
- 19.** Based on the above-mentioned provisions, the Court must, in each application, conduct an assessment of its jurisdiction and rule on objections thereto, if any.
- 20.** In the present case, the Court notes that the Respondent State does not raise any objection to its jurisdiction. The Applicants have not made any submissions on this issue either.
- 21.** Having found that nothing on record indicates that it lacks jurisdiction, the Court finds that it has:
- i. Personal jurisdiction, insofar as the Respondent State is a party to the Charter, the Protocol and has deposited the Declaration which allows individuals and non-governmental organisations to bring

cases directly before the Court.

- ii. Material jurisdiction, insofar as, with reference to its jurisprudence, “ [T]he fact that the provisions of the Charter are not specifically mentioned in an Application does not mean the Application is inadmissible, as long as the rights alleged to have been violated are guaranteed in the Charter or any other human rights instrument ratified by the State concerned”;⁴ even if they do not expressly mention the Charter, the Applicants allege violations relating to the economic rights contained in that instrument.
 - iii. Temporal jurisdiction, insofar as the alleged violations occurred after the Respondent State became a party to the Charter and the Protocol,⁵ which is the case here as indicated in paragraph 2 of this Ruling.
 - iv. Territorial jurisdiction, insofar as the facts of the case and the alleged violations took place in the territory of the Respondent State.
- 22.** Based on the foregoing, the Court finds that it has jurisdiction to hear the present Application.

VI. Admissibility

- 23.** Article 6(2) of the Protocol provides that “the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.
- 24.** Under Rule 50(1) of the Rules of Court, “ The Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules”.
- 25.** Under Rule 50(2) of the Rules of Court, which restates the provisions of Article 56 of the Charter it is provided that:
Applications filed before the Court shall comply with all of the following conditions:
- a. Indicate their authors even if the latter request anonymity;
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter;
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
 - d. Are not based exclusively on news disseminated through the mass media;
 - e. Are sent after exhausting local remedies, if any, unless it is obvious

⁴ *Frank Omary and Others v United Republic of Tanzania* (28 March 2014) (admissibility) 1 AfCLR 358, § 93.

⁵ *TLS and Others v United Republic of Tanzania* (merits) (14 June 2013) 1 AfCLR 34, § 84.

that this procedure is unduly prolonged;

- f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter; and;
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the Charter.
- 26.** The Court notes that the Respondent State raises an objection to admissibility based on non-exhaustion of local remedies. The Court will first rule on (a) that objection before considering, if necessary, (b) the other admissibility conditions.

A. Objection based on non-exhaustion of local remedies

- 27.** The Respondent State alleges that the Application does not meet the requirement of Article 56(5) of the Charter. It submits that that the Applicants did not exercise the legal and judicial remedies provided for by domestic procedural law, namely appeal and cassation. According to the Respondent State, even if the Applicants exhausted local remedies, they have not produced any formal evidence thereof.
- 28.** The Respondent State further alleges that the fact that the Applicants produced a copy of Decision No 24 of 14 April 2020, by which the Supreme Court of Mali dismissed their appeal, clearly demonstrates that they did not exhaust all local remedies. Lastly, the Respondent State contends that the fact that the Applicants unsuccessfully brought a case before the Ombudsman cannot absolve them from exhausting judicial remedies.
- 29.** For their part, the Applicants contend that it is incorrect to argue, as the Respondent State does, that the Tribunal declared their two above-mentioned applications inadmissible.
- 30.** According to the Applicants, domestic court proceedings on which the Kita Labour Court ruled relate to the summons of the trade union committee and that of the members. They further submit that the Court dismissed both actions even though the petition against BCM Mali was declared inadmissible and while the one against UPS was declared admissible.

31. The Court recalls that the remedies to be exhausted within the meaning of Rule 50(2)(e) of the Rules are ordinary remedies of a judicial nature.⁶ Moreover, it is not sufficient for the Applicants to allege a mere attempt to exercise such remedies. They must prove that they have exhausted all existing, available and effective remedies⁷ unless they can show the existence of an impediment attributable to the Respondent State.⁸ In any event, an application may only be brought before the Court after the highest domestic court has rendered a final decision on the issues raised in the Application.⁹
32. The Court notes that, in relation to the allegations made in the present Application, the Applicants initiated three sets of proceedings before domestic courts. The Applicants in the present Application are identical in whole or in part to the Applicants in the three proceedings in question. The same applies to the complaints raised in the said proceedings.
33. As regards the first set of proceedings, the Court notes that, by application of 20 December 2010, the members of the trade union committee of the *Confédération syndical des travailleurs du Mali* (CSTM) and the workers of UPS-RH SARL and BCM-Mali SA of Loulo, who are among the Applicants before the Court, brought an application before the Kita Labour Court against those two companies, seeking reinstatement, payment of salary arrears and damages. By decision of 22 February 2012, the Kita Labour Court declared the action against BCM-Mali SA inadmissible and that against UPS-RH SARL admissible before dismissing it as ill-founded. An appeal was then lodged against this judgment, which was upheld by the Kayes Appeal Court in a ruling dated 12 December 2013.
34. The Court observes that after this appeal decision by the Kayes Court, the applicants in question did not appeal to the Supreme Court as provided for in the above-mentioned Article L 217 of Act No 92-020 of 23 September 1992 on the Labour Code in the

6 *Tanganyika Law Society and Others v United Republic of Tanzania* (merits) (14 June 2013) 1 AfCLR 34, § 31.

7 *Norbert Zongo and Others v Burkina Faso* (Preliminary Objections) (21 June 2013) 1 AfCLR 197, § 84; *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 64; *Wilfred Onyango Nganyi and Others v United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 507, § 95.

8 *Benedicto Mallya v United Republic of Tanzania* (merits and remedies) (26 September 2019) 3 AfCLR 482, § 29.

9 See *African Commission on Human and Peoples' Rights v Kenya* (merits) (26 May 2017) 2 AfCLR 9, § 94; see also *Peter Joseph Chacha v United Republic of Tanzania* (Admissibility) (28 March 2014) 1 AfCLR 398, § 142-145.

Republic of Mali, which provides:

The Supreme Court shall hear cassation appeals against final judgments and judgments of the Appeal Court. The appeal shall be filed and judged in the manner and under the conditions laid down by the laws on the organisation and procedure of the Supreme Court.

35. It emerges from these provisions that the Malian Supreme Court, the court of cassation, offered the Applicants, had they brought the matter before it, the possibility of amending or overturning the decision of the Kayes Appeal Court.
36. In this respect, the Court recalls, in line with its constant jurisprudence, that the cassation appeal is an effective remedy since it is likely, in certain cases, to change the substance of the contested decision; and that, without having exercised this remedy, one could not prejudge the outcome of the related proceedings.¹⁰
37. Based on the foregoing, the Court finds that local remedies were not exhausted in respect of the first proceedings before domestic courts, insofar as the Applicants did not exercise the cassation appeal remedy.
38. With regard to the second procedure, the Court notes that, by application of 22 March 2011, the CSTM-Loulo trade union leadership brought before the Kita Labour Court a claim for compensation for damages against BCM-Mali SA in favour of Moussa KANTE and four (4) other workers of the said company. This action was declared inadmissible by decision of 29 February 2012 for lack of standing.
39. The Court notes that the Applicants concerned by this second set of domestic proceedings did not exercise any other remedy to challenge the decision of the Kita Labour Court, nor did they attempt to bring an effective action before another domestic court. Indeed, the said applicants had the possibility of appealing to the Appeal Court, as they are allowed to do under Article L.213 of the Labour Code, which provides in its first paragraph that: "The judgments of the tribunal are final and not subject to appeal, except in respect of jurisdiction, where the amount of the claim does not exceed twelve (12) times the amount of the guaranteed inter-professional minimum wage", and in its second paragraph

10 *Moussa Kanté and Others v Republic of Mali*, ACtHPR, Application No 006/2019, Judgment of 25 June 2021 (jurisdiction and admissibility), §§ 30-36; *Komi Koutché v Republic of Benin*, ACtHPR, Application No 020/2019, Judgment of 25 June 2021 (jurisdiction and admissibility), §§ 91-94; *Sébastien Germain Ajavon v Republic of Benin*, ACtHPR, Application No 027/2020, Judgment of 2 December 2021 (jurisdiction and admissibility), §§ 72-83; *Norbert Zongo et al v Burkina Faso* (merits) (28 March 2014) 1 AfCLR 219, § 70.

that: “Above this amount, judgments may be appealed to the social division of the Appeal Court “.

40. The Court notes that the appeal remedy was indeed applicable to the Applicants in the present case insofar as the ground for which the Kita Labour Court dismissed their action was for lack of standing and not the amount of the claim. Moreover, the fact that the same Applicants, in the third proceeding examined below, challenged the decision of another labour court, namely, that of Kayes, first before the Appeal Court and then before the Supreme Court, proves that these remedies in superior courts were available but were not exercised in the second procedure.
41. In the light of the foregoing, the Court finds, with regard to this second set of proceedings before domestic courts, that all available local remedies were not exhausted.
42. Finally, as regards the third procedure, the Court observes that a few months after the decisions in the first two procedures were rendered, Moussa KANTE and three hundred (300) other workers and thirty (32) other temporary workers of UPS-RH Loulo, acting in their own names and for their own accounts, sued UPS-RH before the Kayes Labour Court for the same cause, namely the payment of salary arrears, damages and interest. The Kayes Labour Court dismissed the claims of the Applicants in question.
43. Following this judgment of the Kayes Court, the Applicants appealed to the Kayes Court of Appeal, which, by Judgment No 4 of 23 March 2017, upheld the Court's decision. The Applicants appealed this appeal judgment before the Supreme Court.
44. By its judgment No 17 of 14 April 2020, the Supreme Court declared their appeal inadmissible on the grounds that the Applicants did not put forward any grounds warranting cassation such as violation of the law, lack of legal basis or contradiction in the judgment.
45. The Court notes that this decision of the Supreme Court could have justified the exhaustion of local remedies. However, the Court recalls that, under Article 56(5) of the Charter, the exhaustion of local remedies is assessed at the date of filing the Application in the case under consideration.¹¹ It follows that in the present case, the principle of anteriority and exhaustion of local remedies was not respected insofar as the Applicants brought a case before this Court on 14 January 2019, whereas the Supreme Court rendered its decision after the said referral, that is, on 14 April

11 *Ghaby Kodeih and Nabih Kodeih v Republic of Benin*, ACtHPR, Application No 008/2020, Judgment of 23 June 2022, § 42.

2020. The present Application is therefore premature as regards the requests relating to the third procedure.

46. Based on the foregoing, the Court finds that the Applicants had not, as at the date of filing the present Application, exhaust local remedies as required by Rule 50(2)(e) of the Rules. Accordingly, it upholds the objection raised by the Respondent State on this issue.

B. Other conditions of admissibility

47. The Court recalls that the admissibility conditions of an Application filed with it are cumulative¹² so that if one of them is not met, the entire Application is inadmissible. In the present case, as the Application has not met the condition on exhaustion of local remedies, the Court, therefore, need not examine the other conditions under Rule 50(2)(e) of the Rules. The Court, therefore, declares the Application inadmissible and dismisses it.

VII. Costs

48. The Respondent State prays the Court to order that the Applicant bear its own costs.
49. The Applicants made no submission in this regard.

50. Rule 32(2) of the Rules¹³ provides: “[u]nless otherwise decided by the Court, each party shall bear its own costs, if any”.
51. In view of the above provision, the Court decides that each Party shall bear its own costs.

12 *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (jurisdiction and admissibility) (21 March 2018) 2 AfCLR 237, § 63; *Rutabingwa Chrysanthé v Republic of Rwanda* (jurisdiction and admissibility) (11 May 2018) 2 AfCLR 361, § 48.

13 Rule 30(2) of the Rules of 2 June 2010.

VIII. Operative part

52. For these reasons,

The Court

Unanimously,

On jurisdiction

i. *Declares* that it has jurisdiction.

On admissibility

ii. *Upholds* the objection based on non-exhaustion of local remedies;

iii. *Declares* the Application inadmissible.

On costs

iv. *Orders* that each Party shall bear its own costs.

Traoré v Mali (ruling) (2022) 6 AfCLR 773

Application 002/2019, *Yacouba Traoré v Republic of Mali*

Ruling, 22 September 2022. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM and NTSEBEZA

Recused under Article 22: SACKO

The Applicant is a national of the Respondent State and a former employee of a company operating in the Respondent State. The Applicant claimed that he was a member of a workers' union that signed a memorandum of understanding with his former company. In his Application, he alleged that the Respondent State violated his human rights following the non-performance of the memorandum of understanding. Upholding the Respondent State's objection, the Court held that the Applicant had not exhausted local remedies. Accordingly, the Court declared the Application inadmissible.

Jurisdiction (material jurisdiction, 22-26)

Admissibility (exhaustion of local remedies, 38-48; cumulative nature of requirements, 49)

I. The Parties

1. Mr. Yacouba Traoré (hereinafter referred to as "the Applicant") is a Malian national. He is a former employee of the ANALABS Morila Laboratory where he worked as a laboratory chemist supervisor in Sikasso (Mali). He alleges a violation of his rights following the non-performance of a memorandum of understanding signed between Laboratoire d'analyse ANALABS and a workers' union.
2. The Application is filed against the Republic of Mali (hereinafter "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter "the Charter") on 21 October 1986 and to the Protocol on 20 June 2000. On 19 February 2010, the Respondent State deposited the Declaration provided for in Article 34(6) of the Protocol (hereinafter referred to as "the Declaration"), by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and non-governmental organisations.

II. Subject of the Application

A. Facts of the matter

3. The Applicant avers that on 7 March 2006, ANALABS and a group of workers, of which he was a member, signed a Memorandum of Understanding approved by the Sikasso Labour Inspector. Under the terms of the memorandum, the employer, on the one hand, owed each of the nine (9) “retrenched workers”, whose contracts had been terminated, an amount of Five Hundred Thousand (500,000) CFA francs in settlement of their meal and overtime allowances. On the other hand, the employer “reserved the right to investigate the reality and extent of the supposedly unpaid overtime” of the workers retained in the company.
4. The Applicant further avers that owing to the non-performance of the said memorandum, on 19 January 2012, he referred the matter to the Bamako Labour Court which, by Judgment No 123/JGT of 21 May 2012, declared that it lacked jurisdiction and referred him to the Sikasso Labour Court for further proceedings.
5. He submits that by Judgment No 010/JMT/2013 rendered on 4 November 2013, the Sikasso Labour Court declared the action statute-barred. He states that he appealed this judgment before the Bamako Court Appeal which, by Judgment No 60 of 2 April 2015, upheld the judgment.
6. He states that he further appealed the judgment of the Bamako Appeal Court but “the docket has not been found after several searches with the President of the Social Chamber” of the Supreme Court.

B. Alleged violations

7. The Applicant alleges a violation of his right to have his cause heard, in particular,
 - i. The right to bring an action before the competent national courts for any act violating fundamental rights, protected by Article 7(1)(a) of the Charter;
 - ii. The right to be tried within a reasonable time, protected by Article 7(1)(d) of the Charter

III. Summary of the Procedure before the Court

8. The Application was received at the Registry on 14 January 2019. It was served on the Respondent State, on 21 January 2019 for

its response within sixty (60) days of receipt.

9. All pleadings and documents were filed within the time prescribed by the Court.
10. Pleadings were closed on 24 August 2022 and the Parties were duly notified.

IV. Prayers of the Parties

11. The Applicant prays the Court to find that the Respondent State violated his right to have his cause heard, in particular
 - i. His right to be tried by a competent court; and
 - ii. His right to be tried within a reasonable time.
12. As regards reparations, the Applicant prays the Court to order the Respondent State to:
 - i. Provide him medical care, in accordance with the terms of the memorandum signed by ANALABS under the aegis of the Regional Inspection of Sikasso;
 - ii. Pay the arrears of social security contributions to l'Institut National de Prévoyance Sociale (INPS);
 - iii. Pay him an amount of Ten Million (10,000,000) CFA francs, as arrears of overtime payments and meal allowance;
 - iv. Pay him an amount of Thirty Million (30,000,000) CFA francs, as a productivity bonus, in accordance with the enforceable copy of the judgment of 15 February 2015;
 - v. Pay him the sum of forty million (40,000,000) CFA francs as damages.
13. The Respondent State prays the Court to:
 - i. Determine what is right;
 - ii. Dismiss the Applicant's requests.

V. Jurisdiction

14. The Court notes that Article 3 of the Protocol provides as follows:
 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
15. Under Rule 49(1) of the Rules of Court¹ "The Court shall ascertain its jurisdiction [...] in accordance with the Charter, the Protocol

1 Rule 39(1) of the Rules of Procedure of 2 June 2010.

and these Rules.”

16. Based on the above-mentioned provisions, the Court must, for each application, examine its jurisdiction and dispose of on any objections thereto.
17. The Court notes that the Respondent State has raised an objection to the Court’s material jurisdiction. The Court will rule on this objection before considering the other aspects of its jurisdiction.

A. Objection based on material jurisdiction

18. The Respondent State raises an objection to the material jurisdiction of the Court, arguing that the Applicant regards this Court as an appellate court in relation to the decisions of domestic courts.
19. It contends that the Applicant’s requests sufficiently demonstrate that he is disregarding the jurisdiction of the Court, which he considers to be a court of third instance, responsible for settling his problems with his former employer.
20. The Applicant submits that the objection to the Court’s material jurisdiction should be dismissed. He argues, to this end, that he does not confuse the domestic courts with this Court given that he filed the present Application because of the malfunctioning of the Malian justice system.
21. He notes that the Court’s jurisdiction is derived from Article 3(1) of the Protocol and that where the rights of a national of a State Party to the Charter are violated, it is for the Court to establish the law.

22. The Court notes that pursuant to Article 3(1) of the Protocol, it has jurisdiction over “ all cases and disputes submitted to it concerning the interpretation and application of the Charter, this [...] Protocol and any other relevant Human Rights instrument ratified by the States concerned.”
23. The Court underlines that it has material jurisdiction where the Applicant alleges violations of human rights protected by the Charter or by any other human rights instrument to which the

Respondent State is a party.²

24. In the present case, the Court notes that the Applicant alleges a violation of his right to bring proceedings before the domestic courts against any act violating his fundamental rights, and **his** right to be tried within a reasonable time, protected by Articles 7(1)(a) and 7(1)(d) of the Charter respectively, an instrument to which the Respondent State is a party.³
25. Furthermore, the Court underlines, in accordance with its jurisdiction, that it is not an appellate court in relation to the decisions domestic courts. However, “that does not preclude it from assessing whether domestic proceedings were conducted in accordance with international standards set out in the Charter and other international human rights instruments ratified by the State concerned.”⁴
26. In the light of the foregoing, the Court dismisses the objection to its material jurisdiction and declares that it has material jurisdiction to hear the present Application.

B. Other aspects of jurisdiction

27. The Court notes that no objection has been raised to its personal, temporal and territorial jurisdiction.
28. Having found that nothing in the records indicates that it lacks jurisdiction the Court finds that it has:
 - i. Personal jurisdiction, insofar as the Respondent State is a party to the Charter, the Protocol and has deposited the Declaration, by virtue of which the Court can receive Applications directly from individuals and non-governmental organizations having observer status before the Commission;
 - ii. Temporal jurisdiction, insofar as the alleged violations occurred after the entry into force of the instruments referred to in point (i) of this paragraph in relation to the Respondent State;
 - iii. Territorial jurisdiction, insofar as the facts of the case and the alleged violations took place in the territory of the Respondent State.
29. Consequently, the Court finds that it has jurisdiction to hear the present Application.

2 Sébastien Germain Marie *Aïkoué Ajavon v Republic of Benin*, ACTHPR, Application No 027/2020, Judgment of 2 December 2021, § 37.

3 The Respondent State became a Party to the Charter on 21 October 1986.

4 *Ibid.* Note 3, § 46.

VI. Admissibility

30. Article 6(2) of the Protocol provides: “the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.
31. In accordance with Rule 50(1) of the Rules:⁵ “The Court shall ascertain the admissibility [...] of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these [...] Rules”.
32. Rule 50(2) of the Rules, which essentially restates the provisions of Article 56 of the Charter, provides as follows:
Applications filed before the Court shall comply with all of the following conditions:
 - a. Indicate their authors even if the latter request anonymity
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter;
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union,
 - d. Are not based exclusively on news disseminated through the mass media,
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
 - f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter, and
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the Charter.
33. The Court notes that the Respondent State raises an objection to the admissibility of the Application based on non-exhaustion of local remedies. The Court will rule on this objection before examining, if necessary, the other admissibility requirements.

A. Objection based on non-exhaustion of local remedies

34. In support of its objection based on non-exhaustion of local remedies, the Respondent State submits that, contrary to the Applicant’s assertion that he filed an appeal before the Cassation Court, the document he tenders to that effect cannot be considered

5 Rule 39 of the Rules of Procedure of 2 June 2010.

- as evidence of such a remedy.
35. According to the Respondent State, this document addressed to the Chief Registrar of the Bamako Appeal Court and dated 4 June 2015 is labelled “received on 05-06-011” [*sic*] with a signature, which means that it was “received four years before its establishment”.
 36. It further submits that a remedy cannot be proved by simply producing a letter, even if it purports to be from a law firm. According to the Respondent State, remedies are regulated by various procedural codes depending on the subject matter and that the “copy and paste” letter produced by the Applicant cannot constitute proof of the remedy he claims to have initiated.
 37. The Applicant submits that the objection based on non-exhaustion of domestic remedies be dismissed. He further submits that he filed a cassation appeal against the judgment of 2 April 2015 and that the notice of appeal was received and registered on 5 June 2015.

38. The Court notes that, in accordance with Article 56(5) of the Charter and Rule 50(2)(e) of the Rules of Court, applications must be filed after the exhaustion of local remedies, if any, unless it is clear that the proceedings in respect of such remedies are unduly prolonged.
39. The Court underlines that the local remedies to be exhausted are those of a judicial nature, which must be available to the Applicant without impediment, effective and satisfactory in the sense that they are “found satisfactory by the complainant or are capable of redressing the complaint”.⁶
40. The Court further states that it has consistently held that in the judicial system of the Respondent State, the cassation appeal is

6 *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema dit Ablassé, Ernest Zongo, Blaise Iboulido and Mouvement burkinabé des droits de l'homme et des peuples v Burkina Faso*, Judgment (merits) (5 December 2014), 1 AfCLR 219, § 68; *Ibid. Konaté v Burkina Faso* (merits), § 108; *Sébastien Germain Marie Ajavon v Republic of Benin*, ACTHPR, Application No 027/2020, § 73.

an ordinary remedy to be exhausted.⁷

41. The Court notes that in the present case, the question it is called upon to decide is whether the Applicant has lodged a cassation appeal or, at the very least, whether the document he relies on can be regarded as sufficient proof of that appeal.
42. The Court emphasizes, in this regard, that the form and time limit for the cassation appeal are provided for in Articles 629-1⁸ and 630 of the Code of Civil, Commercial and Social Procedure⁹ as well as Articles 133 and 134 of the Organic Law on the Supreme Court¹⁰ of the Respondent State.
43. The Court notes that it emerges from these texts that the cassation appeal comprises two (2) phases, namely i) on the one hand, the signed statement of appeal together with a copy of the decision. It contains, under penalty of nullity, the following information: the surname, first name, address, nationality, date and place of birth, if the appellant is a natural person; the surname, first name and address of the Respondent or, if it is a legal person, its name and registered office, and an indication of the decision being appealed and, ii). the filing of the statement of appeal at the Registry of the court which handed down the decision. This filing shall be attested to by the report of the Registry.
44. The Court notes that in the present case, in support of his request for the dismissal of the objection based on admissibility for non-exhaustion of local remedies, the Applicant has produced a document entitled "Statement of appeal" which he claims to have filed with the Registry of the Bamako Appeal Court.
45. The Court notes, however, that the Applicant has not produced any evidence to prove that he filed a statement of cassation appeal at the Registry of the Bamako Appeal Court. The document

7 See, in this regard, *Yacouba Traoré v Republic of Mali*, ACtHPR, Application No 027/2020, § 43-48, Judgment of 25 September 2020; *Moussa Kanté and thirty-nine (39) others v Republic of Mali*, ACtHPR, Application No 006/2019, Judgment of 25 June 2021, § 36-41.

8 This article provides: "The statement of appeal is made by a document containing, under penalty of nullity: 1° – a) if the applicant in cassation is a natural person: his surname, first name, domicile, nationality, date and place of birth; b) if the plaintiff is a legal person: its form, name, registered office and the body which legally represents it; 2° – the surname, first names and domicile of the Respondent or, if it is a legal person, its name and registered office; 3° – an indication of the decision challenged; 4° – an indication of the judgment; 1° Within two months of the notification of the decision if it is contradictory; 2° within the same time limit which shall only run from the day the appeal is no longer admissible if the decision is rendered by default.

9 Decree No 99-254 of 15 September 1999.

10 Law n°2016-046 of 23 September 2016 on the organic law on the organisation, the rules of functioning of the Supreme Court and the procedure followed before it.

produced by the Applicant contains handwritten notes, without any official stamp of the Registry of the Bamako Appeal Court.

46. More importantly, the Court notes that nothing in the records of cassation appeal proves that the said appeal was actually lodged.
47. Based on the foregoing, the Court considers that no evidence has been provided indicating that a cassation appeal against the Appeal Court judgment of 2 April 2015 was filed.
48. Accordingly, the Court declares that the objection based on admissibility raised by the Respondent State is well founded and finds that the Applicant did not exhaust local remedies.

B. Other admissibility requirements

49. Having concluded that the present Application does not meet the requirement of Article 56(5) of the Charter and Rule 50(2)(e) of the Rules, and having regard to the cumulative nature of the admissibility requirements,¹¹ the Court considers it unnecessary to rule on the other admissibility requirements.
50. Accordingly, the Court declares the Application inadmissible and dismisses it.

VII. Costs

51. Neither party made a submission in respect of costs.

52. The Court notes that under Rule 32(2) “[u]nless otherwise decided by the Court, each party shall bear its own costs, if any”.
53. The Court considers that, in the present case, there is no reason to depart from the principle laid down in this provision.
54. Consequently, the Court decides that each party shall bear its own costs.

¹¹ *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (21 March 2018) (jurisdiction and admissibility) 2 AfCLR 237, § 63; *Rutabingwa Chrysanthé v Republic of Rwanda* (Jurisdiction and Admissibility) (11 May 2018), 2 RJCA 373, § 48; *Collectif des anciens travailleurs ALS v Republic of Mali* (Jurisdiction and Admissibility) (28 March 2019), 3 AfCLR 73, § 39.

VIII. Operative part

55. For these reasons,

The Court

Unanimously,

On jurisdiction

- i. *Dismisses* the objection to its material jurisdiction;
- ii. *Declares* that it has jurisdiction.

On admissibility

- iii. *Upholds* the objection based on non-exhaustion of local remedies;
- iv. *Declares* the Application inadmissible.

On costs

- v. *Orders* that each Party shall bear its own costs.

Yayi v Benin (striking out) (2022) 6 AfCLR 783

Application 023/2019, *Thomas Boni Yayi v Republic of Benin*

Order, 22 September 2022. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

The Applicant, a citizen, and former President of the Respondent State brought this Application alleging that in its response to demonstrations that took place in that State, the Respondent State violated some of his human rights. After his request for provisional measures was dismissed and parties had filed their pleadings, the Applicant requested for a discontinuance of the Application. The Court granted the request and ordered that the Application be struck out.

Procedure (discontinuance, 12-13)

I. The Parties

1. Mr. Thomas Boni Yayi (hereinafter, “the Applicant”) is a former President of the Republic of Benin. He alleges human rights violations in connection with demonstrations that took place on 1 and 2 May 2019 in Cotonou, Benin.
2. The Application is filed against the Republic of Benin (hereinafter, “the Respondent State”), which became a party to the African Charter on Human and Peoples’ Rights (hereinafter, “the Charter”) on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (hereinafter, “the Protocol”) on 22 August 2014. On 8 February 2016, the Respondent State deposited the Declaration provided for in Article 34(6) of the said Protocol (hereinafter, “the Declaration”) by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 25 March 2020, the Respondent State deposited with the African Union Commission the instrument of withdrawal of the said Declaration. The Court has ruled that this withdrawal has no effect on pending cases and on new cases filed before the entry into force of the withdrawal, that is, one year after its deposit, which is on 26

March 2021.¹

II. Subject of the Application

A. Facts of the matter

3. It emerges from the Application, that, on the night of 1 to 2 May 2019, during an electric power outage, several detachments of soldiers fired live ammunition at the crowd gathered in front of the Applicant's home in response to rumours that the latter had been arrested. The Applicant affirms that the gun shots resulted in several casualties. The soldiers arrested several people and erected barricades in the neighbourhood, thereby refusing his relatives, political friends, his doctor and his lawyer access to his home.
4. The Applicant further affirms that whereas, legal proceedings were initiated against him and the persons arrested for participating in an unarmed gathering likely to disturb the public peace, calling for and inciting hate and rebellion, violence, obstruction of justice or charlatanism, no investigation was opened against the security forces to ascertain who fired the live ammunition.
5. The Applicant concludes that the events of 1 and 2 May 2019 and the judicial proceedings initiated in relation to these events constitute massive human rights violations.

B. Alleged violations

6. The Applicant alleges violation of his rights protected by Articles 4, 6, 7(1)(d) and 26 of the Charter, Article 1(l) of the ECOWAS Protocol on Democracy and Good Governance, Article 9 of the International Covenant on Civil and Political Rights, Articles 9 and 10 of the Universal Declaration of Human Rights and Article 1 of the United Nations Convention against Torture.

III. Summary of the Procedure before the Court

7. The Application was filed on 11 June 2019 together with a request for provisional measures. On 25 June 2019, the Application and the request for provisional measures were served on the

¹ *Houngue Eric Noudehouenou v Republic of Benin*, ACTHPR, Application No 003/2020, Order of 5 May 2020 (provisional measures), §§ 4-5 and corrigendum of 29 July 2020.

Respondent State for Responses thereto within sixty (60) days and fifteen (15) days, respectively.

8. On 8 August 2019, the Court issued an Order dismissing the request for provisional measures and this was served on the Parties on 20 August 2019.
9. The Parties filed their submissions on the merits and on reparations within the prescribed time limits.
10. On 22 June 2022, the Applicant requested the discontinuance of the proceedings and notified the Court of his intention not to pursue the Application. This request was notified to the Respondent State on 18 July 2022 for its observations, if any, within fifteen (15) days of receipt. The Respondent State did not file any observations.

IV. Discontinuance of the Application

11. The Court notes that Rule 65(1) of the Rules provides:
 1. The Court may, at any stage of the proceedings, decide to strike applications from its cause list where:
 - a. An Applicant notifies the Court of his/her intention not to proceed with the case;
 - b. An Applicant fails to pursue his case within the time limit provided by the Court;
 - c. It, for any other reason, concludes that it is no longer justified to continue with the examination of the Application.
12. The Court recalls that on 22 June 2022, the Applicant requested the discontinuance of the proceedings and notified the Court of his intention not to pursue the Application. Moreover, the Respondent State has not filed observations on the request.
13. Accordingly, the Court grants the Applicant's request for discontinuance and, pursuant to Rule 65(1)(a) of the Rules, it finds that further consideration of the Application is no longer warranted. The Court therefore decides to strike it out of its cause list.
14. The Court notes that the striking out of the Application does not affect the right of the Applicant to request for the restoration of the Application, pursuant to Rule 65(3) of the Rules.

V. Operative part

15. For these reasons,

The Court

Unanimously,

- i. *Strikes out* Application No 023/2019 – *Thomas Boni Yayi v Republic of Benin* – from its cause list.

Dabo & Ors v Mali (ruling) (2022) 6 AfCLR 786

Application 027/2017, *Mamadou Dabo and Others v Republic of Mali*

Ruling, 1 December 2022. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSOUULA, ANUKAM and NTSEBEZA

Recused under Article 22: SACKO

The Applicants are nationals of the Respondent State and former employees of a company operating in the Respondent State. Some of the Applicants were also members of two trade unions. The Applicants claimed that they were dismissed by their former employer as a result of a strike they embarked upon. They alleged that the Respondent State violated their human rights in its handling of their dismissal. Upholding the Respondent State's objection, the Court held that the Applicants had not exhausted local remedies. Accordingly, the Court declared the Application inadmissible.

Admissibility (exhaustion of local remedies, 55-64; cumulative nature of requirements, 65)

I. The Parties

1. Mr Mamadou Dabo and 55 Others (hereinafter referred to as "the Applicants"), are Malian nationals, and workers¹ of Louis Thomson Armstrong Mali SA (hereinafter referred to as "LTA Mali SA"), twenty-six (26) of whom are members of the National Federation of Mines and Energy (FENAME) and of the Confederation of Trade Unions of Malian Workers (CSTM). They allege a violation of fundamental rights in connection with their right to be heard.
2. The Application is filed against the Republic of Mali (hereinafter "the Respondent State"), which became a party to the African Charter on Human and Peoples' Rights (hereinafter "the Charter") on 21 October 1986, and to the Protocol on 20 June 2000. On 19 February 2010, the Respondent State deposited with the Chairperson of the African Union Commission the Declaration provided for in Article 34(6) of the Protocol (hereinafter "the Declaration"), by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and non-governmental organisations.

1 See the list of workers in the annex.

II. Subject of the Application

A. Facts of the matter

3. It emerges from the records that on 11 June 2012, the Workers' Trade Union Committee of LTA Mali SA gave notice of a strike to the employer. In the notice, they called for the immediate cessation of the arrest and dismissal proceedings in respect of fifty-six (56) workers, twenty-six (26) of whom are trade unionists, the payment of arrears in respect of a seven per cent (7%) salary increase for thirty-two (32) months and performance bonus from 2011.
4. On 19 June 2012, negotiations failed and a strike was called from 28 to 29 June 2012.
5. Following the strike, the Director of LTAMali SA, by correspondence No. AMS/09/07/2012/HR dated 13 July 2012, sought clearance from the Regional Directorate of Kais (First Administrative Region of Mali) to dismiss twenty-six (26) workers including the Applicant, Mr. Mamadou Dabo, and all members of the Trade Union Committee.
6. In response, the Regional Labour Officer of Kais, by letter No. 0263/DRT-K, dated 13 July 2012, authorised the dismissal of twenty-six (26) workers and approved the suspension of thirty (30) other workers from work.
7. The FENAME, in response to these measures, issued a three (3) day strike notice from 18 to 20 July 2012, on behalf of the trade union committees of LTA Mali S.A. and Sadiola Gold Mines Operating Company (SEMOS) S.A. The Respondent State's Minister of Labour, Employment and Vocational Training was duly informed of the matter through the relevant channels.
8. To avoid the risk of the strike spreading to other regions of Mali, the Ministry of Labour, Employment and Vocational Training, by Decision No. 2012-0192 MTEFP-SG of 28 September 2012, set up an Arbitration Council to resolve the dispute between the LTA Mali S.A. and SEMOS S.A. and their employees affiliated to the FENAME in accordance with Articles L.225 *et seq.* of the Labour Law of Mali.
9. On 7 January 2013 the Arbitration Council released Resolution No. 001/C.A containing the findings of its arbitration, which read as follows:
 1. LTA-Mali S. A was to pay the workers the balance of arrears in respect of 7% salary increase for thirty-two (32) months;
 2. LTA-Mali S.A. was to pay the workers a performance bonus for

2011, in accordance with the provisions of Article 8 of the Geological and Aquatic Institutions Collective Agreement.

10. The Arbitration Council ordered the suspension of the arrest warrant issued by the Malian judiciary in respect of the fourteen (14) trade union leaders.
11. By a letter received at the secretariat of the Arbitration Council on 1 February 2013, LTA-Mali S.A. objected to the implementation of the Arbitration Council's Decision No. 001/C.A of 7 January 2013.
12. Subsequently, a group of workers comprising Ismaila TRAORÉ and twelve (12) other workers, filed a lawsuit against LTA-Mali S.A. before the Kayes Labour Court seeking an enforcement order in respect of the Arbitration Council's decision. The said court in its Ruling No. 015 of 24 June 2013 dismissed their request for entitlements and damages for lack of jurisdiction.
13. By letter No. 0039/MTASH/CAB dated 28 January 2014, the Minister of Labour and Social Affairs and Humanitarian Affairs of the Respondent State directed LTA-Mali SA to duly enforce Decision No. 001 of the Arbitration Council, but to no avail.
14. On 25 March 2014, FENAME filed a lawsuit against LTA-Mali S.A. seeking the enforcement of the Arbitration Council's award decision and on 2 June 2014 the Court rendered a ruling declining jurisdiction due to the collective nature of the dispute, on the one hand, and due to the fact that the objection to implementation filed on 1 February 2013 by LTA-Mali S.A. rendered the award null and void, on the other hand.
15. On 30 June 2014, the beneficiary workers of the arbitration award, through their trade union, the CSTM, by letter No. 14/00108 / CEN-CSTM, requested the Minister of Labour, Public Employment and Institutional Relations of Mali, to request Cabinet to implement the Arbitration Council's decision of 7 January 2013.
16. On 28 October 2015, the Minister of Labour, who was in charge of the matter, submitted a written memorandum at a Cabinet meeting seeking to enforce the decision of the Arbitration Council. Cabinet decided to withdraw the approval of the said memorandum on the grounds that the mining sector is not a core sector in the sense of ILO standards.
17. On 7 January 2016, the Minister of Labour, by letter No. 000010 / MTFP-SG, notified the said Cabinet decision to the Secretary-General of the Central Trade Union of the Confederation of Trade Unions of Malian Workers, who in turn notified the said decision to the members, including the Applicants, Mamadou Dabo and others.
18. On 1 November 2016, another group consisting of Mamadou DABO and twenty-five (25) other workers filed a case before

the Civil Court of the Bamako Commune II district claiming the amounts awarded by the Arbitration Council. The Court, in its decision No. 145 of 5 April 2017, dismissed the case for lack of jurisdiction.

19. On 10 January 2018, the same group of workers filed another case before the Labour Court of Bamako seeking enforcement of the Arbitration Council's award. By Order No. 09 of 22 January 2018, the President of the said Court issued an order dismissing the said case.
20. On 9 February 2018, the workers appealed the order before the Bamako Court of Appeal in which a decision was yet to be issued at the time of filing this Application.

B. Alleged violations

21. The Applicants allege that the Respondent State violated their rights as follows:
 1. The right to have their cause heard as provided for in Articles 7(1) of the Charter and Article 8 of the Universal Declaration of Human Rights of 1948 (hereinafter referred to as the "UDHR");
 2. The right to freedom of association provided for in Article 11 of the ILO Convention on Freedom of Association C87 of 1948, Articles 20 and 21 of the Constitution of Mali and Articles 21, L.231,² L.277 of the Labour Code of Mali.

III. Summary of the Procedure before the Court

22. The Application was filed with the Court on 25 September 2017. On 30 January 2018, the Registry requested additional information from the Applicants. A reminder was sent to the Applicants on 2 July 2018.
23. On 12 July 2018, the Applicants responded to the request for additional information and on 27 August 2018 they filed their requests for reparation.
24. On 14 August 2018, the Application was served on the Respondent State with a request to respond within sixty (60) days. The

2 The Respondent State became a party to ILO Freedom of Association Convention of 1948 in 1960.

Respondent State filed its Response on 9 October 2018.

25. The Parties filed their submissions within the time-limits specified by the Court and they were duly notified to the parties.
26. Pleadings were closed on 17 November 2020 and the parties were duly notified.

IV. Prayers of the Parties

27. The Applicants pray the Court to:
 1. Find that the Respondent State violated Article 7(1) of the Charter and Article 8 of the Universal Declaration of Human Rights.
 2. Find that the Respondent State violated Article 1 of the ILO Convention C87, and Articles 20 and 2i of the Constitution of Mali of 25 February 1992.
28. The Applicants also pray the Court to:
 1. Order the Respondent State to pay their salary arrears from July 2012 to 31 August 2018
 2. Order the Respondent State to pay an amount of Eighty Million (80,000.000) CFA francs, as arrears in respect of a 1999 7% salary increment, that is, a total of thirty-two (32) months.
29. Order the Respondent State to pay an amount of Four Billion (4,000, 000, 000) CFA francs as unpaid performance bonus.
 1. Order the Respondent State to pay an amount of Six Million CFA (6,000,000) CFA Francs per worker as reparation for damage suffered and lost earnings;
 2. Order the Respondent State to expedite the payment of half of the entitlements;
 3. Order the Respondent State to issue a work certificate to each former worker.
 4. Order the Respondent State to pay a fine of Four million (4,000.000) CFA francs per worker, for each day of delayed payment from the date of pronouncement of the decision.
 5. Order the Respondent State to bear the costs.
30. The Respondent State prays the Court to:

Declare the Application inadmissible.
31. In the alternative, the Respondent State prays the Court to:
 1. Dismiss the Application for being unfounded.
 2. Order the Applicants to bear the costs.

V. Jurisdiction

32. The Court notes that Article 3 of the Protocol provides as follows:
 - a. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of

the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.

- b. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
33. The Court recalls that, under rule 49(1) of the Rules, it “shall conduct preliminary examination of its jurisdiction and the admissibility of an Application in accordance with the Charter, the Protocol and these Rules.”³
34. In view of the foregoing, the Court must conduct a preliminary assessment of its jurisdiction and dispose of objections thereto, if any.
35. In the instant Application, the Court notes that the Respondent State does not raise any objections to its jurisdiction. Nonetheless, the Court must satisfy itself that it has jurisdiction to hear the Application.
36. With regard to its material jurisdiction, the Court notes that the Applicants allege violations of Articles 7(1) of the Charter, Article 8 of the UDHR and Article 11 of the ILO Convention on Freedom of Association C87 of 1948. The Court recalls that the Respondent State is a party to the Charter and that the UDHR represents customary international law which is automatically binding on States.
37. As regards personal jurisdiction, the Court notes that it has personal jurisdiction insofar as the Respondent State is a party to the Charter and the Protocol and has deposited the Declaration provided for in Article 34(6) which allows individuals and non-governmental organisations with observer status with the African Commission on Human Rights to submit cases directly to it.
38. With regard to temporal jurisdiction, the Court notes that all the violations alleged by the Applicants took place after the Respondent State became a party to the Charter and the Protocol and after it had deposited the Declaration. Accordingly, the Court holds that it has temporal jurisdiction.
39. With regard to territorial jurisdiction, the Court notes that the violations alleged by the Applicants occurred in the territory of the Respondent State and therefore its territorial jurisdiction is established.
40. In view of the foregoing, the Court holds that it has jurisdiction to hear the instant Application.

3 Rule 39(1) of the Rules of 2 June 2010.

VI. Admissibility

- 41.** Article 6(2) of the Protocol provides: “The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter.”
- 42.** In line with Rule 50(1) of the Rules, “the Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules.”
- 43.** Rule 50(2) of the Rules,⁴ which in substance restates the provisions of Article 56 of the Charter, provides as follows:
Applications filed before the Court shall comply with all of the following conditions:
 1. Indicate their authors even if the latter request anonymity;
 2. Are compatible with the Constitutive Act of the African Union and with the Charter;
 3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
 4. Are not based exclusively on news disseminated through the mass media;
 5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 6. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter; and
 7. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union, or the provisions of the Charter.
- 44.** In the present Application, the Respondent State raises an objection based on non-exhaustion of local remedies. The Court will therefore consider the said objection (A) before examining other conditions of admissibility (B) if necessary.

A. Objection based on non-exhaustion of local remedies

- 45.** The Respondent State argues that the Applicants did not exhaust the local remedies available to them. It submits that local remedies in relation to the claim for reparation by Ismaila TRAORÉ and twelve (12) other workers ended at the level of the court of Kayes

4 Rule 40 of the Rules of 2 June 2010.

with judgment No. 015 of 24 January 2013. The said workers did not appeal that decision. The Respondent State submits that, the fact that the Applicants waived the judicial remedy of appeal and subsequent challenge at the Cassation Court, cannot be blamed on it acting through its public services. The Respondent State thus contends that the Application is not admissible and should be dismissed.

46. The Respondent State further submits that the case filed on 25 March 2014 by FENAME seeking confirmation of Arbitration Award No. 001/CA of 7 January 2013 issued by the Arbitration Council and contested by L.T.A. Mali S.A., on which the Labour Court of Bamako ruled in its Judgment No. 154 of 2 June 2014, did not reach the highest court in terms of civil proceedings. It submits that this is because the Applicants, who lost the case, did not pursue the remedies available to them under the Code of Civil Procedure of Mali. The Respondent State avers that it was in their interest to pursue their case all the way to the Supreme Court of Mali to obtain satisfaction. It avers that having failed to pursue the remedy before the Supreme Court, the Applicants cannot hold the Respondent State accountable for violating their right to justice.
47. The Respondent state further explains that the group of L.T.A. Mali S.A. workers comprising Mamadou Dabo and twenty-five (25) others filed a suit before the Bamako Commune II district Civil Court on 1 November 2016 seeking payment of their claims. The said suit was decided by Judgment No. 45 of 5 April 2017 by which the said court declined jurisdiction and the Applicants did not pursue their case any further.
48. The Respondent state avers that on 9 February 2018, the Applicants appealed the Labour Court's Judgment No. 09 of 22 January 2018 before the Bamako Appeal Court, that is, after filing their Application before this Court on 21 August 2017. The Application is therefore inadmissible for failure to exhaust local remedies.
49. The Respondent State also contends that the Applicants' reluctance to challenge the decisions⁵ of the Regional Director of Labour Office in Kayes before domestic administrative courts proves beyond doubt that they did not exhaust all local remedies available to them before seizing this Court.
50. The Respondent State further avers that all cases brought so far before domestic courts have been tried without undue delay. All cases filed since 2013 have been decided within two (2) years or

5 Reference No. 0263/DRT-K of 13 July 2012 and 0348/DRT-K of 24 August 2012.

less. However, most of the said proceedings have ended at the level of first instance only. The case brought by Ismaila TRAORÉ and others before the Kayes Labour Court in 2013 was decided by Judgment No. 15 delivered on 24 June 2013. The second case, which was brought by FENAME before the Bamako Labour Court, was initiated on 25 March 2014 and was decided by the said court by Judgment No. 154 of 2 June 2014.

51. The third case, filed by Mamadou DABO and twenty-five (25) others before the Civil Court of Bamako Commune II, commenced on 1 November 2016 and was decided by the said court by Judgment No. 145 of 5 April 2017. The fourth application was filed on 10 January 2018 before the President of the Labour Court of Bamako by Mamadou Dabo and twenty-five (25) others seeking an enforcement order in respect of the Arbitration Council's award decision. The President of the Court ruled on the matter by dismissing the application on 22 January 2018, only a few days after it was filed.
52. The Respondent State argues that the trade union leaders, who claim to have been unjustly dismissed, have not brought any case for the purpose of proving their claims of arbitrary dismissal and seeking reinstatement into their company in accordance with the provisions of Article L 277⁶ of the Labour Code. On the contrary, they preferred to submit claims for payment of sums of money and sought a court decision making the decision of the Arbitration Council enforceable.
53. Finally, the Respondent State affirms that the voluntary reluctance of the Applicants to take any legal action before the national judicial bodies responsible for administrative disputes against the decisions⁷ of the Regional Director of Labour in Kayes confirms

6 Article L.277: The authorisation of the labour inspector is required before any dismissal of a staff delegate, permanent or substitute, envisaged by the employer or his representative.

The employer and the staff representative concerned must be notified of the authorisation of dismissal, or the refusal of such authorisation.

If the labour inspector does not respond within 15 days of the application being made, this is considered to be authorisation for the dismissal.

Any dismissal that occurs in violation of the procedure provided for in the previous paragraph shall be automatically null and void and the delegate shall be reinstated in his rights and reinstated in the company.

However, in the event of gross misconduct, the employer may immediately order the temporary lay-off of the person concerned pending the final decision. In the event of a refusal to authorise dismissal, the lay-off shall be without effect.

The above provisions shall apply to workers who are candidates for the office of delegate during the period between the date of posting of the lists and the date of the ballot, as well as to delegates elected until the date of the new elections and for a period of six months following the expiry of the delegate's mandate.

7 Reference No. 0263/DRT-K of 13 July 2012 and 0348/DRT-K of 24 August 2012.

without any doubt that all local remedies available to them were not exhausted before seizing this Court.

54. In response, the Applicants submit that, local remedies are unavailable and ineffective since at the time of initiating the procedure, the laws of Mali had no provision for a court vested with jurisdiction to enforce arbitral awards arising out of collective labour disputes. The arbitration award was revoked after it was rejected by Cabinet, the only body empowered to make the decision enforceable.
55. They aver however that, even after pursuing this remedy, they brought a case before the Labour Court of Bamako seeking to make the said arbitral award enforceable. The case was dismissed. The Applicants assert that there was no legal remedy to their situation. The Applicants appealed the decision of the Labour Court of Bamako before the Bamako Appeal Court more than eight months ago, a procedure that is still pending.

56. The Court notes that, in accordance with Article 56(5) of the Charter, which essentially restates Rule 50(2)(e) of the Rules, applications submitted to it must meet the requirement of exhaustion of local remedies. The rule of exhaustion of local remedies aims to give States the possibility to address human rights violations within their national jurisdiction before resorting to an international human rights body to determine State responsibility in this regard.⁸
57. The Court recalls that the local remedies to be exhausted are ordinary remedies, unless it is clear that they are unduly prolonged. It is, therefore, for the Court to consider whether, in the present

8 ACtHPR, Application 006/2012, *African Commission on Human and Peoples' Rights v Republic of Kenya*, Judgment of 26 May 2017 (merits), §§ 93-94.

Application, the Applicants exhausted local remedies.

58. From the records, the Court notes that the Applicants filed proceedings before the courts of the Respondent State in three groups:
59. As for FENAME, the first group, it filed a lawsuit on 25 March 2014 against LTA-Mali S.A. seeking the enforcement of the arbitral award. On 2 June 2014 the Court rendered its judgment, dismissing the case for lack of jurisdiction due to the collective nature of the dispute and the fact that LTA-Mali S.A. filed a statement of opposition in respect of the arbitration decision on 1 February 2013, which makes the award pending.
60. In respect of the second group of workers, Ismaila TRAORÉ and twelve (12) other workers, brought a case against LTA-Mali S.A. before the Kayes Labour Court. The Labour Court in its Judgment No. 015 of 24 June 2013 dismissed their claims for lack of jurisdiction.
61. On 1 November 2016, the third group comprising Mamadou DABO and twenty-five (25) others filed a case with the Civil Court of Bamako Commune II district claiming the amounts awarded by the Arbitration Council. In its Judgment No. 145 of 5 April 2017, the Civil Court dismissed their claims for lack of jurisdiction. The same group of workers, Mamadou DABO, and twenty-five (25) others, brought the case back before the Labour Court of Bamako seeking to make the decision of the Arbitration Council enforceable. On 22 January 2018 and by Order No. 09, the President of the said Court issued an order dismissing the case. On 9 February 2018, the workers appealed the ruling before Bamako Court of Appeal which had still not delivered its judgment after the filing of the Application before this Court.
62. The Court notes that on 1 February 2013, LTA-Mali S.A. notified the Clerk of the Arbitral Council of its opposition, to the implementation of the Arbitration Council Decision No. 001/C.A of 7 January 2013, within the statutory time limits, making the award pending in accordance with Article 229 of the Labour Law of Mali No. 92-020 of 23 September 1992.⁹
63. The Court also notes that the Respondent State promulgated Law No. 021-2017 of 12 June 2017 amending Law No. 92-020 of 23

9 Article 229: The decision of the Arbitration Council shall be immediately notified and commented upon to the parties by the chairperson of the Arbitration Council. If, within eight clear days following this notification to the parties, none of them has expressed opposition, the decision shall become enforceable. In the case of disputes concerning essential services, the interruption of which could endanger the life, safety or health of persons, jeopardize the normal functioning of the national economy, or concern a vital sector of the professions, the Minister in

September 1992 on the Labour Code of Mali amending Article 229,¹⁰ which grants appeal against the decision of the Arbitration Council before the Social Chamber of the Supreme Court for abuse of authority, violation of the law or violation of procedural rules. This article also spelt out the cases where arbitral awards can be annulled. The Law was published in the Official Gazette of the Respondent State on the same date, that is, before the instant Application was filed by the Applicants on 25 September 2017.

64. The Court notes that the Applicants filed their Application before this Court on 25 September 2017, that is, after the new law came into force. It follows that the Applicants did not exhaust local remedies.
65. The Court, therefore, finds that the Application does not meet the admissibility requirement under Rule 50(2) of the Rules and Article 56(5) of the Charter. Accordingly, it upholds the Respondent State's objection and consequently declares the Application inadmissible.

B. Other admissibility requirements

66. Having found that the Application does not meet the requirement of Rule 50(2)(f) of the Rules, and since the admissibility requirements are cumulative,¹¹ the Court needs not rule on

charge of Labour, in the event of disagreement by one or both parties, shall bring the dispute before Cabinet, which may declare the decision of the Arbitration Council enforceable.

10 Article L.229, new: The Arbitration Council shall have a period of 15 days to make its award. The Council's decision is immediately notified and commented on to the parties by the Chairman, who sends a copy to the Minister of Labour. The Council's decision shall be declared enforceable by order of the President of the competent court, at the request of the earliest party. The arbitration award may only be appealed against on the grounds of misuse of power, violation of the law or violation of the rules of procedure, before the Social Division of the Supreme Court. Recourse for annulment of the arbitration award is available: if the arbitration council was irregularly constituted; if the arbitrator ruled without complying with the mission assigned to him or her; if he or she violated a rule of public order; when the principle of adversarial debate was not respected. The appeal must be exercised within 8 clear days following the notification of the award. It suspends the enforcement of the arbitral award. In case of annulment of all or part of the arbitration award, the Supreme Court, within 3 clear days following the date of referral by the most diligent party, shall refer the case to the parties who shall propose to the Minister in charge of labour the constitution of a new arbitration council. In the event that the new award is annulled, the Supreme Court shall, within 15 days following the second annulment decision, issue an award with the same powers as an arbitrator, which may not be appealed.

11 *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (Jurisdiction and admissibility) (21 March 2018) 2 AfCLR 237, § 63; *Rutabingwa Chrysanthé v Republic of Rwanda* (jurisdiction and admissibility) (11 May 2018) 2 AfCLR 361, § 48; *Collectif des anciens travailleurs ALS v Republic of Mali*, ACTHPR, Application No. 042/2015, Judgment of 28 March 2019 (Jurisdiction and admissibility), § 39.

whether the Application is compatible with other admissibility requirements under Rule 50(2)(a), (b), (c), (d), (f) and (g) of the Rules.¹²

VII. Costs

67. The Applicants pray the Court to order the Respondent state to bear all costs.
68. The Respondent State prays the Court to order the Applicants to bear all costs.

69. The Court notes that Rule 32(2) of its Rules¹³ provides that “unless otherwise decided by the Court, each party shall bear its own costs, if any.”
70. Given the circumstances of this case, the Court decides that each Party shall bear its own costs.

VIII. Operative part

71. For these reasons,

The Court

Unanimously,

On jurisdiction

- i. *Declares* that it has jurisdiction.

On admissibility

- ii. *Upholds* the Respondent State’s objection based on non-exhaustion of local remedies;
- iii. *Declares* the Application inadmissible.

On costs

- iv. *Orders* that each party shall bear its own costs.

12 *Ibid.*

13 Rule 30(2) of the Rules of 2 June 2010.

Diarra v Mali (ruling) (2022) 6 AfCLR 799

Application 047/2020, *Adama Diarra (A.K.A. Vieux Blén) v Republic of Mali*

Ruling, 1 December 2022. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM and NTSEBEZA

Recused under Article 22: SACKO

The Applicant is a national of the Respondent State and the host of a radio programme. The Applicant claimed that he was unlawfully arrested and detained on criminal charges by the Respondent State. He alleged that his arrest and detention were in violation of some of his human rights. Upholding the Respondent State's objection, the Court held that the Applicant had not exhausted local remedies. Accordingly, the Court declared the Application inadmissible.

Admissibility (exhaustion of local remedies, 35-47, cumulative nature of requirements, 49)

I. The Parties

1. Mr. Adama Diarra, also known as “Vieux Blén” (hereinafter “the Applicant”) is a Malian national and radio host. He challenges the legality of the procedure that led to him being held in detention for contempt of court and cybercrime.
2. The Application is filed against the Republic of Mali (hereinafter “the Respondent State”) which became a party to the African Charter on Human and Peoples’ Rights (hereinafter “the Charter”) on 21 October 1986 and to the Protocol on 20 June 2000. The Respondent State also deposited, on 19 February 2010, the Declaration provided for in Article 34(6) of the Protocol (hereinafter “the Declaration”), by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and non-governmental organisations (NGOs).

II. Subject of the Application

A. Facts of the matter

3. It emerges from the records that on 22 October 2020, the deputy public prosecutor of Bamako Commune III district High Court

placed the Applicant under detention following a joint complaint lodged by the two magistrates' unions of the Respondent State, namely the *Syndicat Autonome de la Magistrature* (SAM) and the *Syndicat Libre de la Magistrature* (SYLIMA), for contempt of court and insults, committed through an information system by posting a video on the internet. According to the said complaint, the Applicant "gratuitously attacked the magistrates in charge of the case of the State versus Sidiki DIABATE who, according to him, refused, in flagrant violation of the laws of the Republic, to hear the latter (the accused) who is in detention".

4. The Applicant submits that under Article 83 of the Respondent State's¹ Code of Criminal Procedure (CCP), trial should take place within three (3) months. The Applicant further avers that under Article 151 of the said code,² he was entitled to apply for bail at any stage of the proceedings provided that this measure does not constitute a threat and that he is guaranteed legal representation. He further avers that by applications dated 25 October and on 10 and 11 November 2020, his three (3) lawyers requested that he

1 Article 83: "In the event of a flagrant offence, where the act is punishable by imprisonment, and if the investigating judge is not seized, the public prosecutor may place the accused under a detention order, after having questioned him about his identity and the acts with which he is charged.

The same shall apply where, following a preliminary investigation, a criminal offence punishable by imprisonment appears to have been established against an accused, either by his or her own confession or by the unanimous testimony of several witnesses; in this case, the accused must be summoned to appear before the court no later than three months after the detention order.

If the public prosecutor fails to comply with this time limit, the administrator of the prison is required to notify him. He shall then immediately bring the accused before the public prosecutor, who shall have him released after having made him observe the formalities of election of domicile.

The Justice of the Peace shall be under the same obligation for detentions ordered under this article.

The requirement laid down in this Code in respect of proceedings before the trial courts shall apply.

The provisions of this article shall not apply to media offences, or offences the prosecution of which is provided for by a special law, or if the persons suspected of having participated in the offence are minors under the age of eighteen years".

2 Article 151 provides: "Bail may also be requested in any case by any accused or defendant, and at any stage of the proceedings.

When a trial court is seized, it shall be responsible for ruling on bail; before referral to the Assize Court and during the interval between assize sessions, this power shall be vested in the indictment chamber.

In the event of an appeal, and until the Supreme Court has given its ruling, the application for bail shall be decided by the court which last heard the case on the merits. If the appeal has been lodged against a judgment of the assize court, the detention shall be decided by the indictment chamber.

In the event of a decision of lack of jurisdiction and generally in all cases where no court is seized, the indictment chamber shall hear applications for release.

In cases where a foreign national, whether charged, accused or convicted, is left or released on bail, only the competent court may assign him or her to a place of residence from which he or she may not be removed, subject to the penalties provided for in Article 191 of the Criminal Code.

be granted bail.

5. The Applicant states that the said three applications for bail were heard on 15 December 2020. By preliminary Ruling No 25 of 27 January 2021, the Bamako Commune III High Court granted the Applicant bail. The Prosecution appealed the said ruling.
6. According to one of the Applicant's lawyers, the said preliminary Ruling No 25 of 27 January 2021 was upheld by the Appeal Court on 25 February 2021 and the Applicant was released on bail.

B. Alleged violations

7. In the Application, the Applicant alleges violation of the following rights:
 - i. The right to liberty, protected by Article 6 of the Charter;
 - ii. The right to a fair trial, protected by Article 7(1) of the Charter and Article 14 of the International Covenant on Civil and Political Rights (hereinafter the ICCPR);³ and
 - iii. The right to freedom of conscience, protected by Article 8 of the Charter.

III. Summary of the Procedure before the Court

8. The Application and the request for provisional measures were received on 1 December 2020.
9. On 15 January 2021, the Registry served the Application and the Request for provisional measures on the Respondent State with a request to file its Response within ninety (90) and fifteen (15) days, respectively, of receipt of notification.
10. On 2 March 2021, the Registry requested additional information from the Applicant on the outcome of the hearing of 25 February 2021 by the Bamako Appeal Court, which was to rule on the appeal against the decision granting the Applicant bail. On 11 March 2021, the Applicant's lawyer informed the Registry that the ruling releasing the Applicant on bail had been upheld.

3 The Respondent State became a party to the ICCPR on 16 July 1974.

11. On 29 March 2021, this Court issued a ruling for provisional measures by which it declared the Applicant's request moot.
12. All pleadings and procedural documents were duly filed and notified to the Parties.
13. On 28 October 2021, the pleadings were closed and the Parties were informed.

IV. Prayers of the Parties

14. In his Application, the Applicant prays the Court to order the Respondent State as follows:
 - i. Review its legislation to ensure strict separation of prosecutorial power and judicial power by prohibiting the public prosecutor from issuing detention orders, as guarantee of non-repetition of the said violations;
 - ii. Ensure the independence of the authorities responsible for adjudicating cases brought by magistrates, by bringing the procedure into line with that which pertains in complaints against judges, in particular by vesting jurisdiction in the Supreme Court;
 - iii. Publish the various judgments in two media outlets.
15. As reparation for the moral damage suffered, the Applicant prays the Court to order the Respondent State to pay:
 - i. Fifty Million (50,000,000) BCEAO CFA Francs, as reparation for the moral prejudice suffered by the Applicant and his family.
16. In follow-up, Applicant prays the Court to:
 - i. Request the Respondent State to report back to it on the measures taken to cease the said violations, by ordering the release of the Applicant within one month.
17. As regards costs, the Applicant prays the Court to order the Respondent to bear all costs.
18. For its part, the Respondent State prays the Court to:
 - i. Declare the Application inadmissible as to form;
 - ii. In the alternative, on the merits, dismiss it as unfounded.

V. Jurisdiction

19. The Court notes that Article 3 of the Protocol reads as follows:
 1. [t]he jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
20. Under Rule 49(1) of the Rules of Court "[t]he Court shall conduct

preliminary examination of its jurisdiction [...] in accordance with the Charter, the Protocol and these Rules”.

21. Based on the above-mentioned provisions, the Court must, in each application, make a preliminary examination of its jurisdiction and rule on objections thereto, if any.
22. The Court notes that the Respondent State does not contest the jurisdiction of the Court. However, the Court must satisfy itself that it has jurisdiction to hear the Application.
23. Having found that nothing on record indicates that it lacks jurisdiction, the Court finds that it has:
 - i. Material jurisdiction, insofar as the Applicant alleges a violation of Articles 6, 7(1)(a)(b)(c) and 8 of the Charter and Article 14 of the ICCPR, human rights instruments to which the Respondent State is a Party.
 - ii. Personal jurisdiction, insofar as the Respondent State is a party to the Charter, the Protocol and has deposited the Declaration which allows individuals and Non-Governmental Organisations having observer status with the Commission to bring cases directly before the Court.
 - iii. Temporal jurisdiction, insofar as the alleged violations were committed after the entry into force in relation to the Respondent State of the instruments mentioned in sub paragraph (i) of this paragraph.
 - iv. Territorial jurisdiction insofar as the facts of the matter and the alleged violations occurred in the territory of the Respondent State.
24. In view of the foregoing, the Court finds that it has jurisdiction to hear the present Application.

VI. Admissibility

25. Article 6(2) of the Protocol provides: “[t]he Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.
26. In accordance with Rule 50(1) of the Rules of Court,
[t]he Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules.
27. Rule 50(2) of the Rules, which essentially restates Article 56 of the Charter, reads as follows:
Applications filed before the Court shall comply with all of the following conditions:
 - a. Indicate their authors even if the latter request anonymity;
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter;

- c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
 - d. Are not based exclusively on news disseminated through the mass media;
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 - f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date the Commission is seized with the matter, and;
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the Charter.
28. The Respondent State raises an objection based on non-exhaustion of local remedies. The Court will rule on this objection (A) before deciding, if necessary, on the other admissibility requirements (B).

A. Objection based on non-exhaustion of local remedies

29. The Respondent State submits that, although the Applicant has been charged and arraigned for contempt of court and other offences, his trial has not commenced. The Respondent State contends that no final decision has been issued in the matter. The Respondent State therefore submits that the Applicant did not exhaust local remedies.
30. The Applicant submits that the Respondent State does not in any way indicate what remedies were available to him. He further submits that although it is true that cases must be submitted to the Court only after exhaustion of local remedies, it is nonetheless the case that that the remedies, in line with the jurisprudence of the Court, must not only be available, that is, they can be pursued without impediment, but must be effective and satisfactory in the sense that they are “capable of redressing the complainant or of remedying the situation in dispute” (African Commission on Human and Peoples’ Rights decision, Communication No 147/95-149/96, Application No 1/95) – *Dawda K. Jawara v Republic of the Gambia*). He further submits that the said remedies must clearly not be unduly prolonged.
31. The Applicant submits that during the proceedings in respect of which he was held in detention, the public prosecutor, assumed various legally incompatible roles in order to deprive him of freedom. He explains that the latter acted variously as trade unionist, a party to the trial and a judicial authority. He contends

that his rights were not violated because he was prosecuted, but rather because the public prosecutor, who is a party to the proceedings and who is in fact the complainant in his capacity as president of the trade union, can issue a detention order without the intervention of another judicial authority.

32. In this regard, the Applicant submits that Article 83(1) of the CCP⁴ empowers the public prosecutor to issue a detention order, whereas this power should be the preserve of a judge of the court. He avers that this prerogative violates the principle of the separation of the prosecuting and adjudicating authorities. He further contends that his rights were also violated by the fact that his application for bail was prevented from being examined within a reasonable time.
33. He states that while he has not yet exhausted local remedies on the merits of the case, the same cannot be said of the decision by the Public Prosecutor to place him under a detention order, or the refusal to examine his application for bail, against which there is no local remedy.
34. The Applicant further submits that it is “incongruous” to note that in the event of a dispute between a magistrates’ union and a litigant, the case is decided by a magistrate who is himself a member of the magistrates’ union. The Applicant contends that it is difficult, if not impossible, to be judged by a judge who is independent of the two judicial unions, of which 99.99% of magistrates are members. He avers that it took until 15 December 2020 for the prosecutor to agree to list his application for bail and that the exhaustion of remedies is no longer in doubt. Finally, the Applicant avers that it is the reason the Respondent State filed its submissions on the merits, knowing that the Application is indeed admissible for the above-mentioned reasons.

35. The Court recalls that pursuant to Article 56(5) of the Charter and Rule 50(2)(e) of the Rules of Court, applications must be filed

4 Article 83 paragraph 1 of the Code of Criminal Procedure states: “In the event of a flagrant offence, when the act is punishable by imprisonment, and if the investigating judge is not seized, the public prosecutor may place the accused under a detention order, after interrogating him or her about his or her identity and the facts of the matter.

after exhaustion of local remedies, if they are available, unless it is clear that the procedure in respect of such remedies is being unduly prolonged.

36. The Court underscores that the local remedies to be exhausted are those of a judicial nature, which must be available, that is, they must be available to the applicant without impediment, effective and satisfactory in the sense that they are “capable of satisfying the applicant or of redressing the situation in dispute”.⁵
37. The Court recalls, on the other hand, that the requirement of exhaustion of local remedies implies that the issue which an Applicant intends to bring before an international body has been raised, in substance, before domestic bodies if the latter exist and if they are adequate, accessible and effective.⁶
38. The Court notes that the requirement of exhaustion of local remedies is assessed, in principle, at the date on which the Application is brought before it.⁷
39. The Court points out that, in order to determine whether the requirement of exhaustion of local remedies has been met, the domestic proceedings to which the Applicant was a party must have been concluded at the time the Application was lodged with it.⁸
40. Furthermore, it is for the Applicant to take all necessary steps to exhaust, or at least attempt to exhaust, local remedies.⁹
41. The Court notes that in the present case, the Applicant was prosecuted for contempt of court and insults committed through an information system, offences provided for and punishable

5 *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema dit Ablassé, Ernest Zongo, Blaise Iboulo and Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* (28 March 2014) (merits) 1 AfCLR 219, § 68; *Konaté v Burkina Faso* (merits), § 108; *Sébastien Germain Marie Ajavon v Republic of Benin*, ACtHPR, Application No 027/2020, § 73.

6 *Koumi Koutché v Republic of Benin* (jurisdiction and admissibility; § 49; *Sébastien Germain Ajavon v Republic of Benin* (Judgment of 29 March 2019) (merits) 3 AfCLR 130, § 98. See also, ACHPR, *Dabakorivhuma Patriotic Front v Republic of South Africa*, Decision of 9-23 April 2013, Communication No 335/2006, §§ 81-83; ECHR (GC), *Azinas v Cyprus*, Judgment of 28 April 2004, §§ 40-41; CHR, *Kavanagh v Ireland*, Views of 26 April 2001, Communication No 819/1998, § 9.3.

7 *Yacouba Traoré v Republic of Mali*, ACtHPR, Application No 010/2018, Judgment of 25 September 2020, § 41.

8 *Komi Koutché v Republic of Benin*, ACtHPR, Application No 020/2019, Ruling of 25 June 2021, § 61; *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*, ACtHPR, Application No 027/2020, § 74.

9 *Peter Joseph Chacha v United Republic of Tanzania* (admissibility) (28 March 2014) 1 AfCLR 398, § 143. See also, *Epoux Diakité v Republic of Mali* (jurisdiction and admissibility) (28 September 2017) 2 AfCLR 118, § 53; *Komi Koutché v Republic of Benin*, ACtHPR, Application No 020/2019, Ruling of 25 June 2021 (Jurisdiction and admissibility), § 92.

under Article 147 of the Malian Criminal Code¹⁰ and Article 21 of Law 2019-056 of 5 December 2019 on the fight against of cybercrime.¹¹

42. The Court notes that, in the circumstances, following a referral from the public prosecutor of the Bamako Commune III district High Court in respect of the complaint lodged by the magistrates' unions (SAM and SYLIMA), the Applicant was invited by the criminal investigations brigade of Bamako on 21 October 2020, and subsequently placed in police custody, in accordance with Articles 76¹² and 77¹³ of the Malian Code of Criminal Procedure, after which he was taken before the public prosecutor who charged him and then placed him on remand pending his appearance in court on 15 December 2020, in accordance with the established

- 10 Article 147 of the Penal Code states: 'Anyone who, either through speeches, clamour or threats made in public meetings or places, or through written material sold or distributed, put on sale or exhibited in public meetings or places, offends the person of the Head of State shall be liable for imprisonment of between three months and one year and a fine of between 50,000 and 600,000 CFA francs, or by either of these two penalties only. The same provisions shall apply to foreign Heads of State visiting Mali. Where one or more administrative or judicial magistrates, or one or more assessors, in the exercise of their functions or on the occasion of such exercise, have been the target of any insult by word, in writing or by drawing, not made public, intended in these various cases to undermine their honour or delicacy, the person who has addressed such insult shall be liable to at least fifteen days and at most one year in prison. If the contempt by word has taken place in a court or tribunal, the imprisonment shall be of at least three months and at most two years. Contempt by gesture or threat or by sending any object with the same intention and directed at a magistrate or assessor in the exercise of his duties, shall be punishable by imprisonment for a term of one month to six months; if the contempt took place at a court or tribunal hearing, it shall be punishable by imprisonment for a term of three months to two years.'
- 11 Article 21 of Law 2019-056 of 5 December 2019 on the fight against cybercrime provides: "Anyone who utters an insult through an information system against a person shall be liable for six (6) months to two (2) years in prison and a fine of one million (1,000,000) to ten million (10,000,000) CFA francs or one of these two penalties."
- 12 Article 76 paragraph 2 states: "If there is serious and corroborating evidence against a person that could justify his or her indictment, the forty-eight-hour period of police custody may be extended by twenty-four hours by written authorisation from the public prosecutor (...)"
- 13 Article 77 paragraph 2 provides: "The judicial police officer must make mention on the record of the proceedings, in respect of any person in custody, the day and time from which he or she was held in custody, as well as the day and time from which he or she was either released or brought before the competent magistrate. This note must be specially signed by the persons concerned in the event of refusal. It must include the reasons for the accused being held in custody."

procedure in preliminary investigations.¹⁴

43. The Court notes that the Applicant brought his Application before it even before the pre-trial judgment ordering his release on bail.
44. With regard to the allegation relating to fair trial, the Court notes that the Applicant himself acknowledges that he did not exhaust the local remedies available to him, such as that provided for under Article 616 of the Respondent State's CCP.
45. With regard to the allegation relating the Prosecutor's power, the Court notes that the Applicant raises a principle for which he does not indicate the basis; he merely alleges that there is no local remedy.
46. The Court notes, however, that the Applicant does not demonstrate the efforts made or the difficulties encountered or the obstacles to pursuing existing remedies such as remedies for unconstitutionality or for violation of his rights.
47. In the light of the foregoing, the Court considers that the Application was filed while the domestic proceedings were still ongoing and is therefore premature.
48. In the light of the foregoing, the Court upholds the Respondent State's objection to admissibility and finds that the Applicant did not exhaust local remedies.

B. Other admissibility requirements

49. Having found that the present Application does not satisfy the requirement of Article 56(5) of the Charter and Rule 50(2)(e) of the Rules, and having regard to the cumulative nature of the admissibility requirements,¹⁵ the Court considers it superfluous to

14 Article 83, paragraphs 1 and 2, provide that: "In the event of a flagrant offence, where the offence is punishable by imprisonment, and if the examining magistrate is not seized, the public prosecutor may place the accused under a detention order, after having questioned him about his identity and the acts of which he is accused. The same shall apply when, following a preliminary investigation, a criminal offence punishable by imprisonment appears to be established against an accused, either by his confession or by the unanimous testimony of several witnesses; in this case, the accused must be summoned to appear before the court at the latest within three months of the committal order.

15 *Yacouba Traoré v Republic of Mali*, ACTHPR, Application No 002/2019, Judgment of 22 September 2022 (jurisdiction and admissibility), § 49; *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (jurisdiction and admissibility) (21 March 2018) 2 AfCLR 237, § 63; *Rutabingwa Chrysanthé v Republic of Rwanda* (jurisdiction and admissibility) (11 May 2018) 2 AfCLR 361, § 48; *Collectif des anciens travailleurs ALS v Republic of Mali* (jurisdiction and admissibility) (28 March 2019) 3 AfCLR 73, § 39.

rule on the other admissibility requirements.

50. Accordingly, the Court declares the Application inadmissible.

VII. Costs

51. The Court notes that the Applicant requests the Court to order the Respondent State to bear costs.

52. The Respondent State did not submit on costs.

53. Rule 32(2) of the Rules provides as follows: “Unless otherwise decided by the Court, each Party shall bear its own costs, if any”.

54. The Court considers that, in the present case, there is no reason to depart from that principle.

55. Accordingly, the Court decides that each Party shall bear its own costs.

VIII. Operative part

56. For these reasons,

The Court

Unanimously,

On jurisdiction

i. *Declares* that it has jurisdiction;

On admissibility

ii. *Upholds* the objection to admissibility based on non-exhaustion of local remedies;

iii. *Declares* the Application inadmissible;

On costs

iv. *Orders* that each Party shall bear its own costs.

Fory v Côte d'Ivoire (ruling) (2022) 6 AfCLR 810

Application for review 001/2022, *Kouadio Kobena Fory v Republic of Côte d'Ivoire*

Ruling, 1 December 2022. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSALOULA, ANUKAM, NTSEBEZA and SACKO

The Applicant, a citizen of the Respondent State, had brought an Application against the Respondent State in 2017. In a judgment delivered on 2 December 2021, the Court declared aspects of the original Application inadmissible but found a partial violation by the Respondent State. Claiming that he had discovered new facts and new evidence, the Applicant brought the present Application, seeking for a review of the 2021 judgment. The Court held that the Applicant's challenge to the earlier judgment did not raise new facts and no new evidence was adduced. Accordingly, the Court declared the Application for review inadmissible.

Jurisdiction (no reconsideration in Applications for review, 13-14, 19-21)

Admissibility (basis for admissibility of review application, 23-26; compliance with time limits, 27-31; submission of new facts or evidence)

Review (meaning of new facts, 37-41, 48-51, 65-66; new evidence, 56-60, 66)

I. The Parties

1. Mr Kouadio Kobena Fory (hereinafter referred to as "the Applicant") is an Ivorian national. He seeks a review of the Court's judgment delivered on 2 December 2021 in his initial Application No 034/2017 of 8 November 2017.
2. The Application was filed against the Republic of Côte d'Ivoire (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter"), on 31 March 1992, and to the Protocol on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 25 January 2004. Furthermore, the Respondent State, on 23 July 2013, deposited the Declaration provided for in Article 34(6) of the Protocol (hereinafter referred to as "the Declaration") by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organizations having

observer status before the Commission. On 29 April 2020, the Respondent State deposited with the Chairperson of the African Union Commission an instrument of withdrawal of its Declaration. The Court held that such a withdrawal has no bearing on pending cases and on new cases filed with it before the withdrawal came into effect one year after the said instrument was deposited, that is, on 30 April 2021.

II. Subject of the Application

3. On 2 December 2021, the Court delivered a judgment (hereinafter the Judgment¹) in Application No 034/2017: *Kouadio Kobena Fory v Republic of Côte d'Ivoire*.¹ Following the Judgment, the Applicant filed an application for review (hereinafter referred to as "the Application") on 17 January 2022, claiming that he had discovered new and erroneous facts which in his view, constitute new evidence.

III. Brief background of the Matter

4. In the initial Application filed with the Court on 8 November 2017, the Applicant alleged that the Respondent State violated his rights to a fair trial, physical and moral integrity, dignity and privacy, liberty and security of the person, as well as his right to work, to remuneration and to landed property.
5. He therefore prayed the Court to order the Respondent State to reinstate him as Paymaster, immediately deconfiscate his landed property, annul his criminal sentence of ten years' imprisonment, then pay him the sum of Eight Billion (8,000,000,000) United States dollars as reparation for the extra-patrimonial damage he suffered, pay him One Billion One Hundred and Eighty-Eight Million (1,188,000,000) US dollars in damages for violation of his property rights, pay him the sum of Twenty Million (20,000,000) US dollars in back pay and benefits, reimburse him legal fees and expenses and to publish the judgment in the "*Fraternité Matin*" daily newspaper.

¹ *Kouadio Kobena Fory v Republic of Côte d'Ivoire*, ACtHPR, Application No 034/2017, Judgment of 2 December 2021 (merits and reparations).

6. The Court delivered its judgment on 2 December 2021, the operative part of which is as follows:

On jurisdiction

- i. *Finds* that it has jurisdiction to hear the alleged violations committed after the date of entry into force of the Protocol in regard to the Respondent State.

On admissibility

- ii. *Finds* that the objection based on inadmissibility is founded in relation to the prohibition of arbitrary arrest and detention and the alleged violation of the right to the respect of his political opinion;
iii. *Declares* inadmissible the allegation of violation of the right to work, to remuneration and to property;
iv. *Dismisses* the objection based on the alleged violations of the right to be tried within a reasonable time;
v. *Declares* the Application admissible.

On merits

- vi. *Finds* that the Respondent State has violated the Applicant's right to a hearing within a reasonable time as guaranteed in Article 7(1) (d) of the Charter;

On reparations

On pecuniary reparations

Unanimously

- vii. *Finds* that the request for reparation for prejudice related to the right to work, to remuneration, and to property is moot;
viii. *Dismisses* the request for the reimbursement of travel expenses purportedly incurred by the Applicant's family members to visit him during his detention;
ix. *Orders* the Respondent State to pay the Applicant the sum of Forty-five million (45,000,000) CFA francs, which breaks down as follows:
a. Forty million (40,000,000) CFA francs for the moral damage he suffered;
b. Two million (2,000,000) CFA francs as reparation for the moral prejudice suffered by the Applicant's wife;
c. One million (1,000,000) CFA francs to each of the Applicant's three (3) children for the moral prejudice they suffered.

7. The said Judgment is the subject of this Application for review.

IV. Summary of the Procedure before the Court

8. The Application for Review was filed with the Registry on 17 January 2022 and notified to the Respondent State on 11 February 2022.
9. All pleadings and procedural documents were duly notified and the parties filed their submissions within the stipulated time-limits.
10. Pleadings were closed on 12 September 2022 and the Parties were duly notified thereof.

V. Prayers of the Parties

11. The Applicant prays the Court to review its judgment, in particular, to:
 - i. Find that by declaring that it had no jurisdiction to deal with the alleged violations committed before the date of entry into force of the Protocol in respect of the Respondent State, the Court introduced a new fact into the case and disregarded the continuing nature of the violation of his right to be tried by an impartial court;
 - ii. Find that he had no remedy against the decision of the Civil Service Disciplinary Board when it refused to reinstate him in his post;
 - iii. Re-calculate the time-limits for local remedies in respect of his immovable property, starting from the date on which the domestic courts were seized until the date on which his application was examined by this Court in December 2021, and find that in the present case, local remedies were prolonged unduly;
 - iv. Re-evaluate the amount awarded as reparation for moral damage suffered by the members of his family and by himself and set the quantum of reparation higher than or at least equal to the amounts awarded to Sébastien Germain Ajavon, his wife, and his children in Application No 013/2017: *Sébastien Germain Ajavon v Republic of Benin*.
12. For its part, the Respondent State prays the Court to:
 - i. Declare that it lacks personal jurisdiction insofar as the application for review was lodged after 30 April 2021, the date on which the withdrawal of the Declaration allowing individuals to lodge applications directly against it took effect;
 - ii. Declare the application for review inadmissible for lack of evidence of new facts;
 - iii. Dismiss the request for a reassessment of the amount of reparation for moral damage awarded in the original judgment;
 - iv. Order the Applicant to bear the costs of the proceedings.

VI. Jurisdiction

13. When seized of an application for review, the Court does not have to ensure again that it has jurisdiction.
14. In the instant case, the jurisdiction of the Court was previously established in its judgment of 2 December 2021.² However, the Respondent State raises an objection to the personal jurisdiction of the Court.
15. The Court will therefore examine this objection to its jurisdiction.
16. The Respondent State challenges the personal jurisdiction of the Court to hear the present Application. It reminds the Court that it has withdrawn its Declaration. For the Respondent State, given that its withdrawal of the Declaration came into effect on 30 April 2021, no individual or non-governmental organisation (NGO) may file an application against it before the Court as from 1 May 2021.
17. The Respondent State accordingly requests the Court to declare that it lacks personal jurisdiction to entertain the Application for review, dated 13 January 2022, and filed with the Registry of the Court on 17 January 2022, a date subsequent to that on which the withdrawal of its Declaration took effect.

18. The Applicant prays the Court to dismiss the objection. Relying on Rules 40 and 78 of the Rules of Court, the Applicant urges the Court to avoid the confusion created by the Respondent State as to its personal jurisdiction. He submits that Rule 40 on the institution of proceedings cannot apply in the case of an application for review. He notes that in the circumstance, the jurisdiction of the Court and the admissibility requirements of an application for review, which are spelt out in Rule 78 of the Rules. He submits that his application for review in respect of the judgment of 2 December 2021 is not a new application but rather a “rebuttal” of Application No 034/2017 brought before the Court prior to the Respondent State withdrawing its Declaration. The Applicant prays the Court to dismiss the objection to its personal jurisdiction raised by the Respondent State.

2 *Kouadio Kobena Fory v Republic of Côte d’Ivoire*, ACTHPR, Application N°034/2017, Judgment of 2 December 2021, §§ 21 to 35.

19. The Court emphasises that the purpose of an application for review is not to submit a new case to it but to seek a review of a judgment it has already delivered in a case, in respect of which a revision is sought.
20. In the instant case, the Court notes that the present Application for Review was filed in relation to the initial Application filed on 8 November 2017, which was before the Respondent State's withdrawal of the Declaration took effect on 30 April 2021. In this respect, the Court notes that the withdrawal of the Declaration under Article 34(6) of the Protocol by the Respondent State has no effect on the initial Application and, consequently, on the application for review of the Judgement rendered in the initial case.
21. In the light of the foregoing, the Court finds that it has personal jurisdiction to hear the Application for Review, which was received on 17 January 2022.

VII. Admissibility

22. The Applicant states that, on reading the Judgment, he discovered four (4) new facts that negatively influenced the outcome of the case, which he prays the Court to review.
23. The Court observes that within the meaning of Article 28(2) of the Protocol, which restates the provisions of Rule 72(1) of the Rules of Court, its judgments are final and not subject to appeal. However, under Article 28(3) of the Protocol, the Court may, without prejudice to the finality of its judgment as set out in subparagraph (2) of the same Article, review its judgment under the conditions laid down in the Rules of Court. Thus, Article 28(3) of the Protocol therefore makes the procedure for review of the Court's judgments an exceptional one, subject to admissibility requirements set out in Rule 78(1) and (2).
24. Rule 78(1) and (2) of the Rules provides as follows:
 1. A party may, in the event of the discovery of a new fact or evidence, which by its nature, has a decisive influence and which, when the judgment was delivered, was unknown to the party and could not with due diligence have been known to that party, request the Court, within a period of six months after that party acquired knowledge of the fact (or evidence), apply to the Court to revise that judgment. The Court shall not accept any request for review of its judgment after five (5) years of the delivery of the same

2. The Application shall specify the judgment in respect of which review is requested, contain information necessary to show that the conditions laid down in sub-rule 1 of this Rule have been met, and be accompanied by a copy of all relevant supporting documents.
25. With regard to the indication of the judgment whose review is sought, the Court notes that in the present case the Applicant indicates that he is seeking review of the judgment delivered by the Court on 2 December 2021 in Application No 034/2017: *Kouadio Kobena Fory v Republic of Côte d'Ivoire*. Therefore, this requirement is met.
26. Furthermore, in accordance with Rule 78(1) of the Rules, in order to be admissible, the Request for Review must be filed within six (6) months from the date on which the Applicant became aware of the new fact or at least five (5) years from the date of the Judgment (A). The Applicant must also prove the existence of facts or evidence that he or she considers to be new (B).

A. On compliance with the time-limits

27. The Court observes that, in accordance with Rule 78(1) of the Rules of Court, it shall reject of its own motion any application for review of its judgment filed five (5) years after its delivery. In the present case, the judgment in respect of which a review is sought was delivered on 2 December 2021 and the application for review was received at the Court Registry on 17 January 2022, that is, one (1) month and fifteen (15) days after the notification of delivery of the Judgment.
28. Accordingly, the present Application meets the requirement of the five (5)-year-time-limit.
29. With regard to the requirement to comply with a time limit of six (6) months from the discovery of the new fact or evidence, the Applicant submits that it was after reading the Judgment of 2 December 2021 that he discovered evidence, claiming that he was not aware of it at the time the judgment was delivered. In this regard, the Court notes that it was on 27 December 2021 that the Applicant received a copy of the Judgment by DHL mail. Thus, start date of the six (6) month time-limit under Rule 78(1) is set on 27 December 2021.
30. The Court notes that between the notification of the Judgment to the Applicant on 27 December 2021 and the filing of his Application for Review on 17 January 2022, a period of twenty-one (21) days elapsed.

31. The Court finds that the Applicant also complied with the six (6)-month-time-limit.
32. Accordingly, the Court finds that the Application for Review was filed timeously, in accordance with Rule 78(1) of the Rules.

B. On new facts or evidence

33. The Applicant submits that the developments underlying his application for review relate to the Court's temporal jurisdiction (i), the Court's assertion that the Applicant had a remedy against the decision of the Civil Service Disciplinary Board (ii), the calculation of the duration of the domestic proceedings on the claims relating to his real estate (iii) and the determination of the amount of reparation for non-pecuniary damage suffered by himself and by members of his family (iv).

C. Allegation of a new fact relating to the Court's temporal jurisdiction

34. The Applicant submits that in paragraph 31 of the Judgment of 2 December 2021, the Court introduced a new fact into the case by holding that the alleged violations of his right to equal protection before the law, the right not to be compelled to testify against oneself, the right to protection of the family, the right to be presumed innocent and the right to be tried within a reasonable time were committed before the date of entry into force of the Protocol in relation to the Respondent State, that is, before 24 January 2004. He submits that in his Application, he averred that these violations occurred continuously from July 1995 until 31 July 2005, when he was released from prison.
35. Furthermore, he submits that in his Application he raised the violation of his right to be tried within a reasonable time by an impartial court, but that the Court in its judgment assumed its temporal jurisdiction to rule on the right to be tried within a reasonable time, without ruling on his right to be tried by an impartial court, both rights guaranteed by the same Article 7(1) (d). The Applicant prays the Court to review its judgment of 2 December 2021 by taking cognisance of the lack of impartiality of the court which sentenced him to ten (10) years' imprisonment in 1995. He therefore prays the Court to erase and rectify the error it made when assessing its temporal jurisdiction.³

3 See paragraphs 11 and 12 of the Application for Review.

36. The Respondent State submits that the Application for review does not raise any new facts within the meaning of Article 28(3) of the Protocol and Rule 78(1) of the Rules. It further submits that the Applicant merely interprets the judgment of 2 December 2021, with a view to lead the Court to adopt his own perception of the facts contained in the initial Application.

37. The Court notes that new facts or evidence refer to “new discover(y) (ies)” which “were not known to the party bringing the case”⁴ or of which that party “could not with due diligence have known” at the time of filing the initial Application.⁵ The Court further considers that a fact or event that occurs after a judgment has been delivered is not a “new fact” within the meaning of Rule 78(1) of the Rules, regardless of its legal consequences. Consequently, a new fact must precede the delivery of the judgment on the merits.
38. In the present case, the Court notes that this first “new fact” matches its own analysis according to which, on the one hand, the above-mentioned violations took place between July 1995 and June 1996 (as stated in paragraph 33 of the Judgment), that is, before the entry into force of the Protocol in relation to the Respondent State, and, on the other hand, that these violations are not of a continuous nature, but are rather instantaneous.
39. The Court also notes that the Applicant describes the Court’s analysis as an “error” because, in his view, the violations alleged are of a continuing nature and, consequently, the Court should have assumed its temporal jurisdiction and examined the alleged violation of his right to the presumption of innocence and to be tried by an impartial court.

4 *Alfred Agbesi Woyome v Ghana*, ACTHPR, Application for Review No 001/2020, Judgment of 26 June 2020 (review) § 38; *Urban Mkandawire v Malawi* (review and interpretation) (2014) 1 AfCLR 299 § 14.2.

5 *Alfred Agbesi Woyome v Ghana*, § 43.

40. It emerges from the present Application for review that the Applicant seeks exclusively to call into question the findings and analysis of the Court in the Judgment. In this connection, the Court observes that the Applicant's own assessment of the Court's findings on the grounds raised in the initial Application does not constitute a new fact within the meaning of Article 28 of the Protocol.
41. Accordingly, the Court finds that Applicant's submission herein does not contain any new facts.

i. Alleged new fact regarding the availability of a remedy against the decision of the Public Service Disciplinary Board

42. The Applicant presents as new evidence the Court's statement in paragraph 56⁶ of the Judgment that he had an effective remedy against the decision of the Public Service Disciplinary Board which he should have exercised in order to claim to have exhausted local remedies.
43. He submits that, in rejecting his request for reinstatement in his post, the Public Service Disciplinary Board made no mention of any appeal against its decision. The Applicant further contends that when the Court stated in its judgment of 2 December 2021 that he had the avenue to bring an action for misuse of power before the administrative courts, it does not indicate to him to which administrative court he should have turned to have his right to work and to remuneration restored.
44. For the Applicant, the fact that the Court found in its judgment of 2 December 2021 that after twenty (20) years, three (3) months and ten (10) days, the Supreme Court had still not ruled on his appeal raises the question of the efficiency and effectiveness of the remedy in respect of abuse of power before the Respondent State's courts.

6 Paragraph 56 of the Judgment of 2 December 2021 reads as follows: "With regard to the alleged violation of the right to work and remuneration, it appears from the documents in the case docket that on 4 October 2011, the Applicant petitioned the Civil Service Disciplinary Board, a body empowered by the Civil Service Statute of the Respondent State, to request his reinstatement in his position as Paymaster. After hearing the Applicant, the Judicial Officer of the Treasury and the Inspector General of the Treasury at its 30 March 2012 meeting, the Civil Service Disciplinary Board deliberated on 6 June 2012 and concluded that although the Applicant was not removed from the Civil Service, he would have to produce the ruling of the Supreme Court on his appeal before any final decision by the Board. The Court also noted that the Applicant had the possibility of appealing the decision of the Disciplinary Board to the administrative courts to exhaust domestic remedies".

45. The Applicant therefore requests the Court to instruct him as to whether there is a judicial or administrative court or tribunal empowered to receive a remedy seeking to restore his right to work and to remuneration.

46. The Respondent State contends that this particular aspect of the Application does not meet the requirement of a new fact justifying the admissibility of the Application for review. It submits that, in substance, the Applicant's allegations call into question the finality of the Judgment delivered on 2 December 2021 and prays the Court to dismiss the present Application.

47. The Court recalls that, in accordance with the provisions of Article 28(3) of the Protocol, the review procedure is without prejudice to Article 28(2) of the Protocol, such that such a procedure cannot be used to undermine the principle of the finality of judgments,⁷ which are not subject to appeal.⁸
48. The Court recalls that the reasons for its decision cannot be considered as new facts or evidence warranting an application for review of its judgment.
49. In the present case, the Court notes that, here again, the Applicant misconstrues as new facts the grounds of its judgment of 2 December 2021, in which it held that, having failed to lodge an appeal on grounds of abuse of power against an administrative decision adversely affecting him, the Applicant did not exhaust the existing local remedies.
50. The Court considers that the finding in its judgment that the Applicant had the possibility of bringing an action for misuse of

7 *Alfred Agbesi Woyome v Ghana*, ACTHPR (review), *Op. cit.* § 26. *Urban Mkandawire v Malawi* (review and interpretation) (2014) 1 AFCLR 299 § 14.

8 *Delta International Investments S.A. and others v Republic of South Africa*, ACTHPR, Application No 001/2012, Judgment of 15 March 2013 (appeal), § 6.

power before the administrative courts in order to claim to have exhausted local remedies is not a new fact within the meaning of Article 28(3) of the Protocol.

51. Therefore, the Court finds that the Applicant has not provided any new evidence to justify the review of its judgment.

ii. Allegation of a new fact in the determination of the duration of the domestic proceedings in relation to his landed property

52. The Applicant submits as new evidence the fact that in paragraph 58 of the Judgment of 2 December 2021, the Court determined the duration of local remedy that he pursued before the domestic courts seeking to recover his landed property, counting from the date on which the Applicant submitted his application, namely, 8 November 2017. He submits that it would have been normal to start counting from at least 12 October 2020, the day pleadings were closed.
53. Citing the case-law of the United Nations Human Rights Committee, the Applicant argues that if the Court had followed this international practice of computing time-limits, the duration of the domestic remedies, which it considers to be two (2) years and five (5) months respectively, and three (3) years, eleven (11) months and four (4) days⁹ respectively, would have been six (6) years and four (4) months for one and five (5) years, eight (8) months and four (4) days for the other.
54. For the Applicant, the Court should review its judgment and come to the conclusion according to which the periods of six (6) years and four (4) months on the one hand and five (5) years, eight (8) months and four (4) days on the other are long enough. On that basis, the Applicant prays the Court to find his Application admissible. He further submits that once his initial Application is declared admissible for violation of his right of ownership over his immovable property, the Court should then rule that the Respondent State is holding his movable and immovable property wrongfully.

9 In the Initial Judgment, the Court noted that it emerges from the records that the duration of the first case brought by the Applicant to claim his landed property was two (2) years five (5) months and twelve (12) days while that of the second case was three (3) years, eleven (11) months and four (4) days.

- 55.** The Respondent State reiterates its argument that the application for review only illustrates the Applicant's understanding of the facts of his original application. The Respondent State invites the Court to dismiss the Applicant's request for review of the original Judgment for lack of new evidence.

- 56.** The Court recalls its jurisprudence that an application for review must be based on material facts or circumstances that were not known at the time the judgment was delivered.¹⁰ In this regard, the Court has pointed out that the evidence required under Rule 78(1) of the Rules is defined as the "demonstration of the existence of a fact", that is, an "event which occurred or took place"¹¹ outside the proceedings before the Court and which was not previously known to a party or parties.¹²
- 57.** In this respect, the Court underscores that judgment review may be sought for exceptional reasons, such as those relating to documents whose existence was unknown at the time the judgment was delivered, to documentary or testimonial evidence or confessions in a final judgment and is later found to be false, or when there has been prevarication, bribery, violence, or fraud, and facts subsequently proven to be false, such as a person having been declared missing and found to be alive.¹³
- 58.** In the present case, the Court notes that the application exclusively seeks to call into question the grounds of the judgment of 2 December 2021, which is final. In this connection, the Court reiterates, as it has already done above, that the application for

¹⁰ *Alfred Agbesi Woyome v Ghana* (review), *op. cit.* § 38; *Ramadhani Issa Malengo v Tanzania*, ACtHPR, Application for Review No 001/2019, Judgment of 15 July 2020 (review), § 31.

¹¹ Dictionnaire de Droit international public, Bruxelles, Bruylant, 2001, p. 493, cited in *Frank David Omary et autres c. Tanzanie* (review) (2016) 1 AfCLR 383.

¹² *Urban Mkandawire v Malawi* (review and interpretation) *op. cit.* § 14.2.

¹³ IACtHR, *Genie Lacayo v Nicaragua* (application for judicial review of the judgment on the merits, reparations and costs), IACHR, Series C No 45, § 12.

review cannot be based either on the legal grounds of its judgment or on particulars underpinning its findings. Accordingly, the purpose of an application for review cannot be to re-examine the grounds of law or fact contained in the decision in respect of which a review is sought. In the present case, the Applicant's application is akin to an appeal against the judgment of 2 December 2021 since it exclusively seeks to challenge the Court's findings and the analysis underpinning its judgment, and for a rectification of what he describes as an error of assessment.

59. The Court further notes that the Applicant contends that the matters which he claims constitute new facts and errors are identified in the Judgment of 2 December 2021.
60. From the foregoing, the Court finds that there are no new facts relating to the admissibility of the allegation of violation of the Applicant's right to property.

iii. Allegation of a new fact in relation to the determination of the amount of reparation for material and moral damage

61. The Applicant submits that once the Court has drawn the consequences of the fact that the violations arising from the proceedings against him since 24 July 1995 are of a continuous nature, it should assume its temporal jurisdiction and find that his arrest, the forced cessation of his duties for twenty-six (26) years, the "destruction" of his career and his sentencing to ten (10) years' imprisonment were unlawful. He further submits that after such a finding, the Court should review its decision with regard to reparation for the material and moral damage he suffered and award him a substantial amount.
62. The Applicant further contends that if the Court in its Judgment recognises his wife and children as vicarious victims, it should award them reparation taking into account its jurisprudence on the matter. He refers to the amount awarded by the Court in Application No 013/2017: *Sébastien Germain Ajavon v Republic of Benin* and prays the Court to review its decision by re-evaluating the amount of reparation for non-pecuniary damage suffered by his wife and children to an amount higher than the amounts awarded to the wife and each of the children of Mr. Sébastien Germain Ajavon.
63. He further submits that the Court failed to take into account all the mental suffering he endured for more than twenty-six (26) years as a result of the violations of his rights as captured in paragraphs 435 and 486 of the initial application and therefore must award him fair reparation equivalent to the duration of his suffering

and the gravity of the violations of his rights. He alleges that the moral suffering he endured during these twenty-six (26) years, of which more than ten were spent in prison, is heavier than those of Sébastien Germain Ajavon who was never in prison. For all these considerations, he requests the Court to review its judgment of 2 December 2021 and award him the amount of Three Billion (3,000,000,000) CFA francs as reparation for the moral damage he suffered.

64. The Respondent State submits that there is no basis for the Applicant to rely on a situation that is supposedly comparable to his in order to request a review of the amount of reparation for the non-pecuniary damage that he and his family members allegedly suffered. It further contends that the Court should dismiss the Applicant's request as it does not rule by comparing similar situations.

65. The Court reiterates that for a decision to be reviewed, it must be established that at the time of rendering the decision, new facts have come to light of which the Court and the parties were unaware and which are of such a nature as to have a decisive influence on the decision already rendered. In the present case, the Applicant does not provide proof of any fact of which he was unaware and which would have been decisive in determining the amount of reparation for non-material damage suffered.
66. Furthermore, the Court notes that in the present Application for review, the Applicant, by virtue of all the particulars he relies on, is challenging the findings and orders of the Court in the Judgment entered on 2 December 2021. These particulars are therefore neither new facts nor new evidence within the meaning of Article 28(3) of the Protocol and Rule 78(2) of the Rules. The Court considers that the Applicant's comparison of the amounts awarded him to those awarded by the Court in another case does not constitute a new fact.

67. Accordingly, the Court declares inadmissible the Application for review.

VIII. Costs

68. The Respondent State submits that the present Application for review, which was filed after the effective date of the withdrawal of its Declaration under Article 34(6) of the Protocol, constitutes abuse of process by the Applicant and requests the Court to order the Applicant to pay the costs of the proceedings.
69. The Applicant does not make any submission in respect of costs.
70. Under Rule 32(2) of the Rules, "Unless otherwise decided by the Court, each party shall bear its own costs, if any".
71. The Court notes that an application for review is a procedural right of the parties enshrined in Rule 78 of the Rules. In the instant case, the Court reiterates that the withdrawal of the Declaration has no effect on the Application for Review brought in relation to the initial Application of 8 November 2017. Accordingly, the Court holds that there is no abuse of process.
72. In conclusion, the Court finds no reason for it to depart from Rule 32(2) of the Rules and decides that each party shall bear its own costs.

IX. Operative part

73. For these reasons,

The Court

Unanimously,

On jurisdiction,

- i. *Dismisses* the objection to the Court's personal jurisdiction;
- ii. *Declares* that it has jurisdiction;

Admissibility,

- iii. *Finds* that the Application has identified the judgment of which a review is sought and was filed within the required time-limits;
- iv. *Finds* that the challenges to the judgment of 2 December 2021 do not constitute new facts and that, therefore, no new evidence has been adduced.
- v. *Declares* inadmissible the Application for review of the Court's judgment of 2 December 2021 delivered in Application No 034/2017: *Kouadio Kobena Fory v Republic of Côte d'Ivoire*;

Costs

- vi. *Decides* that each Party shall bear its own costs.

Iguna v Tanzania (judgment) (2022) 6 AfCLR 826

Application 020/2017, *Igola Iguna v United Republic of Tanzania*

Judgment, 1 December 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, CHIZUMILA, BENSOUALA, ANUKAM, NTSEBEZA, SACKO and ADJEI

Recused under Article 22: ABOUD

The Applicant, a citizen of the Respondent State, was in prison awaiting execution of a death sentence when he brought this Application. He had been tried, convicted, and sentenced to death for murder. The Applicant alleged that the entire process leading to his conviction and sentencing before the national courts was in violation of his human rights. The Court found that the Respondent State had not violated any of the rights claimed by the Applicant. The Court, therefore, dismissed the claim for reparations.

Admissibility (exhaustion of local remedies, 30-31; reasonable time to file, 32-39)

Fair trial (assessment of evidence, 46; right to have cause heard, 48-49)

Non-discrimination (onus to prove, 53)

Life (mandatory death penalty, 55)

Separate Opinion: TCHIKAYA

Life (mandatory death penalty, 8, 34-36)

Joint Dissenting Opinion: KIOKO, CHIZUMILA and ADJEI

Admissibility (filing within a reasonable time, 5-6, 19-20)

I. The Parties

1. Igola Iguna (hereinafter referred to as “the Applicant”), is a national of the United Republic of Tanzania, who at the time of filing the Application, was incarcerated at Uyui Prison in the Tabora region, having been convicted of the offence of murder and sentenced to death. He challenges the proceedings in the national courts that led to his conviction and sentence.
2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as “the Respondent State”), which became a Party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred

to as “the Declaration”), through which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration. The Court has held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect, that is, one (1) year after its deposit, which is on 22 November 2020.¹

II. Subject matter of the Application

A. Facts of the matter

3. It emerges from the records, that, on 22 April 1993, the Applicant and another not before the Court, broke into the house of Nkwimba Lumiki, then attacked and wounded her with a *machete*. Ms Lumiki’s son having been awoken by his mother’s screams, ran to her aid. In the course of the attack, he was also injured by the Applicant, after which the Applicant escaped. Ms Lumiki was later rushed to the hospital, where she died from her wounds.
4. The Applicant and his accomplice were arrested four (4) months after the attack on Ms Lumiki and charged with murder. On 27 March 2001, they were convicted before the High Court of Tanzania sitting at Tabora and sentenced to death by hanging. The Applicant filed an appeal against the decision of the High Court and the appeal was dismissed by the Court of Appeal on 28 June 2003.

B. Alleged violations

5. The Applicant alleges the following violations:
 - a. The right to non-discrimination protected under Article 2 of the Charter in relation to the judgment of the Court of Appeal and
 - b. The right to a fair trial protected under Article 7(1) of the Charter in relation to the evaluation of evidence in the Court of Appeal.

¹ *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACTHPR, Application No 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.

III. Summary of the Procedure before the Court

6. The Application was filed on 13 June 2017. On 16 June 2017, the Registry requested the Applicant to provide copies of the Judgment of the Court of Appeal which he submitted on 8 May 2018.
7. The Application was served on the Respondent State on 2 October 2018.
8. The Respondent State failed to file a Response to the merits even after several reminders by the Court to do so.
9. The Applicant filed his submissions on reparations on 13 May 2019 and this was served on the Respondent State on 14 May 2019 which filed its Response on 18 March 2021.
10. Pleadings were closed on 8 November 2022 and the parties were notified thereof.

IV. Prayers of the Parties

11. The Applicant prays the Court to:
 - a. Make an Order quashing both conviction and sentence;
 - b. Order his release from custody;
 - c. Grant him reparations to the tune of Tanzanian shillings Fifty-Nine Million, One Hundred and Thirty-Six Thousand (59,136,000) pursuant to Article 27(1) of the Protocol;
 - d. Grant any other legal remedy that the Court may deem fit in the circumstances of the Applicant's complaints.
12. The Respondent State prays the Court for the following:
 - a. A Ruling dismissing the Applicant's Application for reparations in its entirety;
 - b. A Declaration that the Respondent has not violated the provisions of the Charter and that the Applicant was treated fairly by the Respondent State;
 - c. Any Order this Hon. Court may deem right and just to grant under the prevailing circumstances.

V. Jurisdiction

13. The Court notes that Article 3 of the Protocol provides as follows:
 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

14. The Court underscores the provision of Rule 49(1) of the Rules that, “[t]he Court shall conduct preliminarily examination of its jurisdiction...in accordance with the Charter, the Protocol and these Rules.”
15. The Court notes that, even though nothing on record indicates that it lacks jurisdiction, it is obligated to determine if it has jurisdiction to consider the Application. In view of this, with regards to its personal jurisdiction the Court notes, as earlier stated in this judgment, that the Respondent State is a party to the Protocol and on 29 March 2010, it deposited the Declaration with the African Union Commission. Subsequently, on 21 November 2019, it deposited an instrument withdrawing its Declaration.
16. The Court recalls its jurisprudence that the withdrawal of the Declaration does not apply retroactively and only takes effect one (1) year after the notice of such withdrawal has been deposited, in this case, on 22 November 2020.² Resultantly, the Court finds that it has personal jurisdiction.
17. As regards its material jurisdiction, the Court notes that the Applicant alleges violation of Articles 2 and 7(1) of the Charter to which the Respondent State is a party and therefore its material jurisdiction has been satisfied.
18. With respect to its temporal jurisdiction, the Court underscores, in accordance with the principle of non-retroactivity that it cannot consider allegations of human rights violations that occurred before the Respondent State’s obligations were triggered unless the violations are continuing in nature.
19. In the instant case, the Court notes that the alleged violations are based on the alleged denial of the right to a fair trial in the national courts, which occurred between 1993 and 2003. In this regard, the alleged violations occurred after the Respondent State had ratified the Charter but prior to the ratification of the Protocol and the deposit of the Declaration on 29 March 2010. However, the alleged violations continued thereafter since the Applicant is on death-row based on his conviction by the national courts from procedures that he considers to be unfair.³ Consequently, the Court finds that it has temporal jurisdiction.

2 *Andrew Ambrose Cheusi v Tanzania* (merits and reparations), §§ 37-39.

3 *Jebra Kambole v United Republic of Tanzania*, ACtHPR, Application No 018/2018, Judgment of 15 July 2020 (merits and reparations), § 24; *Dismas Bunyerere v United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 702, § 28(ii); *Norbert Zongo and Others v Burkina Faso* (preliminary objections) (25 June 2013) 1 AfCLR 197, §§ 71-77.

20. The Court also notes that it has territorial jurisdiction, given that the facts of the case occurred in the Respondent State's territory.
21. In light of the foregoing, the Court holds that it has jurisdiction to hear this Application.

VI. Admissibility

22. Article 6(2) of the Protocol provides: "the Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter."
23. Pursuant to Rule 50(1) of the Rules, "[t]he Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules."
24. Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:
Applications filed before the Court shall comply with all of the following conditions:
 - a. Indicate their authors even if the latter request anonymity;
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter;
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
 - d. Are not based exclusively on news disseminated through the mass media;
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 - f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter; and
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union, or the provisions of the Charter.
25. The Court notes that the conditions of admissibility set out in Rule 50(2) of the Rules are not in contention between the parties. However, pursuant to Rule 50(1) of the Rules, the Court is obligated to determine the admissibility of the Application.
26. From the record, the Court notes that, the Applicant has been identified by name in fulfilment of Rule 50(2)(a) of the Rules.
27. The Court notes that the claims made by the Applicant seek to protect his rights guaranteed by the Charter. It also notes that one of the objectives of the Constitutive Act of the African Union as

stipulated under Article 3(h), is to promote and protect human and peoples' rights. The Court, therefore, holds that the Application is compatible with the Constitutive Act of the African Union and the Charter and thus meets the requirements of Rule 50(2)(b) of the Rules.

28. The Court finds that the Application does not contain any disparaging or insulting language and therefore, meets the admissibility requirement of Rule 50(2)(c) of the Rules.
29. The Application is not based exclusively on news disseminated through mass media as it is founded on court documents from the municipal courts of the Respondent State in fulfilment of Rule 50(2)(d) of the Rules.
30. The Court notes that, in accordance with Article 56(5) of the Charter, Rule 50(2)(e) of the Rules and as it has established in its case law that "the local remedies that must be exhausted by the Applicants are ordinary judicial remedies",⁴ unless they are manifestly unavailable, ineffective and insufficient or the proceedings are unduly prolonged.⁵
31. In the instant case, the Court notes that, the Applicant was convicted of murder by the High Court and sentenced to death on 27 March 2001. He appealed against this decision to the Court of Appeal, the highest judicial organ in the Respondent State, which upheld the decision of the High Court by its judgment of 28 June 2003. The Court, therefore, holds that the Applicant exhausted the available local remedies.
32. With regard to the condition of filing an Application within a reasonable time after exhaustion of local remedies, the Court notes that Article 56(6) of the Charter does not specify any time frame within which a case must be filed before this Court. Rule 50(2)(f) of the Rules, which in substance restates Article 56(6) of the Charter, only requires an application to be filed within "a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter."
33. In computing the time to be assessed against the requirement under Article 56(6) of the Charter, two elements are of relevance. Firstly,

4 *Mohamed Abubakari v Tanzania* (merits) (3 June 2016) 1 AfCLR 599, § 64. See also *Alex Thomas v Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 64; and *Wilfred Onyango Nganyi and 9 Others v Tanzania* (merits) (18 March 2016) 1 AfCLR 507, § 95.

5 *Lohé Issa Konaté v Burkina Faso* (merits) (5 December 2014) 1 AfCLR 314, § 77. See also *Peter Joseph Chacha v Tanzania* (admissibility) (28 March 2014) 1 AfCLR 398, § 40.

the reckoning of time within which to assess reasonableness in filing the Application should have been the date when the Court of Appeal rendered its judgment that is on 28 June 2003. However, in the instant case, the actual starting date for computing the time is 29 March 2010, that is, when the Respondent State filed its Declaration because that is when individuals could seise the Court with claims against the Respondent State.

34. Secondly, the Court observes that the period between 2007 and 2013 were the formative years of its operation. As the Court has previously held, during the stated period, members of the general public, let alone persons in the situation of the Applicant in the present case, could not be presumed to have had sufficient awareness of the existence of the Court.⁶ Consequently, the period to be assessed in the present case, is that between 2013, when the public would be expected to have become aware of the Court and 2017, the year when the Application was filed, which is a period of four (4) years. The issue for consideration is whether such a period of time is reasonable within the meaning of Article 56(6) of the Charter.
35. The Court recalls its jurisprudence, that: "... the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."⁷ Some of the circumstances that the Court has taken into consideration include: imprisonment, being lay without the benefit of legal assistance,⁸ indigence, illiteracy, lack of awareness of the existence of the Court, incarceration at the death-row⁹ and the use of extraordinary remedies.¹⁰
36. The Court notes that in the present Application, the Applicant is self-represented before this Court. Also, proceedings involving him before domestic courts and the alleged violations occurred between 2001 and 2003 before the Court came into existence.

6 *Sadick Marwa v United Republic of Tanzania*, ACTHPR, Application No 005/2016, Judgment of 2 December 2021, § 52.

7 *Norbert Zongo v Burkina Faso* (merits), *op. cit.*, § 92. See also *Alex Thomas v Tanzania* (merits) *op. cit.*, § 73.

8 *Alex Thomas v Tanzania* (merits), *op. cit.*, § 73; *Christopher Jonas v Tanzania* (merits) *op. cit.*, § 54; *Amir Ramadhani v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 83.

9 *Evodius Rutechura v United Republic of Tanzania*, ACTHPR, Application No 004/2016, Judgment of 26 February 2021, § 48.

10 *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 56; *Werema Wangoko v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520, § 49 *Alfred Agbes Woyome v Republic of Ghana* (merits and reparations) (28 June 2019) 3 AfCLR 235, §§ 83-86.

37. The Court further notes that the Applicant was incarcerated and was therefore limited in movement and with limited flow of information which this Court has held in previous similar instances could cause delays in filing applications.¹¹ The latter factor is compounded by the Applicant's incarceration on death row.
38. This situation of seclusion from the general population has without any doubt caused the Applicant to be cut off from possible information flow, and be restricted in his movements. The Court notes that these extenuating factors mitigate in his favour.
39. In view of these circumstances, the Court finds that the period of four (4) years that it took the Applicant to file the present Application, was reasonable within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.
40. The Court further notes that the Application does not concern a case which has already been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union in fulfilment of Rule 50(2)(g) of the Rules.
41. The Court, therefore, finds that all the admissibility conditions have been met and that this Application is admissible.

VII. Merits

42. The Applicant alleges the violations of Articles 2 and 7 of the Charter in relation to the following allegations:
 - i. His conviction was based on unreliable evidence; and
 - ii. The assessment of the evidence leading to the conviction was discriminatory.

A. Allegation that the conviction was based on unreliable evidence

43. The Applicant alleges that the Court of Appeal erred in its decision as it did not properly examine and evaluate the identification evidence adduced by "PW2". He submits further that the Court of Appeal did not consider his arguments regarding the said "identification evidence" which caused a miscarriage of justice. The Applicant, therefore, alleges that the Court of Appeal violated his rights under Article 7 of the Charter.

11 *Supra* note 8.

44. The Respondent State did not file a response.

45. Article 7(1) of the Charter provides: “Every individual shall have the right to have his cause heard ...”.

46. The Court reiterates its position according to which, it held that:
(...) domestic courts enjoy a wide margin of appreciation in evaluating the probative value of a particular evidence, and as an international court, this court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings.¹²

47. In the instant case, the record before this Court shows that the national courts convicted the Applicant on the basis of evidence tendered by two (2) prosecution witnesses. The Court of Appeal in determining the evidence tendered by PW2 (the deceased’s son) relied on its jurisprudence especially the case of *Waziri Amani v Republic* which enumerates the guidelines on the identification of witnesses. Among the considerations a judge must consider in assessing identification evidence are:

- a. the distance at which the witness observed the incident;
- b. the time at which the crime was witnessed;
- c. the conditions in which such observations occurred including the lighting at the scene; and
- d. Whether the witness knew or had seen the accused before.

48. The Court notes, that the Court of Appeal assessed the circumstances in which the crime was committed and considered the arguments by both the Respondent State and the Applicant, who was duly represented by counsel, in order to eliminate possible errors as to the identity of the perpetrator of the murder. Furthermore, the Court of Appeal particularly noted that the Applicant was at the crime scene and thus his *alibi* was fabricated, that he was well known to the victim and PW2, that a torch was used in the commission of the crime, that it was possible for PW2 to identify the Applicant and further that PW2 himself was injured by the Applicant’s accomplice and therefore they were in close proximity. On the basis of the evidence adduced by the witnesses,

12 *Kijiji Isiaga v Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 65.

the national courts convicted the Applicant and sentenced him to death.

49. The Court finds that the manner in which the domestic courts evaluated the evidence relating to the Applicant's identification does not disclose any manifest error or miscarriage of justice to the Applicant. The Court therefore dismisses this allegation.

B. Allegation relating to the discriminatory assessment of evidence

50. The Applicant alleges that the manner in which the Court of Appeal arrived at his conviction through assessing the evidence tendered, violated his right to non-discrimination.
51. The Respondent State did not file a response.

52. Article 2 of the Charter provides:
Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.
53. The Court observes that the onus lies on the Applicant to prove his claim but that he failed to substantiate it.¹³ The Court also notes that nothing on the record demonstrates that the Applicant suffered any discrimination in the proceedings before the Court of Appeal. The Court notes that the Court of Appeal applied its law and jurisprudence in its assessment of the case to avert any peril of injustice. In this regard, the Court is satisfied that the Applicant has not proven that he was discriminated against and thus dismisses the claim.
54. The Court holds that the Respondent State did not violate Article 2 of the Charter as alleged herein.
55. Having held that the Respondent State did not violate the rights of the Applicant, the Court nevertheless reiterates its finding in its

13 *Alex Thomas v Tanzania* (merits) (2015) 1 AfCLR 465, § 140.

previous cases¹⁴ that the mandatory death penalty is a violation of the right to life among other rights in the Charter and should thus be expunged from the laws of the Respondent State. Furthermore, the Applicant should be given a hearing on the sentencing through a procedure that does not allow the mandatory imposition of the death sentence and which upholds the full discretion of the judicial officer.¹⁵

VIII. Reparations

56. The Applicant prays the Court to grant him reparations for the violations he suffered including quashing his conviction and sentence and ordering his release.
57. The Respondent State prays the Court to dismiss the Applicant's request for reparations.

58. Article 27(1) of the Protocol provides that:
if the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.
59. In the instant case, given that no violation has been established, the issue of reparations does not arise. The Court, therefore, dismisses the Applicant's prayer for reparations.

IX. Costs

60. The Parties did not make any submissions on costs.

14 *Ally Rajabu and Others v United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 539, §§ 104-114. See also, *Amini Juma v United Republic of Tanzania*, ACtHPR, Application No 024/2016, Judgment of 30 September 2021, §§ 120-131; *Gozbert Henerico v United Republic of Tanzania*, ACtHPR, Application No 056/2016, Judgment of 10 January 2022, § 160.

15 *Ally Rajabu and Others v Tanzania* (merits and reparations), § 171. See also, *Amini Juma v Tanzania* (merits and reparations), § 174; *Gozbert Henerico v Tanzania* (merits and reparations), § 217.

61. The Court notes that Rule 32(2) of its Rules provides that “unless otherwise decided by the Court, each party shall bear its own costs, if any.”
62. Consequently, the Court decides that each Party shall bear its own costs.

X. Operative part

63. For these reasons,

The Court

On jurisdiction

Unanimously,

- i. *Declares* that it has jurisdiction;

On admissibility

By a majority of seven (7) for, and three (3) against, Justices Ben KIOKO, Tujilane R. CHIZUMILA and Dennis D. ADJEI, dissenting:

- ii. *Declares* the Application admissible;

On merits

Unanimously,

- iii. *Finds* that the Respondent State did not violate the right to a fair trial protected under Article 7 of the Charter in relation to its evaluation of evidence;
- iv. *Finds* that the Respondent State did not violate the right to non-discrimination protected under Article 2 of the Charter in relation to its decision.

On reparations

- v. *Dismisses* the prayer for reparations

On costs

- vi. *Orders* each that each Party shall bear its own costs.

Separate Opinion: TCHIKAYA

1. The sixty-seventh session of the African Court was the session of “the death penalty”.

2. Despite the increasingly abolitionist, continental and universal position, the African Court, by three judgments, confirmed its position in its earlier decision in *Ally Rajabu and others v Tanzania* of 8 December 2019. I was unable to share the position taken by the majority of the honourable judges through these three judgments on the issue of the death penalty.
3. Since the beginning of the third millennium, 146 states have been classified as either abolitionist or *de facto* abolitionist¹ including the Respondent State in the three cases, namely: *Marthine Christian Msuguri*, *Igola Iguna* and *Ghati Mwita*, all dated 1 December 2022.²
4. *Marthine Christian Msuguri* was the first case examined by the Court. After committing murder, the Applicant in the aforementioned case was incarcerated at the central prison of Butimba (Mwanza) having been found guilty of the offence and sentenced to death. The second case involved Mr. *Igola Iguna*, who was incarcerated at Uyui Prison (in the Tabora Region). He was sentenced to death for murder. Finally, the third case involved *Ghati Mwita*, a woman convicted of murder, sentenced to death and incarcerated at the same Butimba Central Prison.
5. All in all, these three applicants challenged before this Court, *mutatis mutandis*, the violation of their rights in the proceedings before domestic courts, which resulted in the death penalty.
6. This opinion reformulates and supports the idea that the death penalty is vacuous in socio-human terms on the one hand, and on the other hand, highlights the wait-and-see attitude of the Court. This wait-and-see attitude is due to the fact that it denounces the irregular nature of the mandatory penalty imposed by the Respondent State without questioning the underlying principle. Having stated the grounds of the judgments, the Court does not seem to dwell on the death penalty legal regime.
7. As in its 2019 decision in *Rajabu et al.*,³ the Court in these three judgments invalidates Tanzania's mandatory death penalty provisions but allows the death penalty to persist in the Respondent State's system. It should have taken the opportunity to strengthen international law on this issue. This assessment of

1 The death penalty is enshrined in domestic law, but it is not applied.

2 ACtHPR, *Marthine Christian Msuguri v Tanzania; Igola Iguna v Tanzania, Ghati Mwita v Tanzania*, 1 December 2022. A fourth case, *Thomas Mgira v Tanzania* (Application No 003/2019), relating to the death penalty, was on the Court's list for this 67 session, but was deferred for further consideration.

3 See The Individual Opinions in the 2019 *Ally Rajabu et al.* decision, Justices Bensaoula Chafika and B. Tchikaya.

the law on the death penalty, which makes a distinction between crime and offence, should no longer be supported because of the evolution of international human rights law. The Court, a human rights court, should keep pace with the evolution of international law.

8. As long as it is the task of international jurisdictions to develop the clarity of human rights, it seems useful to recall that *the right to life and the sanctity of human life* are not associated with the death penalty, of which they are the strict antidotes. For this reason, it seems unfortunate that the three decisions of the Court have maintained the old legal regime that apply a variant of the death penalty (I.). Next, it will be clarified that the current situation in which Article 4 of the Charter operates and the evolution of human rights, imposes an interpretation that rejects any form of death penalty (II.).

I. “Keeping the death penalty alive” through three judgments/decisions

9. Three judgments have just been delivered by the Court. Common to all three is the fact that they recall the 2019 *Rajabu and Others v Tanzania* decision and by doing so, they keep the death penalty alive.

A. Confirmation of the 2019 precedent

10. The operative part of its 2019 decision in *Ally Rajabu and others* states:
 - § 8: Finds that the Respondent State violated the right to life guaranteed under Article 4 of the Charter in relation to the provision in its penal Code for the mandatory imposition of the death penalty as it removes the discretion of the judicial officer;
 - § 9: Finds that the Respondent State has violated the right to dignity protected under Article 5 of the Charter in relation to the provision for the execution of the death penalty imposed in a mandatory manner.
11. By these grounds, the Court deplores various infringements of fundamental rights, but, as it does in the judgments that follow, it does not reject the empire of the death penalty. This approach is once again the focus of attention in the three cases.
12. In the *Marthine Christian Msuguri* judgment of 2022 the Court states in its operative part that:
 - “v Finds that the Respondent State has violated the right to life protected under Article 4 of the Charter in relation to the provision in

its Penal Code for the mandatory imposition of the death penalty as it removes the discretion of the judicial officer;

...

vii. Finds that the Respondent State has violated the Applicant's right not to be subjected to inhuman and degrading treatment protected under Article 5 of the Charter in relation to the lengthy pre-trial detention, detention in the death row, and confinement".⁴

13. There is one particular element in this provision. The Court rejects and condemns the fact that the applicant was subjected to long pre-trial detention, detention on death row and confinement. This is somewhat contradictory, as the death penalty is indirectly validated. The death penalty has often been synonymous with death row and confinement.

14. *Last but not least*, the Court, once again, made a point of recalling its constant jurisprudence. In the instant case, the legality of the mandatory death penalty under international law is challenged.⁵ The United Nations Human Rights Committee had declared that the mandatory death penalty: "constitutes an arbitrary deprivation of life, in violation of article 6 of the *International Covenant on Civil and Political Rights*".⁶ It is clear that:

"the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence".⁷

15. These words are repeated in the *Igola Iguna* decision. Paragraph 55 states that:

"Having held that the Respondent State did not violate the rights of the Applicant, the Court nevertheless reiterates its finding in its previous cases that the mandatory death penalty is a violation of the right to life among other rights in the Charter and should thus be expunged from the laws of the Respondent State. Furthermore, the Applicant should be given a hearing on the sentencing through a procedure that does

4 ACTHPR, *Marthine Christian Msuguri v Tanzania*, *op. cit.* at § 143.

5 ACTHPR, *Rajabu et al.*

6 Human Rights Committee, *Pagdayawon Rolando v Philippines*, Communication No 1110/2002, UN Doc. CCPR/C/82/D/1110/2002, 8 December 2004, § 5.2. 99; UN Doc. E/CN.4/1999/39, 6 January 1999, § 63. 100; UN Doc. E/CN.4/2005/7, 22 December 2004, § 80. See also *Woodson v North Carolina*, 428 U.S. 280 (1976).

7 Human Rights Committee, PACE document 12223 on the situation in Belarus, 27 April 2010.

not allow the mandatory imposition of the death sentence and which upholds the full discretion of the judicial officer”.⁸

16. The Court typifies the Applicant *Iguna* in demonstrating the need to comply with international law. Thus, Mr. *Igola Iguna* was the subject of an erroneous procedure and should not have been sentenced to death.

B. The specificity of the Ghati Mwita judgment

17. The *Ghati Mwita* case does not depart from this. The operative part states:
“xiii. Finds that the Respondent State has violated the right to life of the Applicant, protected by Article 4 of the Charter by reason of the mandatory nature of the death penalty;
“ix. Finds that the respondent state has violated the right to dignity under Article 5 of the Charter by prescribing hanging as the method of execution of the death penalty”.⁹
18. As a result, the state “violated the right to life” and acted contrary to international law and its evolution.
19. Two violations of fundamental rights are involved: the violation of life and the violation of human dignity.
20. The *Ghati Mwita* decision introduces the idea that hanging is unacceptable, unlike other methods of enforcing the death penalty, without saying which.¹⁰ Moreover, no execution technique humanizes the death penalty or makes it lawful. The same goes for hanging. Europe was not mistaken in adopting a set of Rules that is mandatory for all European States, which prohibit trade of instruments used in the enforcement of the death penalty.¹¹
21. The Court confirmed its displeasure in *Amini Juma v Tanzania* in 2021,¹² a case that was of particular interest to the Court. In that case, on 15 December 2003, the Applicant was charged with murder and sentenced to life imprisonment. The Applicant appealed the conviction and sentence, and the Respondent State also appealed, seeking an upward review of the sentence. The Applicant’s appeal was dismissed and his sentence of life

8 ACTHPR, *Igola Iguna v Tanzania*, op. cit. at § 55.

9 ACTHPR, *Ghati Mwita v Tanzania*, op. cit. at § 184.

10 Points ix of the operative part.

11 EU, Regulation No 2019/125 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, 5 April 2019.

12 ACHPR, *Amini Juma v Tanzania*, 30 September 2021.

imprisonment was replaced by a sentence of death by hanging, thus granting the Respondent State's appeal.

22. In the 2021 *Amini Juma* case, like the three 2022 cases, and regarding the Appeal Court substituting life imprisonment for capital punishment by hanging, the Court found that the Respondent State violated Article 5 of the Charter insofar as it allowed the death penalty to be carried out "through a brutal manner, that is, by hanging" (§ 132).¹³
23. This decision also emphasises that hanging a person is [...] inherently degrading. Furthermore, [...] the mandatory imposition of the death sentence violates the right to life due to its arbitrary nature [...], the method of implementation of that sentence, that is, hanging, inevitably encroaches upon the dignity of a person in respect of the prohibition of torture and cruel, inhuman and degrading treatment.¹⁴
24. This reasoning was also found in *Rajabu et al*:
The Court observes that many methods used to implement the death penalty have the potential of amounting to torture, as well as cruel, inhuman and degrading treatment given the suffering inherent thereto. In line with the very rationale for prohibiting methods of execution that amount to torture or cruel, inhuman and degrading treatment, the prescription should therefore be that, in cases where the death penalty is permissible, methods of execution must exclude suffering or involve the least suffering possible.
25. The central question of respect for the right to life and the strict observance thereof, enshrined in international human rights law, is once again raised.

II. The right to life and the end of the death penalty are already enshrined in international law

26. The question of the death penalty regime in Africa and its inevitable demise is considered. The fact that the current regime is contrary to Article 4 of the African Charter on the right to life gives rise to this reflection. This last aspect, mentioned earlier, deserves to be updated.

13 v AU Commission on Human and Peoples' Rights, *Case of Interights and Ditshwanelo v Republic of Botswana*, 18 November 2015: "where the death penalty is applied by a state party for the most serious crimes, it must be carried out in such a way as to cause the least possible physical and mental suffering".

14 ACTHPR, *Amini Juma v Tanzania*, 30 September 2021, § 136.

A. Human rights and the death penalty

27. We can detail the bumpy path of the Arusha Court on this issue. The death penalty has evolved, before becoming contrary to international rules and fundamental freedoms, for example, Article 2 § 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that “No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law”. While the death penalty regime is still contrasted in the Inter-American system,¹⁵ the jurisprudence of the ECHR has followed the trend towards the abolition of the death penalty in Council of Europe member states, thereby following the footsteps of the European Court of Human Rights.¹⁶ Protocol No 13 is clear in its reference. It speaks of abolition of the death penalty “in all circumstances”.¹⁷
28. It seems reasonable to discuss the death penalty in relation to other human rights. This was the approach of the Inter-American Court when it examined the death penalty regime with the right to life, in *the Case of Martínez Coronado v Guatemala* of 10 May 2019.¹⁸ The Inter-American Court showed its leaning towards an “abolitionist tendency” in its interpretation of this form of punishment, which implies that the use of the death penalty is exceptional.¹⁹ Clearly, this represents progress on the part of

15 The death penalty is maintained in one-third of OAS member states. Of the 14 states that apply it, 12 are now in the English-speaking Caribbean. However, none of them has carried out executions for more than a decade. The United States is the only OAS country that carries out executions.

16 ECHR, *Al-Saadoon and Mufdhi v United Kingdom*, 2010, § 116: Following the opening for signature of Protocol No 6 to the Convention, the Parliamentary Assembly of the Council of Europe established a practice whereby states wishing to join the Council of Europe had to commit themselves to an immediate moratorium on executions, to abolish the death penalty in their domestic legislation, and to sign and ratify Protocol No 6.

17 Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, on the abolition of the death penalty in all circumstances. All member states of the Council of Europe have now signed this protocol, and ratified it, except Russia. Article 1 on the abolition of the death penalty states that “The death penalty is abolished. No one shall be condemned to such a penalty or executed”.

18 IACHR, *Martínez Coronado v Guatemala*, merits, reparations and costs, 10 May 2019, Series C, n° 376, § 62. v *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, 8 June 1990, OASTS no 73. v also *Restrictions to the Death Penalty* (1983), Advisory Opinion, OC-3/83, IACHR (Ser A) no 3; L. Hennebel, *The American Convention on Human Rights: Mechanisms of Protection and Scope of Rights and Freedoms*, Bruylant, 2007, Pref.

19 The wording of Article 4: on the right to life states that “Every person has the right to have his life respected. This right shall be protected by law and, in general,

the said court.

29. The Court, therefore, remained committed to its position expressed in the judgment, *Ally Rajabu and others* (28 November 2019). It did not take a new position. While impugning the laws of Tanzania on the mandatory death penalty, it allows the death penalty to continue; it only rejects and challenges the so-called mandatory death penalty in the three decisions under discussion.
30. In this, the Court says:

“Given the framing of Article 4 of the Charter, and the broader developments in international law in relation to the death penalty, the Court holds that this type of punishment should exceptionally be reserved only for the most heinous of offences committed in seriously aggravating circumstances”.²⁰
31. Thus, deplorably, the death penalty is maintained.
32. It is of interest to note that in *Marthine Christian Msuguri*, the Court is persuaded that although the applicant’s arguments are admissible, they cannot prosper because of domestic legislation. The Court refrains from going further.
33. The Court noted that:

In this respect, this Court recalls its position in *Gozbert Henerico v United Republic of Tanzania*²¹ where it found that the failure of the High Court to consider the medical evaluation report of the Applicant’s mental health status, constituted a grave procedural irregularity that resulted in a violation of the Applicant’s right to a fair trial, as guaranteed under Article 7(1) of the Charter.²²

In sum, the Court finds the insanity argument valid, but it cannot defeat the argument of the current death penalty legislation. One might think of the image of the *Wolf and the Lamb*, so dear to the fabulists.

B. Article 4 of the African Charter and total abolition of the death penalty

34. Relying on Article 4, which protects the right to life by declaring it

from the moment of conception. No one shall be arbitrarily deprived of his life”. And, paragraph 6 adds that “Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority. The Convention gives elements of maintenance and attachment to life”.

20 ACTHPR, *Ghati Mwita*, § 66.

21 ACTHPR, *Gozbert Henerico v Tanzania* (merits and reparations), § 160.

22 ACTHPR, *Msuguri v Tanzania*, § 72.

sacred and inviolable,²³ the Court, in *Ghati Mwita*,²⁴ acknowledged the two trends, global and African, towards abolition of the death penalty. It acknowledged that

“[...] a global trend towards the abolition of the death penalty, including the adoption of the Second Option Protocol to the International Covenant on Civil and Political Rights (ICCPR)”²⁵ § 64.

However, the Court supports its position by arguing that:

“At the same time, [...] the death penalty remains on the statute books of some states and that no treaty, on the abolition of the death penalty has gained universal ratification.²⁶ Presently, the Second Optional Protocol to the ICCPR, the Court notes, has ninety (90) State Parties out of the one hundred-seventy three (173) State Parties to the ICCPR”, § 64.

35. The Court takes up the same idea in *Igola Iguna* where stands as an *obiter dictum* protecting the right to life:

“Having held that the Respondent State did not violate the rights of the Applicant, the Court nevertheless reiterates its finding in its previous cases that the mandatory death penalty is a violation of the right to life among other rights in the Charter and should thus be expunged from the laws of the Respondent State. Furthermore, the Applicant should be given a hearing on the sentencing through a procedure that does not allow the mandatory imposition of the death sentence and which upholds the full discretion of the judicial office”.²⁷

36. The African continent is joining the international movement whose goal is the total abolition of the death penalty. 20 out of the 55 member states of the African Union (AU), no longer execute those sentenced to death, and nearly forty countries are abolitionist in law or in practice. It is possible to say that the majority of these states refuse this ultimate sanction.²⁸ It is well known that “the

23 Trindade Antonio Augusto Cançado, The Inter-American Human Rights Protection System: Current Status and Prospects for Evolution at the Dawn of the 21st Century, *AFDI*, 2000, p. 548.

24 *Ghati Mwita* judgment, §§ 64 and 65.

25 *Amini Juma v United Republic of Tanzania*, ACTHPR, Application No 024/2016, Judgment of 30 September 2021 (merits and reparations), § 122 and *Ally Rajabu and others v United Republic of Tanzania*, ACTHPR, Application No 007/2015, Judgment of 28 November 2019 (merits and reparations), § 96. It should be noted that the Respondent State is not a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights.

26 For more comprehensive information on developments relating to the death penalty, see, United Nations General Assembly, Secretary-General’s report on a moratorium on the use of the death penalty 8 August 2022.

27 Judgment, *Igola Iguna v Tanzania*, § 55.

28 As of this date, Congo-Brazzaville and Madagascar having abolished capital punishment in 2015 and Guinea in 2016 are the last African abolitionist states.

Respondent State violated Article 1 of the Charter by failing to amend its Penal Code which permits the mandatory death sentence as well as execution by hanging”.²⁹ It was, therefore, up to the Court to place this violation in its legal context: in addition to the right to life, the application of the death penalty was at stake.

37. This issue falls under the ambit of individual states, which determine their criminal policy and the hierarchy of penalties enshrined in their criminal law. As has already been written, the concept of reservation takes on its full meaning in international law. It applies to those “matters which are essentially within the domestic jurisdiction of a State”, within the meaning of Article 2(7) of the Charter,³⁰ and which are subject to their international commitments. The Court, using its praetorian power, should give impetus to this movement in order to uphold the right to life.
38. The European system, which, through Article 3 of its last Protocol prohibiting the death penalty, excludes reservations, sets the tone. It states that “No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol”. The Protocol takes care to emphasise that “The death penalty shall be abolished. No one shall be condemned to such penalty or executed.”³¹ It further states that this constitutes a “final step in order to abolish the death penalty in all circumstances”.³²
39. In support of this opinion, it is useful to recall that the superiority of international law is a principle applicable to all categories of internal procedural and material rules. This commitment is sovereignly negotiated and fixed by the State with its peers. It is therefore up to the States to adapt their legal system. It is not certain that, for the law of treaties, States lose their sovereignty by their international commitment.³³

29 *Idem*, § 14.

30 W Schabas *The abolition of the death penalty in International Law*, Grotius, Cambridge, 1993, 384 p.

31 Article 1, Protocol No 13, *Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances*, Vilnius, 3 May 2002

32 *Idem*, preamble to the Protocol

33 Whatever its relationship with international law, a State only commits itself to rights and duties which, when accepted by other States, become the law in force. This law takes precedence, otherwise it is unlawful. This also applies to its supranational relations in the field of human rights. A well-known formula of the Permanent Court underlines this. *v P.C.I.J., A.C., Pecuniary claims of Danzig railway employees who have entered Polish service against the Polish railway administration* (jurisdiction of the Danzig courts), 3 March 1928, *Rec. Serie B*, No 15, pp. 18. In this same case, the Hague Court laid down the principle of the non-invocability of constitutional provisions against international law: “a State cannot,

III. Conclusion

40. If the Court fails to keep up with the advances in international law, it is bound to be “caught up” by the international law patrol. Human rights doctrine and jurisprudence will note this. While listening to the majority position of my honourable colleagues, a question deserves to be asked: How can we understand that the Court maintains its jurisprudence behind the evolution of the applicable international law. There would be two regimes: one favourable to the full protection of the right to life³⁴ and the other less favourable.³⁵ A harmonization is necessary.

Joint Dissenting Opinion: KIOKO, CHIZUMILA and ADJEI

1. In the above-mentioned matter, the Court properly addressed itself to the admissibility requirements specified in Rule 50(2) of the Rules, which substantially reproduces the provisions of Article 56 of the Charter. The majority opinion is that all admissibility conditions have been met and therefore the Application is admissible.
2. While we fully agree generally with the assessment and findings of the majority with regard to most of the admissibility conditions,

vis-à-vis another State, rely on the constitutional provisions of the latter but only on international law and international commitments validly entered into, on the other hand, and conversely, a State cannot invoke vis-à-vis another State its own Constitution in order to evade the obligations imposed upon it by international law”, *Treatment of Polish Nationals in Danzig*, 4 February 1932, Series A/B, No 44, pp. 24.

34 D Breillat ‘L’abolition mondiale de la peine de mort, A propos du 2e Protocole facultatif se rapportant au Pacte international relatif aux droits civils et politiques visant à abolir la peine de mort’, *RSC*, 1991, p. 261.

35 The 2019 *Rajabu et al.* decision, and other 2022 decisions from this perspective, reflect a limited reading of Article 4 of the Charter.

we have parted ways in respect of the requirement of filing an application within a reasonable time enshrined in Rule 50(2)(f) of the Rules. We believe that the majority erred in interpreting and applying this condition to the present case, hence this dissenting opinion made pursuant to the provisions of Rule 70(2) of the Rules of Procedure of the Court. We have reached this decision in order to ensure consistency in the decision of the Court, even though we strongly believe that a human rights court should as much as possible understand and take into account the challenges faced by Applicants.

3. We believe that the text of a law must be given effect unless it is established that its application would render the text absurd. Furthermore, a Court has the right to depart from its established jurisprudence when it deems it fit to do so but must give cogent reasons for the departure. In the instant case, what is disturbing is that the Court is fixing a specific date (year and not month) when the public should be presumed to have become aware of the existence of the Court without offering any empirical evidence to that effect. It is as a result of the foregoing and other reasons that we will delve into hereinbelow that we hold the firm opinion that there was no basis to declare the application admissible.

I. Filing of an Application within a reasonable time

4. Article 56(6) of the Charter provides that applications will not be received by the Court, unless they “are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter.” Article 56(6) of the Charter does not provide a specific time limit and therefore, the Court has resorted to a case-by-case approach.¹
5. The requirement of filing an application within a reasonable time is an important admissibility criterion recognised in international human rights law.² It is a counterpart of the provision relating to prescription recognised in municipal jurisdictions. The principle is that applicants who wish to seize an international tribunal should do so within a reasonable time from the date they exhausted local

1 *Norbert Zongo v Burkina Faso* (merits), *op. cit.*, § 92. See also *Alex Thomas v Tanzania* (merits) *op.cit.*, § 73.

2 See Article 35(1) of the European Convention on Human Rights (1950), Article 46 American Convention on Human Rights

remedies at the national level.

6. It is important to note that the rule seeks to ensure that applicants show diligence in pursuing their case and do not sleep on their rights. This is dictated by pragmatic considerations, particularly, when applicants take unreasonably long time to institute their case, the Respondent State would no doubt face difficulties in responding to the allegations and more so, before an international tribunal that needs to properly determine the case. As the Court has previously held:

the purpose of Rule [50(2)(f)] of the Rules is to guarantee “[j]udicial security by avoiding a situation where authorities and other concerned persons are kept in a situation of uncertainty for a long time”. Also, “to provide the Applicant with sufficient time for reflection to enable him appreciate the opportunity of bringing a matter to court if necessary” and finally, “to enable the Court to establish the relevant facts relating to the matter”.³

7. Other international courts also have a time limit in which applications should be filed at those Courts. Article 30(2) of the Treaty Establishing the East African Community provides that an application should be filed within two (2) months of the date that an applicant became aware of the complaint. The East Africa Court of Justice has held that “[t]he Treaty does not contain any provision enabling the Court to disregard the time limit of two months and that Article 30(2) does not recognize any continuing breach or violation of the Treaty outside the two months after a relevant action comes to the knowledge of the Claimant.”⁴

8. The European Court of Human Rights (ECHR) require Applications to be filed no later than four (4) months after exhaustion of local remedies. The ECHR was of the view that:

The primary purpose of the four-month rule is to maintain legal certainty by ensuring that cases raising issues under the Convention are examined within a reasonable time, and to prevent the authorities and other persons concerned from being kept in a state of uncertainty for a long period of time (*Lopes de Sousa Fernandes v Portugal* [GC], § 129). It also affords the prospective applicant time to consider whether to lodge an application and, if so, to decide on the specific complaints and arguments to be raised and facilitates the establishment of facts in a case, since with the passage of time, any fair examination of the

3 *Godfred Anthony and another v United Republic of Tanzania*, ACTHPR, Application No 015/2015, Ruling of 26 September 2019 (jurisdiction and admissibility), § 45.

4 *Professor Nyamoya Francois v Attorney General of the Republic of Burundi and the Secretary General of the East African Community*, EACJ, Reference 8 of 2011.

issues raised is rendered problematic (*Ramos Nunes de Carvalho e Sá v Portugal* [GC], §§ 99-101; *Sabri Güneş v Turkey* [GC], § 39.⁵

9. Article 46(1)(b) of the American Convention on Human Rights provides “that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment”.

II. Consideration of reasonable time in the present case

10. We are unable to join the majority of the Court in their decision, as the position taken by them does not accord with the jurisprudence of the Court. We do not intend to reproduce the facts of the case which have been well outlined in the decision of the majority and will only discuss the relevant part of the same when necessary.
11. In the present case, the Applicant was convicted of murder on 27 March 2001 and sentenced to death by hanging. He appealed to the Court of Appeal and it dismissed his appeal on 28 June 2003. The Court of Appeal being the highest judicial organ in the Respondent State means that the available local remedies were exhausted on 28 June 2003.⁶
12. Given that the Applicant could only seize the Court from 29 March 2010 as that is the date when the Respondent State filed its Declaration then the period for computation of reasonable time would be between this date and 13 June 2017, the date when the Application was filed before the Court. The period for consideration therefore, is seven (7) years, two (2) months and fifteen (15) days.
13. We note that the Court had held that between 2007 and 2013, during the early years of the Court, members of the general public in Tanzania did not know of the existence of the Court and that this period should be given to them as a moratorium.⁷ The moratorium does not suggest that time shall not run against a potential applicant, but where an applicant whose right accrued to file an application within that time but could not file because he or she did not know of the existence of the Court is required to file it within a reasonable time from that date. Conversely, an Applicant who does not prove that he did not know about the existence of the Court would not benefit from the moratorium.

5 ECHR, *Mocanu and Others v Romania* [GC], § 258.

6 Paragraph 4 of the judgment.

7 *Sadick Marwa Kisase v United Republic of Tanzania*, AfCHPR, application No 005/2016 Judgment of 2 December 2021 (merits and reparations) §§51-52.

14. It is therefore not true that time did not run, as stated by the majority, against applicants between 2007 and 2013, especially after the Respondent State deposited its Declaration. The majority seems to construe the period between 2007 to 2013 as a period within which time shall not run, which interpretation will lead to absurdity and should not be adhered to. Applicants who filed their applications after 2013 shall be at the mercy of the Court to determine whether they were filed within a reasonable time or not.
15. Despite the six-year moratorium given to individuals who filed their cases against Tanzania to assert their rights within a reasonable time, the Applicant slept on his rights until 13 June 2017, when he filed this application.
16. It is important to recall that the Court has been consistent in its jurisprudence that the determination of reasonableness “depends on the specific circumstances of the case and should be determined on a case-by-case basis.”⁸ Accordingly, the Court has taken into consideration circumstances such as imprisonment, being lay without the benefit of legal assistance, indigence, illiteracy, lack of awareness of the existence of the Court, intimidation and fear of reprisal and the use of extra-ordinary remedies as relevant factors to consider whether the delay of an applicant in seizing the Court is justified.⁹ This approach has allowed the Court to employ some flexibility.
17. However, the Court has also, albeit implicitly, adopted a strict standard of proof to the effect that the longer an applicant delays to file his application, particularly for periods of over five (5) years, the stricter the Court’s demand for justification with sufficient substantiation. For instance, in *Godfred Anthony and Ifunda Kisite v Tanzania*, the Court held that a delay of five (5) years and four (4) months was unreasonable despite the fact that the Applicants were “also incarcerated and thus restricted in their movement”. The Court noted in this case that apart from simply describing themselves as “indigent”, the applicants did not assert or provide “any proof that they were illiterate, lay, or had no knowledge of the existence of the Court”. The Court further observed that “the Applicants were represented by legal counsel in their trial and appeals at the domestic level but they did not file for review of their final judgments”.

8 *Norbert Zongo v Burkina Faso* (merits), op. cit, § 92; *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015), 1 AfCLR 465, § 73.

9 See paragraph 35 of the judgment.

18. In a similar fashion, in *Yusuph Said v Tanzania*, the Court held that a period of eight (8) years and three (3) months was an unreasonable lapse of time before the filing of an application. The Court held that “even though, he is incarcerated, the Applicant did not indicate how his incarceration impeded him in filing his application earlier than he did.”¹⁰ Moreover in *Chananja Luchagula v Tanzania*, the Applicant was a death-row inmate, who filed his case after six (6) years, five (5) months and fifteen (15) days and it was found to be inadmissible for failure of filing it within a reasonable time.¹¹
19. In assessing reasonableness, the majority, for the first time, found it important to consider the fact that the applicant was “a convicted inmate on death row, is secluded from the general population and cut off from possible information flow, and restricted in his movements”.¹² The majority neither provided reasons nor specified circumstances unique to the instant case that justified a departure from the Court’s earlier position, especially the two cases mentioned above, that of, *Yusuph Said* and *Chananja Luchagula*.
20. Furthermore, we are of the view that different treatment should not be given to the Applicant on the sole ground that he is on death row and cannot access information about the Court as the majority seem to adopt in the instance case. The Court differentiated between persons in prison custody serving different custodial sentences from the applicant and other persons in condemned cells as they have their freedoms curtailed to an equal extent and should be treated equally.
21. The treatment by the Court of persons serving different prison terms differently from those on death row and to make application filed by those on death row automatically admissible irrespective of the time the application is filed is discriminatory and unfair. The position taken by the majority favours persons in death-row as opposed to other persons serving life or lesser prison terms and therefore failed to treat the two categories of persons in lawful custody equal before the law.
22. We are mindful that this Court is a human rights court and should exercise flexibility within the law to persons who allege that their

10 *Yusuph Said v United Republic of Tanzania*, ACTHPR, Application No 011/2019, Ruling of 30 September 2021 (jurisdiction and admissibility), § 44.

11 *Chananja Luchagula v United Republic of Tanzania*, ACTHPR, Application No 011/2016, Ruling of 25 September 2020 (jurisdiction and admissibility), § 60.

12 Paragraph 40 of the judgment.

human rights have been violated. However, the right to invoke human rights jurisdiction is time-bound in every jurisdiction as demonstrated above and therefore this benefits the vigilant and not the indolent. A person should not be permitted to keep a Respondent State in an uncertain situation as to whether a person whose case was heard by a domestic court would seek relief from a continental or regional court for human rights violations or not.

23. It is therefore our considered opinion that the majority should have, in line with the Court's previous decisions, computed reasonableness from the date of the deposit of the Declaration, not from the date that the public supposedly found out about the operations of the Court. In addition, the majority should have clearly stated what distinguished this case from the two others mentioned above which were found to be inadmissible because the Applicants therein did not justify why it took them so long to seize the Court. Additionally, even if it was justified to treat those on death row differently, which we refute, we think that there cannot possibly be any justification to fix a specific time when such persons could be taken to have become aware of the Court's existence, in the absence of empirical evidence.
24. The African Commission on Human and Peoples' Rights considered twenty-two months that it took an Applicant who was fleeing persecution to be unreasonable, arguing that it was "beyond a reasonable man's understanding of a reasonable period of time."¹³ In our humble view, the seizing of the Court after seven (7) years, two (2) months and fifteen (15) days without any justification cannot be considered reasonable in the understanding of a reasonable man.
25. Whereas the Court has all the power to depart from its own jurisprudence, such departure must be warranted by cogent reasons and necessitated by the peculiar circumstances of the case, neither of which was present in the instant case. The majority's position risks causing unjustified jurisprudential inconsistency and hence, gravely jeopardize legal certainty.

13 ACHPR, *Majuru v Zimbabwe*, Communication No 308/2005) [2008] ACHPR 95; (24 November 2008)

Mashishanga v Tanzania (ruling) (2022) 6 AfCLR 854

Application 024/2017, *Hamisi Mashishanga v United Republic of Tanzania*

Ruling, 1 December 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, CHIZUMILA, BENSOUOLA, ANUKAM, NTSEBEZA, SACKO and ADJEI

Recused under Article 22: ABOUD

The Applicant, a citizen of the Respondent State, was in prison for burglary and armed robbery at the time he filed this Application. The Applicant claimed that the proceedings before the domestic courts, including his trial, conviction and unsuccessful appeal were in violation of some of his Charter protected rights. In this ruling, the Court held that the Application was inadmissible because it was not filed within a reasonable time.

Jurisdiction (material jurisdiction, 26-29; temporal jurisdiction, 33-35; continuing violations, 34)

Admissibility (exhaustion of local remedies, 52-58; filing within a reasonable time, 65-73)

Dissenting Opinion: BEN ACHOUR

Admissibility (filing within a reasonable time, 4-5)

Dissenting Opinion: BENSOUOLA

Admissibility (filing within a reasonable time, 4, 13)

Dissenting Opinion: NTSEBEZA

Admissibility (filing within a reasonable time, 8-9, 14)

I. The Parties

1. Hamisi Mashishanga (hereinafter referred to as “the Applicant”) is a national of the United Republic of Tanzania, who at the time of filing the Application, was incarcerated at Uyui Central Prison, Tabora, where he is serving a sentence for the offences of burglary and armed robbery. He alleges a violation of his fair trial rights during the domestic proceedings.
2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as “the Respondent State”), which became a Party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration

prescribed under Article 34(6) of the Protocol (hereinafter referred to as “the Declaration”), by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission an instrument withdrawing its Declaration. The Court held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect, that is, on 22 November 2020,¹ which is one year after its deposit.

II. Subject of the Application

A. Facts of the matter

3. It emerges from the record that the Applicant and two others not before this Court, on 1 April 2004, at about 2.00 am in Ilagaja Village, Nzega District in Tabora Region, attacked and assaulted Mr. Masesa Charles, a fellow villager, robbed him and thereafter fled the crime scene.
4. After the robbers had fled, Mr. Masesa raised an alarm and the neighbours, including the area Chairman, came to his rescue. A search was conducted and property including, a medical report belonging to the victim were found in the Applicant’s house. Thereafter the Applicant was apprehended by the police, charged and convicted on 14 July 2004, and sentenced to five (5) years and thirty (30) years imprisonment for the offence of burglary and armed robbery respectively. He was also ordered to pay compensation to the victim for the items which were stolen but not recovered and for injuries sustained by the victim.
5. The Applicant appealed to the High Court of Tanzania at Tabora in Criminal Appeal No 134 of 2004 against the conviction and sentence of the District Court of Nzega, which appeal was dismissed by the High Court on 17 July 2006.
6. The Applicant then appealed to the Court of Appeal of Tanzania at Tabora in Criminal Appeal No 332 of 2007, against the conviction and sentence of the High Court of Tanzania at Tabora. The appeal was dismissed by the Court of Appeal in a Judgment delivered on 1 June 2010.

¹ *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACTHPR, Application No 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.

B. Alleged Violations

7. The Applicant alleges the violation of the following rights:
 - a. The right to non-discrimination guaranteed under Article 2 of the Charter;
 - b. The right to equality before the law and equal protection of the law guaranteed under Article 3(1)(2) of the Charter;
 - a. The right to fair trial guaranteed under Article 7(1)(c) of the Charter; and
 - b. The right to obtain justice within a reasonable time guaranteed under Article 107A (2)(b) of the Constitution of the United Republic of Tanzania, 1977.

III. Summary of the Procedure before the Court

8. The Application was filed with the Court on 31 August 2017 and served on the Respondent State on 6 September 2017.
9. The Parties filed their pleadings on the merits and reparations after several reminders and extensions of time granted by the Court.
10. Pleadings were closed on 15 November 2021 and the parties were duly notified.

IV. Prayers of the Parties

11. The Applicant prays the Court to:
 - a. Re-store justice where it was overlooked;
 - b. Quash both the conviction and sentence of thirty (30) years in jail against him;
 - c. Release him from prison custody;
 - d. Order the Respondent State to compensate him to the tune of Tsh 65,800,000/= which he would have earned out of his agricultural produce; and
 - e. Order the Respondent State to compensate him for special damages in an amount that the Court deems fair in the circumstances.
12. In its response on jurisdiction and admissibility, the Respondent State prays the Court to:
 - a. Declare that it is not vested with jurisdiction to adjudicate this Application;
 - b. Declare that the Application has not met the admissibility requirements under Rule 40(5) and (6) of the Rules of the Court;
 - c. Declare that the Application is inadmissible; and
 - d. Dismiss the Application.

- 13.** On the merits, the Respondent State prays the Court to:
- a. Declare that the Government of the United Republic of Tanzania did not violate the Applicant's rights provided by Article 2 of the African Charter on Human and Peoples' rights;
 - b. Declare that Tanzania did not violate the Applicant's rights under Article 3(1)(2) of the African Charter on Human and Peoples' rights;
 - c. Declare that Tanzania did not violate the Applicant's rights under Article 7(1) of the African Charter on Human and Peoples' rights;
 - d. Declare that Tanzania did not violate the Applicant's rights under Article 7(1)(c) of the African Charter on Human and Peoples' rights;
 - e. Declare that Tanzania did not violate the Applicant's rights under Article 7(1)(d) of the African Charter on Human and Peoples' rights;
 - f. Declare that Tanzania did not violate the Applicant's rights under Article 107A (2)(b) of the Constitution of the United Republic of Tanzania, 1977;
 - g. Dismiss the Application in its entirety for lack of merit;
 - h. Dismiss the Applicant's prayers in entirety;
 - i. Dismiss the Applicant's prayer for reparations; and
 - j. Order the Applicant to pay the costs of this Application.

V. Jurisdiction

- 14.** The Court observes that Article 3 of the Protocol provides as follows:
1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
- 15.** The Court further observes that pursuant to Rule 49(1) of the Rules, it "shall conduct a preliminary examination of its jurisdiction [...] in accordance with the Charter, the Protocol and these Rules."²
- 16.** On the basis of the above-cited provisions, the Court must, in every application, conduct a preliminary assessment of its jurisdiction and dispose of objections thereto, if any.
- 17.** In the present Application, the Court notes that the Respondent State has raised an objection to its material jurisdiction and to its temporal jurisdiction.

2 Rule 39(1) of the Rules of Court, 2 June 2010.

A. Objection to material jurisdiction

18. The Respondent State contends that the jurisdiction of this Court is provided for under Article 3 of the Protocol and Rule 26 of the Rules.
19. It contests the material jurisdiction of this Court with regard to the Applicant's prayers and contends that, this Court is not afforded unlimited jurisdiction to quash the lawful conviction and sentence of the Applicant and to order his release. Doing so would in effect mean overturning the decision of the Court of Appeal of Tanzania, the highest court of the land, which sustained such conviction and sentence. It further avers that the conviction and sentence were based on the Respondent State's Penal Code, Article 285 and 286 for the offence of burglary and armed robbery. Citing the Courts jurisprudence,³ the Respondent State contends that the Applicant has not demonstrated specific or compelling circumstances to warrant an order for release by this Court.
20. The Respondent State, further citing the Courts jurisprudence,⁴ submits that this Court has held that it does not have any appellate jurisdiction to reverse and consider appeals in respect of cases already decided upon by the domestic or regional courts. Furthermore, the Respondent State submits that to quash the conviction and sentence would require a re-appraisal of matters of evidence and procedure already concluded by the Court of Appeal, which is beyond the jurisdiction of this Court, which has also held in a number of decisions⁵ that its mandate is to examine compliance with international human rights standards.
21. The Respondent State avers that this Court would be deliberating on matters of evidence such as the doctrine of recent possession and visual identification, which were already finalised by the Court of Appeal of Tanzania on page 6 of the Judgment. Moreover, it avers that this Court has already ruled,⁶ at paragraph 89 of the Judgment that matters of identification are best left to domestic courts.

3 Application No 005/2013, *Alex Thomas v United Republic of Tanzania*, § 157.

4 Application No 001/2013, *Ernest Francis Mtingwi v Republic of Malawi*.

5 Application No 003/2015, *Kennedy Owino and Others v The United Republic of Tanzania*, §§ 37-38.

6 Application No 005/2013, *Alex Thomas v United Republic of Tanzania*, § 89.

22. The Applicant avers that this Court is clothed with jurisdiction to adjudicate this matter because the violation alleged against the Respondent State concern rights protected by the African Charter on Human and Peoples' Rights and the Protocol.
23. The Applicant cites the Court's jurisprudence,⁷ that as long as the rights allegedly violated are protected by the Charter or any other human rights instrument ratified by the State concerned, the Court will have jurisdiction over the matter. He avers that the alleged violations are provided for under Articles 2, 3(1) and (2) and 7(1)(c) of the Charter as well as Article 107A (2)(b) of the Constitution of the United Republic of Tanzania.
24. The Applicant affirms that he has demonstrated the compelling circumstances that support his prayer for release and cites the Court's jurisprudence,⁸ that an order for an Applicants release from prison can be made only under very specific and/or compelling circumstances.
25. The Applicant further submits that the Court can draw inspiration from the decision of the Inter-American Court of Human Rights in the case of "*Loayza Tamayo v Peru*, merits judgment of 17 August 1997, series C NO 33, Resolatory paragraph 5 and 84". He submits that in this case, "the court ordered the Applicant's release since not doing so would have resulted in double jeopardy which is prohibited by the American Convention on Human Rights".

26. The Court recalls that under Article 3(1) of the Protocol, it has jurisdiction to examine any application submitted to it, provided that the rights of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the

7 Application No 003/2012, *Peter Joseph Chacha v Tanzania*, § 114.

8 Application No 005/2013, *Alex Thomas v United Republic of Tanzania*.

Respondent State.⁹

27. In the present Application, the Court notes that the Applicant has alleged violations of provisions of the Charter, specifically, Article 2 on the right to non-discrimination; Article 3(1)(2) on the right to equality before the law and equal protection of the law; Article 7(1)(c) on the right to fair trial; and Article 107A (2)(b) of the Constitution of the United Republic of Tanzania, 1977 on the dispensation of justice within a reasonable time. The Court notes that these rights are protected by an international instrument to which the Respondent State is a Party.
28. The Court recalls its established jurisprudence that, “it is not an appellate body with respect to decisions of national courts”.¹⁰ However “...this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned.”¹¹ In this regard, therefore, it would not be sitting as an appellate court, if it were to examine the allegations by the Applicant. Consequently, the claim that the Court would be sitting as an appellate court in considering the Applicant’s allegations is dismissed.
29. As a consequence of the foregoing, the Court finds that it has material jurisdiction to consider the present Application and dismisses the Respondent State’s objection.

B. Objection to temporal jurisdiction

30. The Respondent State contests the temporal jurisdiction of this Court on the basis that the allegations raised by the Applicant are not ongoing, since the Applicant is serving a lawful sentence for the offence committed as provided by its Penal Code.

9 See, for instance, *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application No 028/2015, Judgment of 26 June 2020 (merits and reparations), § 18; *Gozbert Henrico v United Republic of Tanzania*, ACtHPR, Application No 056/2016, Judgment of 10 January 2022 (merits and reparations), §§ 38-40.

10 *Ernest Francis Mtingwi v Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, § 14.

11 *Ernest Francis Mtingwi v Malawi*, *ibid.*; *Kenedy Ivan v United Republic of Tanzania*, ACtHPR (merits and reparations) (28 March 2019) 3 AfCLR 48, § 26; *Armand Guehi v Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35.

31. The Applicant avers that this Court has temporal jurisdiction to hear this Application because the rights violated by the Respondent State are protected under the Charter. Additionally, he avers that at the time this offence was committed, the Respondent State had already ratified the Charter on 9 March 1984 and was therefore bound by it.
32. The Applicant submits that the “violations are still ongoing and that he was tried, convicted and sentenced on a flawed charge.” He avers that when a charge upon which the accused person is charged is flawed in form or substance, then, the accused person is considered not to have been accorded a fair trial. Therefore, he is serving an unlawful sentence.

33. In respect of its temporal jurisdiction, the Court notes that the relevant dates, in relation to the Respondent State, are those of entry into force of the Charter and the Protocol as well as the date of depositing the Declaration under Article 34(6) of the Protocol.
34. In the instant case, the Court notes that the violations alleged by the Applicant are based on the judgments of the District Court, High Court and Court of Appeal rendered on 14 July 2004, 17 July 2006 and 1 June 2010, respectively, that is, after the Respondent State had ratified the Charter and the Protocol, and deposited the Declaration on 21 October 1986, 10 February 2006 and 29 March 2010 respectively. Furthermore, the alleged effects of the violations are continuing, as the Applicant remains convicted and is serving a five (5) year imprisonment sentence for the offence of burglary and thirty (30) years for the offence of armed robbery imposed upon him by the District Court of Nzega in Criminal Case No 69 of 2004, on 14 July 2004, on the basis of what he considers an unfair trial.¹²

12 *Hussein Ally Fundumu v United Republic of Tanzania*, ACtHPR, Application No 016/2018, Judgment of 22 September 2022 (jurisdiction and admissibility), §§ 29-30; *Tanganyika Law Society and Legal and Human Rights Center v United Republic*

35. Consequently, the Court holds that it has temporal jurisdiction to examine this Application and dismisses the Respondent State's objection accordingly.

C. Other aspects of jurisdiction

36. The Court notes that the Respondent State does not contest its personal and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules,¹³ it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.
37. In relation to its personal jurisdiction, the Court recalls as indicated in paragraph 2 of the judgment, that the Respondent State is a party to the Protocol and deposited the Declaration under Article 34(6) of the Protocol with the Chairperson of the African Union Commission. Subsequently, on 21 November 2019, it deposited an instrument withdrawing its Declaration.
38. The Court recalls its jurisprudence that the withdrawal of the Declaration does not apply retroactively and only takes effect one year after the notice of such withdrawal has been deposited, in this case, on 22 November 2020.¹⁴ This Application having been filed before the Respondent State deposited its notice of withdrawal, is thus not affected by it. Consequently, the Court holds that it has personal jurisdiction.
39. As for territorial jurisdiction, the Court notes that the violations alleged by the Applicant occurred within the territory of the Respondent State. In the circumstances, the Court holds that its territorial jurisdiction is established.
40. In light of all the above, the Court holds that it has jurisdiction to determine the present Application.

VI. Admissibility

41. Pursuant to Article 6(2) of the Protocol, "the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter."
42. In line with Rule 50(1) of the Rules, "the Court shall ascertain the admissibility of an Application filed before it in accordance with

of Tanzania (merits) (14 June 2013) 1 AfCLR 34, § 84; *African Commission on Human and Peoples' Rights v Kenya* (merits) (26 May 2017) 2 AfCLR 9, § 65.

13 Rule 39(1) of Rules of Court, 2 June 2010.

14 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application No 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 35-39.

Article 56 of the Charter, Article 6(2) of the Protocol and these Rules.

- 43.** The Court notes that Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

Applications filed before the Court shall comply with all of the following conditions:

- a. Indicate their authors even if the latter request anonymity;
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter;
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
 - d. Are not based exclusively on news disseminated through the mass media;
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 - f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of African Union or the provisions of the Charter.
- 44.** The Respondent State raises objections to the admissibility of the Application, based on non-exhaustion of local remedies and failure to file the Application within a reasonable time.

A. Objection based on non-exhaustion of local remedies

- 45.** On the objection based on non-exhaustion of local remedies, the Respondent State avers that the Applicant raised five (5) new violations which were not considered by the domestic courts, namely that:
- i. the Applicant's conviction on the basis of the doctrine of recent possession;
 - ii. the Court of Appeal of Tanzania, did not observe the proceedings from the District Court and the High Court;
 - iii. the Applicant's right to be heard was violated;
 - iv. the Court of Appeal of Tanzania procured its judgments against the Applicant by error by convicting him on the basis of evidence and identification by moonlight; and finally
 - v. there was a delay in the dispensation of justice.
- 46.** The Respondent State submits that it recognises the importance

and significance of the principle of the exhaustion of local remedies, which is reiterated in the Court's jurisprudence in *Urban Mkandawire v The Republic of Malawi*¹⁵ and *Peter Joseph Chacha v Tanzania*. Further, the African Commission on Human and Peoples' Rights held in the matter of *Article 19 v Eritrea* that one should at least attempt to exhaust the available remedy. Simply casting doubt as to the futility of exhausting local remedies does not suffice.

47. It further maintains that the Applicant has not exhausted domestic remedies in respect of the five (5) new claims mentioned above, and accordingly, prays the Court to declare the Application inadmissible.¹⁶ As to the conviction of the Applicant on the basis of the doctrine of recent possession, the Respondent State alleges that the Applicant had the legal remedy of filing a review of the decision of the Court of Appeal, which he did not pursue.
48. Furthermore, the Respondent State submits that the Applicant failed to pursue the available local remedies before the national Courts: by not raising the issue of the Court of Appeal not pronouncing itself on the inconsistent referencing by District Court and High Court of the Criminal Case numbers; not being accorded free legal representation during the trial; the Court of Appeal's reliance on evidence used for identification; and the delay in the dispensation of justice.
49. Finally, the Respondent State submits that the remedy to institute a review of the decision of the Court of Appeal was made known to the Applicant by the prison authorities. However, the Applicant sought the court's leave to file an application for review," ten (10) years after the Court of Appeal delivered its decision on 1 June 2010". Therefore, any so-called delay was caused by the Applicant himself. On these submissions, the Respondent State asserts that the admissibility requirement under Rule 40(5) of the Rules of Court have not been met and the Application should therefore be declared inadmissible and dismissed.

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50. The Applicant contends that he has exhausted local remedies available in the Respondent State's judicial system. Moreover, he

15 Application No 003/2011, *Urban Mkandawire v Republic of Malawi*.

16 *Urban Mkandawire v Republic of Malawi*, ACtHPR, Application No 003/2011, Judgment of 13 March 2011 (jurisdiction & admissibility), § 38.1-38.2; *Peter Joseph Chacha v United Republic of Tanzania*, ACtHPR, Application No 003/2012, Judgment of 28 March 2014 (jurisdiction & admissibility), § 142-145 and *African Commission on Human and Peoples' Rights' decision in Article 19 versus Eritrea*.

appealed to the Court of Appeal of Tanzania, being the highest court in the Respondent State, in Criminal Appeal No 322 of 2007. Furthermore, he contends that the Court of Appeal dismissed his appeal in its entirety on 1 June 2010, thereby bringing his case to its finality. The Applicant cites the Court's jurisprudence in *Alex Thomas v United Republic of Tanzania*, where it held that, "...The Court is persuaded by the reasoning of the *African Commission in Southern Africa Human Rights NGO Network v Tanzania*, Communication 333/2008, Activity Report Nov 2009-May 2010, that the remedies to be exhausted are ordinary remedies."

51. Citing the same case, the Applicant argues that this Court had previously held that an application for review of the decision of the Court of Appeal is neither necessary nor mandatory and that the final appeal in criminal trials lies with the Court of Appeal, which he has already accessed. The Applicant, therefore, prays this Court to find his application admissible, since he has fully exhausted all local remedies.

52. This Court notes that pursuant to Article 56(5) of the Charter, whose provisions are restated in Rule 50(2)(e) of the Rules, any application filed before it shall fulfil the requirement of exhaustion of local remedies, unless the same are unavailable, ineffective and insufficient or the proceedings in respect of the local remedies are unduly prolonged.¹⁷
53. In the instant case, the Court notes that the Applicant's appeal before the Court of Appeal, the highest judicial organ of the Respondent State, was determined by the said court when it rendered its judgment on 1 June 2010.
54. The Court reiterates its jurisprudence where it has held that:
(...) where an alleged human rights violation occurs in the course of the domestic judicial proceedings, domestic courts are thereby afforded an opportunity to pronounce themselves on possible human rights breaches. This is because the alleged human rights violations form part of the bundle of rights and guarantees that were related to

¹⁷ *Peter Joseph Chacha v United Republic of Tanzania* (admissibility) (28 March 2014) 1 AfCLR 398, §§ 142-144; *Almas Mohamed Muwinda and Others v United Republic of Tanzania*, ACTHPR, Application No 030/2017, Judgment of 24 March 2022 (merits and reparations), § 43.

or were the basis of the proceedings before domestic courts. In such a situation it would, therefore, be unreasonable to require the Applicants to lodge a new application before the domestic courts to seek relief for such claims.¹⁸

55. The Court observes that the claim of the right to a fair trial impacts on the realisation of various rights alleged by the Applicant under the bundle of fair trial rights.
56. In light of this, the Court observes that the Respondent State had the opportunity to address the possible human rights breaches before the domestic courts.
57. Regarding the filing of an application for review at the Court of Appeal, the Court has already held that within the Respondent State's judicial system, this is an extraordinary remedy which applicants are not required to exhaust before filing their applications before this Court.¹⁹
58. Consequently, the Court holds that the Applicant has exhausted local remedies as envisaged under Article 56(5) of the Charter and Rule 50(2)(e) of the Rules and therefore, it dismisses the Respondent State's objection.

B. Objection based on the failure to file the Application within a reasonable period of time

59. The Respondent State submits that in the event that the Court finds that the Applicant has exhausted local remedies, it should then find that the Applicant has not filed this Application within a reasonable period, because the decision of the Court of Appeal was delivered on 1 June 2010, whereas this Application was filed before this Court on 31 August 2017. Moreover, the Respondent State deposited its instrument accepting the jurisdiction of the Court under Article 5(3) of the Protocol on 29 March 2010, therefore, "a period of seven (7) years and four (4) months elapsed" from the date the Respondent State accepted the competence of the Court to the time the Applicant filed his Application at the Court.

18 *Jibu Amir alias Mussa and Another v United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 629, § 37; *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, §§ 60-65; *Kennedy Owino Onyachi and Another v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 54; *Ernest Karatta, Walafrid Millinga, Ahmed Kabunga and Others v United Republic of Tanzania* (merits and reparations) (30 September 2021) 1 AfCLR 356, § 57.

19 *Alex Thomas v Tanzania*, *op. cit.*, §§ 63-65; *Mohamed Abubakari v Tanzania* (merits) *op. cit.*, §§ 66-70; *Christopher Jonas v Tanzania* (merits), § 44.

60. The Respondent State submits that even though, the Rules of the Court do not quantify or define reasonable time, this Court has held that it shall consider what amounts to reasonable time on a case-by-case basis.²⁰
61. It contends that the general maxim holds that all admissibility requirements provided by Rule 40(1-7) of the Rules²¹ have to be met for an application to be deemed admissible as was in the case of *Mariam Kouma and Ousmane Diabate v Mali*,²² where the Court held that "... the conditions of admissibility are cumulative and, as such, when one of them is not fulfilled, the Application cannot be admissible". The Respondent State submits that this is the case in the instant matter, therefore the Application should be declared inadmissible and dismissed.

62. The Applicant refutes the Respondent State's submissions and asserts that there is no fixed period to seize the Court, and each case is decided based on its facts and circumstances. He cites the Courts jurisprudence,²³ where the Court upheld the same position.
63. The Applicant alleges that, the existence of this Court, the Charter, the Protocol to the Charter, its Rules and Practice Direction were unknown at Uyu Central Prison at Tabora before "May 2017", where he is serving his custodial sentence. He states that there has never been an application lodged before this Court from this prison earlier than "13.06. 2017" and the same can be verified from the Registry records. He further **notes** that Application No 017/2017 *Abdallah Sospeter Mabomba and Others v United Republic of Tanzania* was the first such application and it was filed on "13.06.2017".

20 Application No 013/2011, *Beneficiaries of the late Norbert Zongo and Others v Burkina Faso*, § 121; Application No 007/2013, *Mohamed Abubakar v The United Republic of Tanzania*, § 91.

21 Rule 50(2) Rules of Court, 2020.

22 Application No 040/2016, *Mariam Kouma and Ousmane Diabate v Mali*, § 63.

23 Application No 009/2011, *Tanganyika Law Society and Legal and Human Rights Centre v United Republic of Tanzania* and Application No 011/2011, *Reverend Christopher Mtikila v United Republic of Tanzania*.

64. The Applicant argues that in the circumstances, his Application was filed within a reasonable time since he only became aware of the existence of this Court in May 2017. Subsequently, he filed his application before this Court on 31 August 2017, therefore the Court should find that the Application is admissible and complies with Rule 40(6) of the Rules.

65. The Court notes that neither the Charter nor the Rules specify the time frame within which Applications must be filed, after exhaustion of local remedies. Article 56(6) of the Charter and Rule 50(2)(f) of the Rules simply provide that Applications must be filed "...within reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter".
66. The Court recalls its jurisprudence that: "...the reasonableness of the time frame for seizure depends on the specific circumstances of the case...".²⁴ Some of the circumstances that the Court has taken into consideration include: imprisonment, being lay without the benefit of legal assistance, indigence, illiteracy, the recent establishment of the Court and lack of awareness of the existence of the Court.
67. This Court has previously held that it is not enough for Applicants to simply plead, for example, that they were incarcerated, are lay or indigent, to justify their failure to file an application within a reasonable period of time.²⁵ As the Court has previously pointed out, even for lay, incarcerated or indigent applicants are duty-bound to demonstrate how their personal situation prevented them from filing their applications before this Court in a timely manner.

24 *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v Burkina Faso* (merits) (24 June 2014) 1 AfCLR 219, § 92. See also *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 73.

25 *Layford Makene v United Republic of Tanzania*, ACtHPR, Application No 028/2017 Ruling of 2 December 2021 (admissibility), § 48; *Rajabu Yusuph v United Republic of Tanzania*, ACtHPR, Application No 036/2017, Ruling of 24 March 2022 (admissibility), § 65.

68. In the instant Application, the Court observes that the judgment of the Court of Appeal in *Criminal Appeal No 322 of 2007* was delivered on 1 June 2010, while the Applicant filed his Application before this Court on 31 August 2017. The Court notes that a period of seven (7) years, two (2) months and thirty (30) days elapsed between 1 June 2010 and 31 August 2017 when the Applicant filed the Application before this Court. The issue for determination, therefore, is whether the period that the Applicant took to file the Application before the Court is reasonable.
69. Additionally, in the instant case, the Court takes note of the Applicant's submissions that he only came to know about the Court's existence in May 2017, after an application by another inmate from the same prison where he was incarcerated was filed before this Court on 13 June 2017 and subsequently, he also filed his own Application on 31 August 2017. A perusal of the Court records reveals that indeed the first Application, No 017/2017 *Abdallah Sospeter Mabomba and Others v United Republic of Tanzania* from Uyuyi Central Prison, where the Applicant is incarcerated, was registered at the Court on 13 June 2017. Therefore, a period of two (2) months and eighteen (18) days elapsed between the time the Applicant filed his application before this Court and when the first Application was filed from Uyui Central Prison.
70. In this regard, the Court has previously considered as relevant factors, the fact that an applicant is incarcerated,²⁶ their indigence,²⁷ lack of free assistance of a lawyer,²⁸ and the recent establishment of the Court,²⁹ are all circumstances that justify some flexibility in assessing the reasonableness of the timeline for seizure of the Court.
71. The Court observes that the Applicant is in a comparable situation, because he is incarcerated; restricted in movement and with limited access to information; he was not accorded free legal representation at the domestic level; and he claims not to have been aware of the existence of this Court and only got to know

26 *Beneficiaries of late Norbert Zongo and Others v Burkina Faso* (merits) (28 March 2014) 1 AfCLR 219, § 92; *Kijiji Isiaga v United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 56; *Alex Thomas v Tanzania* (merits), § 73.

27 *Nguza Viking and Johnson Nguza v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 61.

28 *Mohamed Abubakari v Tanzania* (merits) (2016) 1 AfCLR 599, § 92.

29 *Beneficiaries of late Norbert Zongo and Others v Burkina Faso* (preliminary objections), § 122; *Rajabu Yusuph v United Republic of Tanzania*, ACtHPR, Application No 036/2017, Ruling of 24 March 2021 (jurisdiction and admissibility), § 69.

about it after the first case by another Applicant from the same prison was filed before this Court on 13 June 2017.

72. In a comparable case, where the Applicant claimed not to know about the Courts existence before the first Application from his prison was filed and he took seven (7) years, seven (7) months and ten (10) days to seize the Court after exhaustion of local remedies, this Court held that this argument of the lack of knowledge of the Courts existence, is insufficient to persuade it that the Applicant diligently pursued his case and that he was not in a position to know about the Court prior to the filing of the first case from that prison, where he was incarcerated.³⁰ Similarly, the Court is of the opinion that this Applicant has not provided compelling arguments and sufficient evidence to demonstrate that his personal situation prevented him from filing the Application in a timelier manner.
73. In view of the foregoing, the Court finds that the filing of the Application seven (7) years, two (2) months and thirty (30) days after exhaustion of local remedies is not a reasonable time within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.
74. The Court recalls that the admissibility requirements under Article 56 of the Charter are cumulative, such that if one requirement is not fulfilled then the Application becomes inadmissible.³¹ In the present case, since the Application has failed to fulfil the requirement under Article 56(6) of the Charter which is restated in Rule 50(2)(f) of the Rules, the Court needs not assess the admissibility requirement set out in Article 56(7) restated in Rule 50(2)(g).

C. Other admissibility requirements

75. Having found that the Application does not satisfy the requirement in Rule 50(2)(f) of the Rules, the Court needs not rule on the Application's compliance with the admissibility requirements set out in Article 56(1), (2), (3), (4), and (7) of the Charter as restated in Rule 50(2)(a), (b), (c), (d) and (g) of the Rules, as these

30 *Rajabu Yusuph v United Republic of Tanzania*, ACtHPR, Application No 036/2017, Ruling of 24 March 2021 (jurisdiction and admissibility), § 69.

31 *Dexter Eddie Johnson v Republic of Ghana* (jurisdiction and admissibility) (28 March 2019) 3 AfCLR 99, § 57.

requirements are cumulative.³²

76. In view of the foregoing, the Court declares the Application inadmissible.

VII. Costs

77. The Applicant did not make any prayers with regards to the costs.

78. The Respondent State prayed the Court to order the Applicant to pay the costs of this Application.

79. The Court notes that Rule 32(2) of its Rules provides that “unless otherwise decided by the Court, each party shall bear its own costs.”
80. The Court finds no reason to depart from this provision. Consequently, it rules that each party shall bear its own costs.

VIII. Operative part

81. For these reasons,

The Court

Unanimously,

On jurisdiction

- i. *Dismisses* the objection to temporal jurisdiction;
- ii. *Dismisses* the objection to material jurisdiction;
- iii. *Declares* that it has jurisdiction.

32 *Jean Claude Roger Gombert v Republic of Côte d'Ivoire* (jurisdiction and admissibility) (22 March 2018) 2 AfCLR 270, § 61; *Dexter Eddie Johnson v Republic of Ghana*, ACtHPR, Application No 016/2017, Ruling of 28 March 2019 (jurisdiction and admissibility), § 57.

On admissibility

By a majority of Seven (7) for, and Three (3) against, Justices Rafaâ BEN ACHOUR; Chafika BENSAOULA and Dumisa B. NTSEBEZA dissenting,

- iv. *Finds* that the Application was not filed within a reasonable time;
- v. *Declares* the Application inadmissible.

On costs

Unanimously,

- vi. *Orders* each party to bear its own costs.

Dissenting Opinion: BEN ACHOUR

1. In *Hamisi Mashihanga v United Republic of Tanzania* (Application No24/2017), I am unable to agree with the majority opinion that the application is inadmissible for failure to comply with the reasonable time requirement under Article 56(6) of the Charter and Rule 50(2)(f) of the Rules of Court.
2. Unlike the majority of my fellow judges, I consider that the Application should have been declared admissible and that the time taken by the Applicant (7 years and 4 months) to bring it before this Court is reasonable taking into account the situation and conditions of the Applicant.
3. On the face of it, 7 years and 4 months is too long and therefore unreasonable. An ordinary, legally well-advised Applicant cannot waste so much time, after exhaustion of local remedies, to come before the Arusha Court.
4. However, the African Court has always been flexible in its jurisprudence as regards the time-limits for referrals after the exhaustion of local remedies. It has always considered that the issue of time-limits for referral to the Court is determined depending on the circumstances of each case. It has always rightly considered that it should be dealt with on a “case-by-case” basis. This is all the more so since Article 56(6) of the African Charter and Article 50(2)(f) of the Rules of Court give the Court considerable leeway on this issue. Article 56(6) of the Charter and Rule 50(2)(f) of the Rules merely state that applications must be submitted “[w]ithin a reasonable period from the time local

remedies are exhausted or from the date the Commission is seized of the matter”.¹

5. The last sentence of Article 56(6) of the Charter, restated in Article 50(2)(f) of the Rules of Court, therefore gives the Court discretion to determine the date on which the reasonable time period begins to run.
6. In its jurisprudence, the Court has consistently held that “[t]he reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis”.² Circumstances that the Court has taken into account include the facts of being incarcerated, being uneducated, not having legal aid, being indigent, illiterate and not being aware of the Court’s existence.
7. The Court has held in its previous judgments that the fact that an applicant argues, for example, that he or she is incarcerated, legally illiterate and indigent is not a sufficient reason for not having filed an application within a reasonable time.³ As the Court has pointed out, even litigants who are legally illiterate, incarcerated or indigent are required to show how their personal situation prevented them from filing their application in time.
8. In the instant case, the Appeal Court rendered its decision on 1 June 2010. The Applicant filed his Application with this Court on 31 August 2017, that is, after a period of 7 years and 3 months had elapsed.
9. In the instant case, it should be noted that the Applicant was not represented before the domestic courts and defended himself before this Court. As a result, he did not benefit from the specialised legal support **which** would have enabled **him** to file his application within a shorter period of time.
10. Moreover, the Applicant was incarcerated, restricted in his movements and had only limited access to information. It should also be noted that the Appeal Court upheld the lower court’s decision on 1 June 2010, shortly after the Respondent State deposited the Declaration on 29 March 2010, which confirms the Applicant’s claim that he was unaware of the Court’s existence.

1 Author’s emphasis.

2 *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema dit Ablasse, Ernest Zongo and Blaise Ilboudo v Burkina Faso* (merits) (24 June 2014), 1 AfCLR 219, § 92. See also *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015), 1 AfCLR 465, § 73.

3 *Layford Makene v United Republic of Tanzania*, ACtHPR, Application No 028/2017, Judgment of 2 December 2021 (merits), § 48 and *Rajabu Yusuph v United Republic of Tanzania*, ACtHPR, Application No 036/2017, Judgment of 24 March 2022 (admissibility), § 65.

The Court further observes that the Respondent State does not dispute the fact that the Applicant is legally illiterate, indigent, incarcerated and did not receive adequate legal assistance.

11. The Applicant further alleges, quite plausibly, that he was not aware of the existence of the Court because it was only recently established and that he was informed of its existence only after an inmate in the same prison as him filed the first application from the said prison with the Court.
12. This allegation is corroborated by a review of his docket which indicates that the Applicant filed his Application two (2) months and eighteen (18) days after another prisoner at the same prison facility where the Applicant is incarcerated filed an application with this Court on 13 June 2017.
13. Moreover, the facts of the matter occurred between 2004 and 2010, whereas the Respondent State only deposited its Declaration on 29 March 2010. It is undeniable that the period from 2007 to 2013 was the early years of the Court's practice, during which the general public, let *alone* detainees in the Applicant's situation in the instant case, could not necessarily have had sufficient knowledge of the requirements governing proceedings before this Court.⁴
14. The Applicant could therefore not know about the existence of the Court and the requirements for initiating cases before it. The Court's jurisprudence⁵ has established that the special circumstances of the Applicant justify that the reasonableness of the time-limit be interpreted within the meaning of Article 56(6) of the Charter.
15. In conclusion, the Court should have dismissed the objection to the inadmissibility of the Application for being filed out of reasonable time, declared it admissible and examined the merits of the case which, it seems, reveal a litany of violations of the Applicant's rights.

4 *Sadick Marwa Kisase v United Republic of Tanzania*, ACtHPR, Application No 005/2016, Judgment of 2 December 2021 (merits and remedies), §§ 51-52.

5 *Sadick Marwa Kisase v United Republic of Tanzania*, ACtHPR, Application No 005/2016, Judgment of 2 December 2021 (merits and reparations), §§ 51-52; *Amiri Ramadhani v United Republic of Tanzania* (merits) (11 May 2018), 2 AfCLR 344, § 50; *Kijiji Isiaga v United Republic of Tanzania* (merits) (21 March 2018), 2 AfCLR 218, § 55; *Christopher Jonas v United Republic of Tanzania* (merits) (28 September 2017), 2 AfCLR 101, §§ 53 to 54.

Dissenting Opinion: BENSAOULA

1. I do not share the findings of the Court in the above-mentioned Ruling and the grounds for declaring the Application inadmissible on account of being filed beyond a reasonable time.
2. I wish to write this dissenting opinion because I am convinced that the Court should have declared the Application admissible based on the same grounds for which it declared it inadmissible, as well as other particulars that it did not raise, which have nevertheless become case-law.
3. The Court in its Ruling in the case of the *Beneficiaries of the late Norbert Zongo and Others v Burkina Faso*, delivered on 21 June 2013, ruling on preliminary objections and with regard to reasonable time for filing a case before it, expressly stated that “the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis”.
4. This “case-by-case” principle with respect to reasonable time, has been applied by the Court in numerous cases, to name but a few:
 - *Sadik Marwa Kisase v United Republic of Tanzania*, judgment of 2 December 2022, in which the Court considered the objection to admissibility raised by the Respondent State on the ground that the case was filed beyond a reasonable time. The Court dismissed the objection for the simple reason that the Applicant was in detention, had no legal representation before domestic courts and before this Court (paragraphs 51 and 52) and consequently considered the period of 16 months reasonable.
 - *Christopher Jonas v United Republic of Tanzania* judgment of 28 September 2017 and *Amiri Ramadhani v United Republic of Tanzania*, where the Court considered the fact that the applicants were imprisoned, restricted in their movement, layman in law, indigent, lacking access to information, not having legal representation during the trial, being illiterate and unaware of the existence of the Court, made the period of five (5) years and one (1) month reasonable.
 - Finally, the case of *Stephen John Rutakikirwa v United Republic of Tanzania* judgment of 24 March 2022, where the Court reiterated this principle in paragraphs 45 and 48 when it declared the application filed within four (4) years and four (4) months reasonable, on the ground that the applicant was incarcerated, restricted in his movements with limited access to information and did not receive legal aid!
5. In the Ruling which is the subject of this dissenting opinion, the facts clearly indicate that no one contests that the Applicant was sentenced to thirty-five years’ imprisonment and incarcerated after being found guilty by a decision of the District Court on 24

July 2004, confirmed by the High Court on 17 July 2006 and further by the Court of Appeal on 1 June 2010.

6. It emerges from the decisions rendered by the domestic courts, that the Applicant was not afforded legal representation during the entire procedure by the domestic courts and even before this Court. The Court has held in numerous judgments that these facts by themselves constitute a violation because given the seriousness of the facts and the heaviness of the sentence, the Applicant had the right to legal representation (*Diocles William v United Republic of Tanzania*, judgment of 21 September 2018, *Kennedy Owino Onyachi and others v United Republic of Tanzania*, judgment of 28 September 2009 and *Alex Thomas v United Republic of Tanzania*, judgement of 28 September 2017).
7. What saddens me in relation to the consistency of the Court's jurisprudence is that, in some rulings, the Court considered that "the personal situation of the applicants", especially the fact that they are lay people in law, indigent and incarcerated, constitutes sufficient grounds to grant rather long time-limits as reasonable time to seise this Court i.e. (4 years 8 months and 4 days in the case of *Thobias Mango v Republic of Tanzania*, judgment of 11 May 2018); (5 years 1 month and 12 days in the case of *Christopher Jonas v United Republic of Tanzania*, judgment of 28 September 2017) and (5 years 1 month 1 week and 6 days in the case of *Amiri Ramadhani v United Republic of Tanzania*, judgment of 11 May 2018).
8. However, in other judgments, including this Ruling which is the subject of this opinion (paragraph 92), the Court states the opposite, because, despite the presence of the above-mentioned particulars, the Court declared that the applicants are required to show how their "personal situation" prevented them from filing their application within a shorter period of time (5 years and 11 months in the case of *Hamad Mohamed Lyambaka v United Republic of Tanzania*, judgment of 25 September 2020); (5 years and 4 months in the case of *Godfred Anthony and others v United Republic of Tanzania*, judgment of 26 September 2019); (6 years 3 months and 15 days in the case of *Chananja Luchagula v United Republic of Tanzania*, judgment of 25 September 2020).
9. At no point in these previous judgments did the court demonstrate **what more** it expected from the Applicant in terms of "personal situation". This has resulted in a situation where this Court has used contradictory grounds to determine reasonable time in applications filed at more or less the same time in cases against

the same Respondent State!

10. While the Court should take into consideration that fact that an applicant did not have legal representation, especially incarcerated applicants and applicants sentenced to heavy penalties, knowledge of the existence of the court is also a crucial element that should be considered as a ground for determining reasonable time.
11. In fact, in some judgments, the Court took into consideration this element, stating that the incarcerated applicant was restricted in his movements and did not have access to information and therefore was unaware of the existence of the Court (judgments in *Thobias Mango* and *Amiri Ramadhani* mentioned above and *Christopher Jonas* rendered on 28 September 2017).
12. However, in other judgments against the same Respondent State involving incarcerated applicants, the Court did not take into account this element, as is the case in the Ruling that is the subject of this opinion. Although paragraph 70 of the judgment states that this element has been considered in many of its judgments, the Court in paragraph 72 of its Ruling found, without taking into consideration the date of filing of the Respondent State's Declaration, that the Applicant did not sufficiently demonstrate how his personal situation prevented him from filing the application within reasonable time. The Court's decision was grounded on the fact that the Applicant had claimed that he filed his application after an inmate from the same prison had learned of the existence of the Court and had filed an application before this Court. The Court found in paragraph 73 that the 7 years, 2 months and 30 days that it took to file the application after the exhaustion of local remedies did not constitute reasonable time within the meaning of Article 56(6) of the Charter and Rule 50(2) (f) of the Rules.
13. The date of filing of the Declaration and the period of time between the last decision of the domestic courts and the filing of the Application before the Court are elements that the Court, in numerous judgments took into account to adopt a shorter time-limit, considering it as "an element that proves the ignorance of the court by the applicant, the court being in its early stages of activity".
14. In the *Thobias Mango* and *Amiri Ramadhani* cases, among others, the Court clearly stated that between the date of depositing the Declaration in 2010 and the last decision issued by the domestic courts (2013), the Court was still in its infancy and could not take into consideration this period, insisting that it was in the phase of completing its operationalisation process. Therefore, it would

have taken time for the Applicant to be aware of the existence of the Court and the modalities of filing a case before it (*Thobias* judgment of 11 May 2018 para 55 and *Ramadhani* judgment of 11 May 2018 para 50).

15. In the instant case, the Appeal Court rendered its decision on 1 June 2010, which makes the above-mentioned jurisprudence applicable, especially since the Respondent State is the same, thus the Declaration was deposited in 2010.

Therefore, between 2010 and 2013, the Applicant could not have known the Court, hence the need to reduce the period of 3 years taken by the Applicant to initiate his action before the Court in July 2017, meaning that it took 4 years to file a case before the Court. Furthermore, Article 56(6) of the Charter, which is restated in substance by Rule 50 of the Rules of Procedure, clearly states that the reasonable period of time runs “from the time local remedies are exhausted **OR** from the date the Court is seised of the matter.”

The Court should therefore have deducted these 3 years from the effective 7-year period to compute the time from 2013, which would reduce the period to 4 years instead of 7 years as found in the Ruling. The requirement to comply with this jurisprudential position is further reinforced by the Court’s decision delivered in another case during the same session in which the Court delivered the judgment that is the subject of this opinion. In its judgment in *Igola Iguna v United Republic of Tanzania*, delivered on 1 December 2022, the Court took into account the date and time-limits for the completion of the application for review in order to shorten the time-limit for consideration by several years. Thus, the said time-limit was considered to be 4 years instead of 7 years and the application was consequently declared admissible.

16. In the case of *Marwa Kisase* cited above against the same Respondent State (paragraph 52 of the said judgment) the Court declared that “[...] the Applicant has been incarcerated, did not have legal representation during the proceedings before domestic courts and is self-represented before this Court. Most notably, the facts of the case occurred between 2007 and 2013, which is in the early years of the Court’s operation when members of the general public, let alone persons in the situation of the Applicant in the present case, could not necessarily be presumed to have sufficient awareness of requirements governing proceedings 14 before this Court. Finally, the Respondent State deposited its Declaration in 2010. In such circumstances, this Court considers that the period of time that it took the Applicant to file the case

should be considered reasonable”.

17. Applying this finding in the Marwa judgment to the present Ruling which is the subject of this opinion would have been fair and logical and would have led to the application being declared admissible as it responds to the same facts and elements since the applicant was incarcerated, having been sentenced to a heavy penalty, without legal representation at all stages of the proceedings.
18. This state of affairs suggests to me that the Court should, especially when it comes to the same Respondent State and incarcerated applicants sentenced to heavy penalties, frame all the elements that would lead to an application being declared either admissible or inadmissible instead of being selective which, without exaggerating, would make the grounds of the decision expeditious and would put the readers of the Court's judgments and applicants of the same Respondent State in similar situations. As the situation presents right now, the readers of these judgements are totally unable to comprehend the reason for this selectivity and for the Court's orders.

Dissenting Opinion: NTSEBEZA

1. In accordance with Rule 70(2) of the Rules of Procedure of the Court, I write this dissenting opinion to the majority's decision to “declare the Application inadmissible”. In reaching this conclusion, the majority considered and decided that all the admissibility requirements specified in Rule 50(2) of the Rules, which substantially reproduces Article 56 of the Charter, had not been met.
2. Contrary to the majority position of my fellow judges, I consider that the Application should have been declared admissible and that the time taken by the Applicant, i.e. (7) years, two (2) months and thirty (30) days after exhaustion of local remedies, should have been considered reasonable within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules, taking into account the personal circumstances of the Applicant.
3. In its established jurisprudence, the Court has held that “...the reasonableness of the time frame for seizure depends on the

specific circumstances of the case...”.¹ Some of the circumstances that the Court has taken into consideration include: imprisonment, being lay without the benefit of legal assistance, indigence, illiteracy, the recent establishment of the Court and lack of awareness of the existence of the Court.

4. This Court has also held that it is not enough for Applicants to plead that they were incarcerated, are lay or indigent, to justify their failure to file an application within a reasonable period of time.² As the Court has previously pointed out, even for lay, incarcerated or indigent applicants, there is a duty for them to demonstrate how their personal circumstances prevented them from filing their applications before this Court timeously.
5. In this case, I opine that the Applicant has met the threshold of circumstances that the Court has previously considered as reasonable grounds for seizing the Court under what would ordinarily be considered as an unreasonable time within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.
6. The Applicant in this case did not have legal representation during the domestic proceedings, was incarcerated and restricted in movement with limited access to information and was self-represented before this Court. This, in my opinion, makes it conceivable that he did not have the necessary technical support to explore and envisage remedies other than those offered within the Respondent State.
7. Most importantly, I observe that, the Court of Appeal affirmed the conviction and sentence of the High Court on 1 June 2010, shortly after the Respondent State had deposited the Declaration on 29 March 2010, thereby corroborating the Applicant’s claim of lack of information about the Court. Furthermore, the Applicant submits that he was not aware of the Court’s existence because of its relatively recent establishment and only got to know about it after the first case by another prisoner from the same prison in which he was incarcerated, Uyui Central Prison, had filed his Application before this Court on 13 June 2017.

1 *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v Burkina Faso* (merits) (24 June 2014) 1 AfCLR 219, § 92. See also *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 73.

2 *Layford Makene v United Republic of Tanzania*, ACtHPR, Application No 028/2017 Ruling of 2 December 2021 (admissibility), § 48; *Rajabu Yusuph v United Republic of Tanzania*, ACtHPR, Application No 036/2017, Ruling of 24 March 2022 (admissibility), § 65.

8. I am constrained to reiterate the Court's established jurisprudence in this regard,³ where it exercised its discretion to determine that similar reasons provided by the Applicants in previous cases called for a certain level of flexibility to be applied by the Court in assessing the reasonableness of the timeline for seizure of the Court.
9. In my considered opinion, the Applicant in this case met the threshold for his Application to be considered admissible. Moreover, I observe from the Registry records, that the Applicant was the 2nd person from that prison to file an Application two (2) months and eighteen (18) days, after a prisoner from the same penitentiary where the Applicant was imprisoned, had filed his case before this Court on 13 June 2017.
10. In declaring this Application inadmissible, the Court has compared this case with, and relied on the case of *Rajabu Yusuf v United Republic of Tanzania*⁴ where the Applicant claimed not to have known about the Court's existence before the first Application from his prison was filed. He took seven (7) years, seven (7) months and ten (10) days to seize the Court after exhaustion of local remedies. In *Rajabu Yusuf*, this Court held that the reason that the Applicant did not know about the Court's existence was not compelling and that he did not provide sufficient evidence to demonstrate that his personal circumstances had prevented him from filing the Application. Moreover, the Court was unpersuaded that Rajabu had pursued his case diligently.
11. I opine that the *Hamisi Mashishanga* case is distinguishable from the *Rajabu Yusuf* case to the extent that it was indeed the 2nd Application to be filed before this Court from Uyui Central Prison, where it can be inferred that the Court was still relatively unknown in 2017. Secondly, the first application⁵ from Uyui Central Prison was filed after seven (7) years, two (2) months and fifteen (15) days after exhausting local remedies. However, in that case, the Applicant did not provide any justification for filing the Application

3 *Sadick Marwa Kisase v United Republic of Tanzania*, ACtHPR, Application 005/2016 Judgment of 2 December 2021 (merits and reparations), §§ 51-52; *Amiri Ramadhani v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 50; *Kijiji Isiaga v United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 55; *Christopher Jonas v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101, §§ 53-54.

4 *Rajabu Yusuf v United Republic of Tanzania*, ACtHPR, Application No 036/2017, Ruling of 24 March 2021 (jurisdiction and admissibility), § 69.

5 *Abdallah Sospeter Mabomba and Others v United Republic Tanzania*, ACtHPR, Application No 017/2017, Judgment of 22 September 2022 (jurisdiction and admissibility) §53.

late. The Application was therefore declared inadmissible by this Court.

12. I note that Applicant was arrested on 1 April 2004. He was charged and convicted by the High Court on 14 July 2004. The Court of Appeal affirmed his conviction and sentence on 1 June 2010, while the Respondent State deposited its Declaration on 29 March 2010. The arrest and trial at the domestic court occurred between 2004 and 2010. Again, I reiterate that this Court has previously held that the period between 2007 and 2013, which is the early years of the Court's operation, members of the general public, let alone persons in the situation of the Applicant in the present case, could not be presumed to have had sufficient awareness of the requirements governing proceedings before this Court.⁶
13. This decision, in my view, would imply that when considering the Applicant's time to seize this Court, at least three (3) years should be deducted from the seven (7) years, two (2) months and thirty (30) days, when the Applicant filed this Application before this Court after exhaustion of local remedies. This would bring the period down to four (4) years two (2) months and thirty (30) days. The Court has previously considered such a time as reasonable within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules, whilst taking into account the personal circumstances of the Applicants.
14. Consequently, my considered opinion is that the peculiarities of this case justify the finding that the Applicant did not know about the Court's existence. His appeal was finalised by the Court of Appeal on 1 June 2010, and he had been detained in prison during the trial and shut away from the outside world. All this happened within a space of two (2) months and three (3) days after the Respondent State deposited the Declaration on 29 March 2010. This Court has held that during the years 2007 to 2013,⁷ the Court was not well known, because of its recent establishment, especially by incarcerated persons who were not only locked away from the rest of the world but who did not have easy access to information.
15. I cannot conceive the kind of additional evidence this Court would require from the Applicant to satisfy itself that he really did not know about the existence of this Court at the time.

6 *Sadick Marwa Kisase v United Republic of Tanzania*, ACtHPR, Application 005/2016 Judgment of 2 Dec 2021 (merits and reparations), §§ 51-52.

7 *Ibid.*

16. The end result is that I find that this Court should have dismissed the Respondent State's objection to the admissibility of the Application for having been filed at a time that was unreasonable. In conclusion, drawing from the facts of this case, the Court should have found the Application to be admissible within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules of Court. The Court should therefore have found its way clear to going ahead to examine the merits of the case.

Msuguri v Tanzania (judgment) (2022) 6 AfCLR 884

Application 052/2016, *Marthine Christian Msuguri v United Republic of Tanzania*

Judgment, 1 December 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, CHIZUMILA, BENSALOULA, ANUKAM, NTSEBEZA, SACKO and ADJEI

Recused under Article 22: ABOUD

The Applicant, a citizen of the Respondent State, brought this Application while he was in prison awaiting the execution of a death sentence. He had been charged, tried, convicted, and sentenced to death for murder. The Applicant alleged that his trial, conviction, and sentence before the domestic courts were all in violation of some of his human rights. Overruling objections raised by the Respondent State, the Court found that the State had violated the rights claimed by the Applicant. Accordingly, the Court awarded pecuniary and non-pecuniary reparations in favour of the Applicant.

Jurisdiction (material jurisdiction, 24-27)

Admissibility (exhaustion of local remedies, 41-43; filing within a reasonable time, 46-51)

Life (mandatory death sentence, 68-78)

Fair trial (trial within a reasonable time, 83-87; effective legal representation, 91-101)

Dignity (length of pre-trial detention, 107-110; death row detention, 112-116)

Reparations (basis of, 119-120; onus to provide evidence for, 120, 122; purpose of, 122; moral prejudice, 124; non-pecuniary reparations, 128-129; restitution, 131-133; measures of satisfaction, 135, 137-139)

Separate Opinion: TCHIKAYA

Life (mandatory death penalty, 8, 36)

I. The Parties

1. Marthine Christian Msuguri (hereinafter referred to as “the Applicant”) is a Tanzanian national who, at the time of filing this Application, was incarcerated at Butimba Central Prison in Mwanza after he was convicted and sentenced to death for the offence of murder. The Applicant alleges the violation of his rights in relation to proceedings before domestic courts.
2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as “the Respondent State”), which

became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration"), through which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration. The Court held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect one (1) year after its deposition, that is, on 22 November 2020.¹

II. Subject of the Application

A. Facts of the matter

3. It emerges from the record that the Applicant was charged for the murder of three (3) children. The murders occurred on 18 December 2003 at Businde village, Karagwe District at a time when the Applicant was a soldier and a militia trainer of the Tanzania People's Defence Force.
4. On 30 July 2010, the High Court of Tanzania sitting at Bukoba convicted and sentenced him to death by hanging.
5. Dissatisfied with this decision, he appealed to the Court of Appeal of Tanzania sitting at Mwanza, which dismissed the appeal in its entirety on 11 March 2013.
6. On 12 March 2013, the Applicant filed, before the Court of Appeal, an application for review on ground of manifest errors in the first judgment. At the time of the filing of the present Application, the request for review had neither been heard nor listed for hearing.
7. According to information filed by the Respondent State, on 14 December 2018, the Court of Appeal eventually dismissed the application for review for lack of merit.

¹ *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACTHPR, Application No 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.

B. Alleged Violations

- 8.** The Applicant alleges that the Respondent State has violated:
 - i. Articles 4 and 7 of the Charter, and Article 6 of the International Covenant on Civil and Political Rights (ICCPR) after the mandatory death sentence was imposed on the Applicant;
 - ii. Article 7 of the Charter due to the fact that it failed to provide the Applicant with counsel, and held him in detention for more than six (6) years prior to his trial; and
 - iii. Article 5 of Charter when the Applicant was held on pre-trial detention and in inhuman and degrading conditions of confinement.

III. Summary of the Procedure before the Court

- 9.** The Application was received at the Registry on 9 September 2016 and served on the Respondent State on 16 November 2016.
- 10.** After several extensions of time, the Parties submitted their pleadings on the merits and reparations as directed by the Court.
- 11.** On 5 March 2018, the Cornell University Law School filed a request to represent the Applicant *pro bono* in tandem with PALU which had been representing the Applicant. The request was granted and the case file was availed to the Law School accordingly.
- 12.** On 18 May 2020, the Cornell University Law School filed amended pleadings on behalf of the Applicant. The said pleadings were served on the Respondent State on 1 June 2020. Despite several extensions of time, the Respondent State did not respond to the amended Application.
- 13.** Pleadings were closed on 30 June 2022 and the Parties were duly notified.

IV. Prayers of the Parties

- 14.** The Applicant prays the Court to direct the Respondent State to:
 - i. Vacate the death sentence and grant the Applicant a new trial that comports with the fair trial guarantees of the African Charter; in the alternative,
 - ii. Set aside the death sentence and grant the Applicant a resentencing hearing; and
 - iii. Amend its law to ensure the respect for life.
- 15.** The Respondent State prays the Court to:
 - i. Declare that it lacks jurisdiction to hear the Application;
 - ii. Declare that the Application is not admissible for not exhausting local remedies and not being filed within a reasonable time;

- iii. Find that the Respondent State has not violated any of the provisions as alleged by the Applicant; and
- iv. Dismiss the prayers of the Applicant and order the latter to bear the costs of the proceedings.

V. Jurisdiction

- 16. The Court observes that Article 3 of the Protocol provides as follows:
 - 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
 - 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
- 17. The Court further observes that pursuant to Rule 49(1) of the Rules, it “shall conduct a preliminary examination of its jurisdiction [...] in accordance with the Charter, the Protocol and these Rules.”²
- 18. In view of the foregoing, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.
- 19. In the present Application, the Court notes that the Respondent State raises an objection to its material jurisdiction. The Court will first consider the said objection (A) before examining other aspects of its jurisdiction (B) if necessary.

A. Objection to material jurisdiction

- 20. The Respondent State avers that this Court does not have appellate jurisdiction to determine matters of facts and law such as that of the defence of insanity of the Applicant in the present case. According to the Respondent State, this issue was determined with finality by the Court of Appeal.
- 21. It is also the contention of the Respondent State that this Court does not have jurisdiction to examine the present Application as it cannot quash the conviction, set aside the sentence or order the Applicant’s release.
- 22. The Applicant rebuts the Respondent State’s objection and asserts that the Court has jurisdiction to consider this Application so long as it alleges a violation of rights guaranteed in the Charter

2 Rule 39(1), Rules of Court, 2 June 2010.

and ICCPR.³

23. The issue arising in respect of jurisdiction in the present Application is whether this Court has jurisdiction to examine the case and grant the Applicant's prayers.
24. The Court recalls that under Article 3(1) of the Protocol, it has jurisdiction to examine any application submitted to it, provided that the rights of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.⁴
25. The Court further recalls that, as is now firmly established in its case-law, it does not exercise appellate jurisdiction with respect to claims already examined by domestic courts.⁵ However, the Court reiterates its position that it retains the power to assess the propriety of domestic proceedings as against standards set out in international human rights instruments ratified by the State concerned.⁶
26. In the present matter, the Applicant is asking this Court to determine whether the proceedings before the domestic courts were conducted in line with the Respondent State's obligations under the Charter, ICCPR and other human rights instruments ratified by the Respondent State. The Court is empowered by provisions of Article 3(1) of the Protocol to ensure the observance of these obligations.
27. In light of the above, the Court dismisses the Respondent State's objection and consequently holds that it has material jurisdiction to hear this Application.

3 Ratified by the Respondent State on 11 June 1976.

4 *Kalebi Elisamehe v United Republic of Tanzania*, ACTHPR, Application No 028/2015, Judgment of 26 June 2020, § 18.

5 *Ernest Francis Mtingwi v Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, §§ 14-16.

6 *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; *Werema Wangoko Werema and Another v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520, § 29; and *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 130.

B. Other aspects of jurisdiction

28. The Court observes that no objection has been raised with respect to its personal, temporal and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules, it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.
29. In relation to its personal jurisdiction, the Court recalls, as stated in paragraph 2 of this judgment that, on 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration made under Article 34(6) of the Protocol. The Court further recalls that, as it has previously held, the withdrawal of a Declaration does not have any retroactive effect and also has no bearing on matters pending prior to the filing of the instrument withdrawing the Declaration, or new cases filed before the withdrawal takes effect as is the case of the present Application.⁷ In light of the foregoing, the Court finds that it has personal jurisdiction to examine this Application.
30. In respect of its temporal jurisdiction, the Court notes that the violations alleged by the Applicant occurred after the Respondent State became a Party to the Charter and the Protocol. Furthermore, the alleged violations are continuing in nature since the Applicant remains convicted on the basis of what he considers an unfair process.⁸ Given the preceding, the Court holds that it has temporal jurisdiction to examine this Application.
31. As for its territorial jurisdiction, the Court notes that the violations alleged by the Applicant occurred within the territory of the Respondent State, which is a state party to the Protocol. In the circumstances, the Court holds that it has territorial jurisdiction.
32. In light of the above, the Court holds that it has jurisdiction to determine the present Application.

VI. Admissibility

33. Pursuant to Article 6(2) of the Protocol, “The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.

⁷ *Andrew Ambrose Cheusi v Tanzania* (merits and reparations), §§ 35-39; *Ingabire Victoire Umuhoza v United Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562, § 67.

⁸ See *African Commission on Human and Peoples’ Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 64, 65; *Norbert Zongo and Others v Burkina Faso* (preliminary objections) (25 June 2013) 1 AfCLR 197, §§ 71-77, 83.

34. In line with Rule 50(1) of the Rules, “the Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules.”
35. The Court notes that Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

Applications filed before the Court shall comply with all of the following conditions:

 - a. Indicate their authors even if the latter request anonymity;
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter;
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
 - d. Are not based exclusively on news disseminated through the mass media;
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 - f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of African Union or the provisions of the Charter.
36. The Court notes that the Respondent State raises objections to the admissibility of the Application. The Court will therefore first consider the said objections (A) before examining other conditions of admissibility (B) if needed.

A. Objections to the admissibility of the Application

37. The Respondent State raises two objections to the admissibility of the Application. The first objection relates to the requirement of exhaustion of local remedies while the second one relates to whether the Application was filed within a reasonable time.
- i. Objection based on non-exhaustion of local remedies**
38. The Respondent State argues that the Application does not meet the requirement of exhaustion of local remedies as provided under

Article 56(5) of the Charter and Rule 50(2)(e) of the Rules⁹ which states that a case concerning the violation of human rights must be heard at all levels of domestic courts before being filed before the Court. According to the Respondent State, this Application was filed prematurely because the Applicant still had the option to institute a constitutional petition before the High Court under the Basic Rights and Duties Enforcement Act for the enforcement of the rights allegedly violated.

39. The Applicant refutes the Respondent State's objection and argues that he was not compelled to file a constitutional petition under the Basic Rights and Duties Enforcement Act because the said remedy is extraordinary as previously decided by this Court. According to the Applicant, remedies are exhausted once he goes through the required criminal trial process up to the Court of Appeal.

40. The issue arising for determination regarding admissibility in the present case is whether the Applicant ought to have instituted a constitutional petition before the High Court for the alleged violation of his fundamental rights.
41. Pursuant to Article 56(5) of the Charter, whose provisions are restated in Rule 50(2)(e) of the Rules, any application filed before this Court shall fulfil the requirement of exhaustion of local remedies. Regarding the remedies which have to be exhausted, the Court has previously held that such remedies should be ordinary.¹⁰ In respect of the Respondent State, the Court has also held on numerous occasions that applicants are not required to exhaust the remedy of the constitutional petition before the High Court for breach of fundamental rights because such remedy is extraordinary.¹¹ As the Court has determined, in instances where

9 Rule 40 of the Rules, 2 June 2010.

10 *Laurent Munyandilikirwa v Republic of Rwanda*, ACTHPR, Application No 023/2015, Ruling of 2 December 2021, § 74; *Alex Thomas v Tanzania* (merits), § 64.

11 *Gozbert Henerico v United Republic of Tanzania*, ACTHPR, Application No 056/2016, Judgment of 10 January 2022, § 61; *Mgosi Mwita Makungu v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 550, § 46; *Mohamed Abubakari v United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, §§ 66-70; *Alex Thomas v Tanzania* (merits), §§ 63, 65.

the Applicant has gone through the judicial system up to the Court of Appeal, which is the highest court of the land, he is considered to have exhausted the required remedies.¹²

42. The Court notes that in the present Application, the Applicant's appeal was determined through a judgment rendered on 11 March 2013 by the Court of Appeal, which is the highest judicial authority of the Respondent State. Given that the constitutional petition is not a remedy that the Applicant ought to have used, it must therefore be considered that domestic remedies were exhausted in the present matter.
43. Consequently, the Court holds that the Applicant has exhausted local remedies as envisaged under Article 56(5) of the Charter and Rule 50(2)(e) of the Rules and therefore, dismisses the Respondent State's objection.

ii. **Objection based on the failure to file the Application within a reasonable time**

44. The Respondent State claims that the Application was not filed within a reasonable time after local remedies were exhausted. It is the Respondent State's contention that the Applicant has not stated any reason for not lodging the present Application within six (6) months of the Court of Appeal dismissing the criminal appeal on 11 March 2013. According to the Respondent State, such is the requirement set out by the African Commission on Human and Peoples' Rights in the case of *Michael Majuru v Zimbabwe*.
45. The Applicant on his part refutes the Respondent State's objection and argues that the time he spent awaiting a decision on his application for review of the Court of Appeal's judgment should count towards the time required to exhaust local remedies. The Applicant further avers that the review process was ongoing when he filed the present Application and responsibility falls on the Respondent State to explain the delay.

12 *Hamis Shaban alias Hamis Ustadh v United Republic of Tanzania*, ACTHPR, Application No 026/2015, Judgment of 2 December 2021, § 51; *Mohamed Abubakari v United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, § 76.

46. The Court notes that neither the Charter nor the Rules specify the exact time within which Applications must be filed, after exhaustion of local remedies. Article 56(6) of the Charter and Rule 50(2)(f) of the Rules merely provide that applications must be filed "... within reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter". Therefore, the Respondent State's reference to the period of six (6) months cannot be justified.
47. The Court recalls that in assessing reasonableness, consideration should be given to the situation of the Applicant, namely whether he was incarcerated, lay and indigent, or had limited knowledge of the operation of this Court.¹³ Furthermore, while exhausting extraordinary remedies, such as the review procedure may not be mandatory depending on circumstances of the case, the time spent in attempting to exercise these remedies should be considered in assessing reasonableness under Article 56(5) of the Charter.¹⁴
48. From the record before the Court, the Applicant exhausted local remedies on 11 March 2013, being the date of the Court of Appeal's judgment. Given that the present Application was filed on 9 September 2016, the Court should assess whether the period of three (3) years, five (5) months and twenty-eight (28) days is reasonable within the meaning of Article 56(6) of the Charter.
49. In the instant case, the Court notes that the Applicant is incarcerated, and is on the death row. He also filed an application for review of the Court of Appeal's judgment on 12 March 2013. On 9 September 2016, the Applicant filed the present Application, having awaited the outcome of his review application for over three (3) years.
50. The Court considers that the above stated circumstances constitute valid justification for the time it took the Applicant to file this Application subsequent to the judgment of the Court of Appeal. This Court therefore finds that such time is reasonable within the meaning of Article 56(6) of the Charter.

13 *Mohamed Selemani Marwa v United Republic of Tanzania*, ACTHPR, Application No 014/2016, Judgment of 2 December 2021, § 61; *Amiri Ramadhani v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 83.

14 *Mohamed Selemani Marwa v United Republic of Tanzania*, ACTHPR, Application No 014/2016, Judgment of 2 December 2021, §§ 64, 65; *Thobias Mang'ara Mango and Another v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 314, § 55.

51. In light of the foregoing, the Court dismisses the Respondent State's objection to the admissibility of the Application based on the alleged failure to file the same within a reasonable time.

B. Other conditions of admissibility

52. The Court notes that, from the record, the Application's compliance with the requirements in Article 56 sub-articles (1), (2), (3), (4) and (7) of the Charter, which are reiterated in sub-rules 50(2)(a), (b), (c), (d), and (g) of the Rules, are not in contention between the Parties. Nevertheless, the Court must ascertain that these requirements have been fulfilled.
53. In particular, the Court notes that the requirement laid down in Rule 50(2)(a) of the Rules is met since the Applicant's identity is known.
54. The Court also notes that the claims made by the Applicant seek to protect his rights guaranteed under the Charter. It further notes that one of the objectives of the Constitutive Act of the African Union, as stated in Article 3(h) thereof, is the promotion and protection of human and peoples' rights. The Application also does not contain any claim or prayer that is incompatible with the said provision of the Act. Therefore, the Court considers that the Application meets the requirement of Rule 50(2)(b) of the Rules.
55. The Court further observes that the Application does not contain any disparaging or insulting language with regard to the Respondent State, which makes it consistent with the requirement of Rule 50(2)(c) of the Rules.
56. Regarding the condition stated in Rule 50(2)(d) of the Rules, the Court notes that the Application fulfils the said condition as it is not based exclusively on news disseminated through the mass media.
57. Finally, with respect to the requirement laid down in Rule 50(2)(g) of the Rules, the Court finds that the present Application does not concern a case which has already been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, or the provisions of the Charter. The Application therefore meets this condition.
58. As a consequence of the foregoing, the Court finds that the Application fulfils all the admissibility requirements set out under Article 56 of the Charter, as restated in Rule 50 of the Rules, and accordingly finds it admissible.

VII. Merits

- 59.** The Applicant alleges the violation of his following rights:
- i. Right to life protected under Article 4 of the Charter imposing the mandatory death penalty;
 - ii. Rights to a fair trial, to be tried without undue delay and to have effective representation protected under Article 7(1) of the Charter owing to the delay of proceedings in domestic courts, the lack of competent and experience counsel, and lack of adequate resources to counsel; and
 - iii. Rights to dignity, and to be free from cruel, inhuman and degrading treatment protected under Article 5 of the Charter for the provision of execution of the death sentence by hanging, detention in the death row, and lengthy detention before trial.

A. Alleged violation of the right to life

- 60.** The Applicant avers that the mandatory death penalty violates the right to life as it violates the right to an individualized sentencing process given that it does not consider circumstances peculiar to both the offender and commission of the offence such as mental impairments as is the case of the Applicant. The Applicant alleges that due to the mandatory sentencing scheme implemented in the Respondent State, the court that sentenced him to death did not have an opportunity to consider crucial mitigating evidence, including his history of child abuse, severe mental impairments, service to his country and successful adjustment to life in prison.
- 61.** According to the Applicant, the mandatory death penalty prevented the sentencing court from considering the mitigating effect of his mental impairments while he suffered from debilitating post-traumatic stress disorder (PTSD) and traumatic brain injury. He contends that, while his mental disabilities reduce his moral culpability and disqualify him from the death penalty, the Respondent State's law is indifferent to his psychological disorder so long as he is deemed sane and fit to stand trial. The Applicant also submits that he has a long history of substance abuse namely, of alcohol and marijuana, which helped him cope with successive traumatic experiences. He submits that the sentencing court ignored the fact that he committed the offence when he was in a state of insanity as he had drunk hard liquor and smoked 'bhang' which affected his control.
- 62.** The Applicant further avers that the evaluation of his state of health was conducted three (3) and a half years after the offence had been committed and was limited to a bare assessment of whether

he met the legal threshold for sanity and fitness to stand trial. It is the contention of the Applicant that the medical report obtained by the sentencing court to evaluate his mental health fell short of best practices for psychiatric evaluations because it was incomplete and superficial. According to the Applicant, such deficiencies do not necessarily warrant exemption from criminal sanctions but diminish personal culpability given that the offender's capacity to understand and process information, to communicate and control impulses diminishes. The Applicant submits that as a person with multiple and severe mental disorders, he is exempted from the application of the death penalty.

63. The Respondent State rebuts the Applicant's allegations and submits that as clearly stated under Sections 14(2) and 14(2)(b) of the Penal Code, intoxication can only be a defense to a criminal charge if by reason thereof the person charged at the time of the offence did not understand what he was doing and "[t]he person charged was by reason of intoxication insane, temporary or otherwise, at the time of such act or omission".
64. It is the submission of the Respondent State that having critically examined the evidence and circumstances of the matter, the sentencing court was satisfied that the Applicant knew what he was doing and knew that doing so was wrong. According to the Respondent State, the conduct of the Applicant before, during and after the killings was not the conduct of a person who was temporally insane and did not understand what he was doing. The Respondent State further submits that the Applicant, on both occasions when he committed the killings, ordered the bodies to be thrown into the river, asked his accomplices to stir the water in order to dissolve the victims' blood and warned the said accomplices not to reveal the events to anyone otherwise they would suffer the same fate as the deceased persons. The Respondent State avers that these actions of the Applicant show that he was sane before, during and after the killings and intended to destroy all evidence.
65. The Respondent State, therefore, prays this Court to find that the Applicant's allegations are misconceived, void of merit and dismiss them accordingly.

66. The issue for consideration is whether by sentencing the Applicant to death without taking into account special circumstances of his case, the sentencing court violated the right to life protected under Article 4 of the Charter.
67. Article 4 of the Charter provides :
Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.
68. As this Court held in the matter of *Ally Rajabu and Others v United Republic of Tanzania*, imposition of the mandatory death penalty constitutes a violation of the right to life under Article 4 of the Charter as it contravenes the right to a fair trial.¹⁵ The Court recalls that its findings in the *Rajabu* judgment made a general determination to the effect that encroachment on the right to life is arbitrary in instances where the law takes away from the sentencing authority any leeway to consider circumstances peculiar to the Applicant or the commission of the offence.¹⁶ Notably, the Applicant in the *Rajabu* matter did not actually advance the specific circumstances which the sentencing judge failed to examine but only made a case of the mandatory death penalty not comporting with the right to a fair trial for lack of judicial discretion to consider circumstances peculiar not only to the accused but also to the actual commission of the offence. This reasoning was equally applied in *Amini Juma v Tanzania*, which is a decision subsequent to the *Rajabu* judgment but in respect of similar issues.¹⁷
69. The Court notes that, in the initial Application, the Applicant's allegation was that the sentencing court failed to consider the specific fact that he was under the effect of some narcotic substance at the time of the offence. However, submissions made in the amended pleadings tend to raise the level of attenuating circumstances by demonstrating that the Applicant specifically suffered permanent insanity, but also that the report on his state

15 *Ally Rajabu and Others v United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 539, §§ 104-114. See also, *Amini Juma v United Republic of Tanzania*, ACTHPR, Application No 024/2016, Judgment of 30 September 2021, §§ 120-131.

16 *Ally Rajabu v Tanzania*, §§ 109-114.

17 *Amini Juma v Tanzania*, §§ 116-131.

of health was superficial, and other details were not taken into account by the sentencing judge.

70. In view of the Applicant's submissions as a whole, the issue at stake boils down to the special circumstances of this case namely as to whether the Applicant's right to life was violated because domestic courts did not take into account all aspects of the defence of insanity while sentencing him to death. It follows that, the Applicant in the present case seeks a determination from this Court as to whether the failure by domestic courts to consider circumstances herein specified amounts to a breach of fair hearing and consequently of the right to life. This Application is therefore to be distinguished from *Rajabu* as the present case provides an empirical opportunity to assess whether specific circumstances were actually advanced by the Applicant, which domestic courts failed to examine while applying the death sentence.
71. Noteworthy, in its response to the initial Application, the Respondent State submitted that the trial court and appellate court did not sustain the Applicant's defence of insanity because the latter did not meet the standard required by law and that it was proven beyond reasonable doubt that the Applicant was sane and knew what he was doing when committing the offences.
72. It emerges from the record that the main point of contention between the Parties on the issue under determination is the failure of domestic courts to consider the Applicant's defence of insanity; and reliability of the health report that formed the judicial position of the sentencing court. In this respect, this Court recalls its position in *Gozbert Henerico v United Republic of Tanzania*¹⁸ where it found that the failure of the High Court to consider the medical evaluation report of the Applicant's mental health status, constituted a grave procedural irregularity that resulted in a violation of the Applicant's right to a fair trial, as guaranteed under Article 7(1) of the Charter.
73. This Court notes that, in the instant matter, the High Court considered the Applicant's defence of insanity by examining the medical report produced by the Isanga Mental Institution; and decided to set aside the said report on the ground that it was tendered by PW5, Dr Mbatia, who did not prepare it. However, the High Court also considered the defence of insanity in light of testimonies of prosecution witnesses, and found that there was cogent evidence to convict the Applicant. Noteworthy, circumstances considered by the trial court included the fact that

18 *Gozbert Henerico v Tanzania* (merits and reparations), § 160.

the acts of killing of the deceased persons were carried out at two different times within the same day; and the Applicant on each occasion, instructed his accomplices to conceal the evidence. On the basis of these considerations the High Court, taking into account the *actus reus and mens rea* of the Applicant, concluded that it is evident that he knew what he was doing when committing the crimes.

74. The Court further observes that the Court of Appeal upheld the reasoning and findings of the High Court, and dismissed the appeal for lack of merit. It is against these considerations that the domestic courts dismissed the Applicant's defence of insanity.
75. This Court does not ignore the fact that other factors were also adduced by the Applicant which he claims should have been taken into account by domestic courts. In respect to the said issues, the Court notes that the trial court and Court of Appeal examined the submissions and evidence before them. Having done so, both courts arrived at the conclusion that the evidence considered was enough and substantial to make the conviction stand even when the impugned medical report was set aside.
76. In light of the above, this Court considers that, in convicting the Applicant, the domestic courts not only exercised the judicial discretion to consider the specific circumstances and situation of the Applicant; but also undertook a proper assessment of the said circumstances mainly the Applicant's defence of insanity.
77. Having said that, this Court recalls that the determinative factor in assessing fairness regarding arbitrary deprivation of life under Article 4 of the Charter, is not only whether the trial court was left with the discretion to receive and consider submissions related to the specific situation of the Applicant and circumstances of the offence. The key element in this regard is rather whether the judicial officer was able to exercise discretion in taking into account the above stated situation and circumstances while deciding on the sanction to be imposed in cases of murder. The short answer is No On the issue of discretion, this Court observes that, whatever the outcome of the examination of the circumstances of the case, after entering a conviction, the High Court in the present case would have still had no option but to impose the death penalty as the sole sanction provided for under Article 197 of the Penal Code. Conversely, had the High Court been persuaded by the Applicant's defence of insanity in the present matter, and the law provided for other sanctions for murder depending on the circumstances pleaded in the case, the factor of judicial discretion would have been met and legality upheld under Article 4 of the Charter.

- 78.** In light of the above, the Court considers that the requirement of judicial discretion was not observed in the present Application, and as a consequence finds that the Respondent State violated the right to life protected under Article 4 of the Charter.

B. Alleged violation of the right to a fair trial

- 79.** The Applicant alleges that his rights to a fair trial have been violated in respect of the time he spent in custody awaiting trial; and regarding the lack of provision of legal representation during the process. The Court notes that the Applicant alleges the violation of Article 7 of the Charter, as well as Articles 7, 9, and 14 of the ICCPR. However, in light of its case-law, the Court will examine this allegation solely under Article 7(1) of the Charter which will be interpreted in light of supplementing elaboration found in the ICCPR's provisions.¹⁹

i. Alleged violation of the right to be tried without undue delay

- 80.** The Applicant alleges that the fact that he was held in pre-trial detention for six (6) years and a half prior to his trial constitutes a violation of his right to be tried without undue delay. According to the Applicant, such time in respect of both conviction and sentencing was unreasonable because the case was not complex and the delay was attributable to the Respondent State. In substantiating his allegation, the Applicant states that, after his arrest on 20 December 2003, it took the State Attorney almost two (2) years to charge him, one (1) year for the medical report ordered by the Court to be completed, two (2) years to hold the preliminary hearing after charges were filed, two (2) more years without explanation before the case was set for hearing, and, in all, six (6) and a half years after arrest before the prosecution called its first witness.
- 81.** The Respondent State did not make any submission in respect of this allegation.

¹⁹ *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 73.

82. Pursuant to Article 7(1)(d) of the Charter, every individual shall have “the right to be tried within a reasonable time ...”.
83. This Court has established that, in assessing whether justice was dispensed as prescribed under Article 7(1)(d) of the Charter, factors to be considered should include the complexity of the case, the behaviour of the Parties, and that of the judicial authorities who must exercise due diligence especially where the Applicant faces severe penalties.²⁰ What the Court is called to determine in the instant case is whether the period of six (6) and a half years that lapsed from the Applicant’s arrest before his trial commenced is reasonable.
84. Regarding the complexity of the case, the Court notes that, from the Respondent State’s response to the initial pleadings, and records of domestic proceedings, it is evident that the case was relatively ordinary. The matter did not demand extensive investigation as evidence was mainly made up of witness statements including those of two co-accused who were initially charged with the Applicant. Although it took a year for the medical report to be produced, it is notable that both trial and appeal courts set it aside, and conviction was based largely on post-mortem examinations and witness statements, which were all available within months of the arrest. Besides, at the preliminary hearing, the Applicant had already expressed his intent to proffer a defence of insanity.
85. The Court further observes that the Applicant did not act in any manner or make any request that contributed to the delay. Counsel for the Applicant rather consistently drew the attention of the judicial authorities on the fact that the accused had been in custody for too long, and the case suffered significant delay. Conversely, the Respondent State did not specifically address this issue in its response to the initial Application, nor did the prosecution justify the delays as emerging from domestic proceedings. Notably, in justifying the delay of three (3) years to consider the Applicant’s request for review the Respondent State advances the argument of constraints of the cause list of the Court of Appeal. The Respondent State avers that applications for review, are heard based on the principle of first in, first out. It follows that while there is no evidence that the Applicant contributed to the delay, the same cannot be said of the Respondent State’s judicial authorities.

20 *Gozbert Henerico v Tanzania* (merits and reparations), § 82; *Amini Juma v Tanzania*, *op. cit.*, § 104; *Armand Guehi v Tanzania* (merits and reparations), §§ 122-124.

86. Finally, as far as due diligence is concerned, this Court notes the Applicant alleges a delay of more than six (6) years. The Court observes that authorities of the Respondent State did not provide any explanation for the periods of two (2) years that elapsed before the prosecution filed the charges and one (1) year to produce the medical report at a state institution. There is also no justification for the period of a few more years adjournments on prosecution request to summon witnesses and contact a medical expert three (3) and four (4) years respectively after the charges were filed. These delays, and the lack of justification do not portray due diligence as required under Article 7(1)(d) of the Charter and the above referenced case-law of this Court.
87. Consequently, the Court finds that the Respondent State has violated the Applicant's right to be tried within a reasonable time guaranteed under Article 7(1)(d) of the Charter.

ii. Alleged violation of the right to have effective representation

88. The Applicant alleges that his attorneys did not have adequate time or facilities to prepare his defence, and one of them laboured under a conflict of interest having defended two co-accused of the Applicant at an earlier stage of the same case. According to the Applicant, state-provided attorneys in the Respondent State are poorly paid and, in the present case, could not afford the costs of travel to the prison. Additionally, his second appointed counsel was inexperienced as he had been called to the bar only a year before his appointment. He also avers that the Respondent State denied him access to his attorneys; time, funds and facilities to conduct full investigation into his social and health history and funds to summon witnesses. The Applicant also avers that his lawyers did not identify or call any defence witnesses and that he had only two brief meetings with them before the trial.
89. In its response to the initial Application, the Respondent State submits that the Applicant was defended by state-appointed counsel before the High Court and the prosecution witnesses were cross-examined. The Respondent State further submits that the Applicant entered his defence and exercised his right to appeal, and the allegations, therefore, lack merit and should be dismissed.

90. Article 7(1)(c) of the Charter provides that every individual shall have “the right to defence, including the right to be defended by counsel of his choice”.
91. The Court recalls that the above stated right should be understood not strictly as having to choose one’s own counsel but more importantly that legal assistance should be effective even though provided under a state-organised legal scheme.²¹ In particular, the Court has previously held that effective representation should be one that provides counsel with sufficient time and means to prepare an adequate defence at all stages right from the arrest of the individual, without any interference.²² However, the quality of defence and nature of instructions between the client and counsel is not within the responsibility of the Respondent State which may intervene only when manifest failures are brought to its attention.²³ Given that the Applicant was provided with counsel appointed by the Respondent State, the relevant issue is whether the said assistance was effective.
92. As it emerges from the record that, while the Applicant avers that his lawyers only met with him very briefly on two occasions prior to his trial, he was represented during the conviction and sentencing proceedings both before the trial and appeal courts. Furthermore, and in respect of the submission that lack of time did not permit counsel to investigate his personal, social and health history, the Applicant does not adduce evidence that authorities of the Respondent State restrained counsel in any manner. In any event, the Applicant does not demonstrate a case of failure by the Respondent State to consider a request for more time before and after the commencement of the proceedings. Notably, the fact that the trial was delayed by more than six (6) years, and requests were made by the lawyers for expedited proceedings, presented an opportunity for counsel to seek for time and means to undertake greater and more thorough investigation as they wished. In such circumstances, this Court considers that the allegation is not sufficiently substantiated, and, therefore, dismisses the same.
93. The Applicant also claims that the second appointed counsel lacked the experience and specialisation to adequately represent him because he specialised in land law, and joined the bar only a year before he was appointed.

21 *Gozbert Henerico v Tanzania* (merits and reparations) §§ 107-114; *Amini Juma v Tanzania*, *op. cit.*, §§ 91-98.

22 *Gozbert Henerico v Tanzania* (merits and reparations), § 109.

23 *Ibid*, § 108.

94. The Court observes that, having been afforded legal representation in domestic proceedings, the Applicant was at liberty to raise the lack of experience and expertise of the state-appointed counsel both before the trial and appellate courts. In making this claim in the present Application, the Applicant ought to have also substantiated the lack of experience or expertise by proving how counsel failed to discharge specific duties falling within their mandate.
95. In such circumstances, this Court does not have the required elements to undertake the necessary assessment of the claims made in the present Application. The allegation is accordingly dismissed.
96. Regarding the issue whether counsel laboured under conflict of interest, it emerges from the proceedings before domestic courts that counsel initially appointed in this case had first represented the Applicant and two co-accused during the preliminary hearing. However, when the charges were dropped against the two co-accused, the same lawyer rejoined the Applicant's defence team.
97. This Court considers that its findings regarding the issue of experience and expertise of appointed-counsel apply in respect of the claim that is being examined here. A serious claim such as that of conflict of interest ought to be backed with evidence, which is lacking in the present Application. The mere fact that appointed-counsel was retained after charges against the Applicant's co-accused were dropped cannot be sufficient to establish a conflict of interest. Especially in an instance where the state appointed-counsel was selected from a pre-determined roster under an established legal aid scheme, evidence of specific unethical or similar behaviour is needed to be proved to make a successful case of conflict of interest. In the circumstances, this Court finds that such case has not been made. The allegation is therefore dismissed.
98. Finally, the Applicant also raises the issue of lack of effective representation in this matter regarding funds availed to state-appointed counsel. The Court observes that the Applicant refers to the amount of United States Dollars Thirty (USD 30) – which is the equivalent of Tanzanian Shillings Sixty-Nine Thousand (TZS 69,000)²⁴ – as what counsels receive for the entire case.
99. The Court notes that, in the present case, the Applicant does not provide evidence for the figures stated such as any official

24 As at the rate of TZS 2,300 for USD 1.

document or statements of practising attorneys who had in the past laboured as state-appointed counsel in cases of murder. Furthermore, a meritorious claim would have been one that advances the specific amounts which were paid to counsel in the present Application in order for this Court to be in a position to assess whether funds availed by the Respondent State meet the standards of appropriate legal representation within the meaning of Article 7(1)(c) of the Charter. Absent such substantiation, the claim cannot stand.

100. The Court notes that the Applicant also claims that his lawyers were not allowed to cross examine defence witnesses. Noting further that the claim is in relation to the defence of insanity which was duly considered by domestic courts, and having concluded as it did in respect of the other claims, this Court does not find it determinant to examine the same.
101. In light of the above, the Court finds that the Respondent State has not violated the Applicant's right to an effective legal representation protected under Article 7(1)(c) of the Charter in respect of the conflict of interest, lack of experience, and inadequate funding of state-appointed counsel.

C. Alleged violation of the rights to dignity, and to be free from cruel, inhuman or degrading treatment

102. The Applicant alleges that his rights protected under this provision of the Charter have been violated because he was held in pre-trial detention for more than six (6) years, held in the death row, and experienced deplorable conditions of confinement.
103. The Respondent State does not make specific submissions on this issue.

104. The Court notes that the Applicant alleges a violation of Article 5 of the Charter in respect of the following: i) the length of his pre-trial detention, which resulted in a degrading treatment; ii) his detention in the death row; and iii) the deplorable conditions of confinement which he experienced.
105. Article 5 of the Charter provides as follows:
Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status.

All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

i. On the length of the Applicant's pre-trial detention resulting in a degrading treatment

- 106.** The Applicant alleges that the six (6) and a half years that he waited in prison prior to his trial violated his right not to be subjected to degrading treatment as he experienced anxiety, depression and fear of execution.

- 107.** The Court considers that its earlier findings in respect of the Applicant's right to be tried without undue delay apply to the claim under consideration here. The Court recalls that, as held in *Henerico v Tanzania*,²⁵ the Respondent State bears the duty to act on judicial matters with due diligence and expediency when the case is not complex, and the Applicant is in custody, and does not contribute to delays.²⁶ The Court further notes that delays in proceedings involving serious crimes and facing – “well founded fear” of – the death sentence are likely to cause anxiety and psychological distress, and constitute inhuman and degrading treatment.²⁷
- 108.** Reference to the record reveals that the Respondent State justified the delays mainly by advancing the practice of “first in first out” which is observed in domestic courts. This Court considers that factors pertaining to the operations of domestic courts should be justified with details on how they apply to the circumstances of the Applicant.²⁸ In the present case, the Applicant being in custody and charged with murder which carries the death penalty, docket management constraints put forward by the Respondent State

25 See also *Armand Guehi v Tanzania* (merits and reparations), § 124.

26 *Gozbert Henerico v Tanzania*, *op. cit.*, § 86.

27 *Al Saadon v United Kingdom*, ECHR, Application No 61498/08, Judgment of 2 March 2010, §§ 136, 137; *Bayarri v Argentina* IHRIL 3060 (IACHR 2008) Judgment of 30 October 2008, §§ 81-87.

28 *Ibid*, 88.

do not sufficiently justify why his trial only commenced after more than six (6) years after his arrest.

109. Having affirmed the finding of undue delay, this Court stresses the causal link between such delay and alleged suffering of the Applicant. As established earlier in this judgment, the Applicant was charged two (2) years after his arrest. Having pleaded not guilty by reason of insanity, he had to wait one (1) more year for the medical report to be produced, and about three (3) years due to adjournments on prosecution request to summon witnesses and contact a medical expert. In the circumstances, the average person would suffer anxiety and depression as they deal with the uncertainty inherent in the waiting. Notably, in this case, it appears that the Applicant entertained not just “well founded fear” but certainty of execution.
110. The Court, therefore, finds that the Respondent State violated the Applicant’s right not to be subjected to inhuman and degrading treatment protected under Article 5 of the Charter regarding the length of time spent in pre-trial detention.

ii. On the Applicant’s detention in the death row

111. The Applicant avers that the length of his detention after being sentenced to death caused him anxiety and psychological anguish, which constitute a violation of his right. According to the Applicant, the *de facto* moratorium adopted by the Respondent State does not mitigate the risk of the death row phenomenon as execution may resume at any time, and conditions of detention further compound the associated psychological torture.

112. The Court recalls that, as it has held in the earlier cited *Rajabu* judgment, death row has the inherent potential to cause an adverse impact on an individual’s psychological state due to the fact that the person involved may be executed at any time.²⁹ The Court has taken the view, in several rulings on provisional measures involving the Respondent State, that the existing moratorium does not provide the certainty required to safeguard

29 *Ally Rajabu v Tanzania* (merits and reparations), §§ 148-150.

the right to life when it comes to the death penalty.³⁰

113. The Court also considers the fact that, as at the filing this Application in 2016, the Applicant had been on the death row for at least six (6) years running from his sentencing in 2010. As at the date the present judgment, the Applicant's time on death row is twelve (12) years, and this landmark should be taken into account given the earlier finding of this Court that the mandatory death penalty breaches the right to life and therefore does not comport with the legal obligations of the Respondent State.
114. Having established the anguish caused to the Applicant by his lengthy detention, this Court does not deem it necessary to consider the death row claim any further only to link the ensuing harm with the "ever present shadow of death".³¹
115. The Court also finds that a thorough examination of the claim on deplorable conditions of confinement is not warranted as it intrinsically seeks to buttress the central claim that the Applicant indeed suffered and may still be suffering inhuman and degrading treatment.
116. Given the above, the Court finds that the Respondent State has violated the right not to be subjected to inhuman or degrading treatment protected by Article 5 of the Charter in respect of being kept in the death row.

VIII. Reparations

117. The Applicant prays the Court to:
 - i. Grant him moral damages;
 - ii. Vacate the death sentence and grant him a new trial that comports with the fair trial guarantees in the Charter;
 - iii. In the alternative, direct the Respondent State to set aside the death sentence and grant him a resentencing hearing;
 - iv. Order the Respondent State to amend its law to ensure the respect for life; and
 - v. Order the Respondent State to take appropriate measures to remedy the violations within a reasonable time, and inform the Court within six (6) months of the judgment of the measures taken to implement the latter

30 See *John Lazaro v United Republic of Tanzania* (provisional measures) (18 March 2016) 1 AfCLR 593, §§ 16-18; *Evodius Rutechura v United Republic of Tanzania* (provisional measures) (18 March 2016) 1 AfCLR 596, §§ 16-18; *Cosma Faustin v United Republic of Tanzania* (provisional measures) (18 March 2016) 1 AfCLR 652, §§ 16-18.

31 See *Soering v United Kingdom*, ECHR, Judgment of 7 July 1989, Series A, Vol. 161, § 42.

- 118.** The Respondent State in its submission prayed the Court to:
- i. Find that it does not have jurisdiction to order the release of the Applicant; and
 - ii. Dismiss the Applicant claim for reparation as he is not entitled to any reparation.

- 119.** Article 27 for the protocol provides that: “if the Court finds that there has been violation of a human or people’s rights it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.”
- 120.** The Court considers that, as it has consistently held, for reparations to be granted, the Respondent State should first be internationally responsible of the wrongful act. Second, causation should be established between the wrongful act and the alleged prejudice. Furthermore, and where it is granted, reparation should cover the full prejudice suffered. Finally, the Applicant bears the onus to justify the claims made.³²
- 121.** As this Court has earlier found, the Respondent State violated the Applicant’s rights to life, a fair trial, and not be subjected to inhuman and degrading treatment protected under Articles 4, 7, and 5 of the Charter respectively. Based on these findings, the Respondent State’s responsibility has been established, and the prayers of the Parties will be examined thereon.
- 122.** As stated earlier, an applicant bears the burden of providing evidence to support his/her claims for material prejudice. The Court has also previously held that the purpose of reparations is to, as much as possible, place the victim in the situation prior to the violation.³³ The Court has further held, with respect to moral prejudice, that it exercises judicial discretion in equity in determining the award.³⁴ In such instances, the Court has adopted

³² *Amini Juma v Tanzania* (merits and reparations), § 141; *Armand Guehi v Tanzania* (merits and reparations), § 15; *Norbert Zongo and Others v Burkina Faso* (reparations) (5 June 2015) 1 AfCLR 258, §§ 20-31.

³³ *Amini Juma v Tanzania*, *ibid*, § 143.

³⁴ *Amini Juma v Tanzania*, *ibid*, § 144; *Armand Guehi v Tanzania*, *ibid*, § 181; *Lucien Ikili Rashidi v United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 13, § 119.

the practice of awarding lump sums.³⁵

A. Pecuniary reparations

- 123.** The Court notes that the Applicant prays the Court to grant him moral damages for the prejudice that ensued from the violation of his rights. As established in this judgment, the Applicant suffered several violations which inherently involve moral prejudice. These include imposition of the mandatory death penalty, a lengthy pre-trial detention, the death row, all of them compounded by overall inhuman and degrading circumstances.
- 124.** In similar instances, this Court has found that such circumstances unequivocally warrant moral damages which it has, in equity, assessed to the tune of Tanzanian Shillings Four Million (TZS 4,000,000) to Tanzanian Shillings Five Million (TZS 5,000,000).³⁶ The Court finds that there is no peculiar reason to depart from this range of awards in the present Application. However, in respect of circumstances and substantive findings of this Court, the present Application shares greater similarities with that of *Gozbert Henerico v Tanzania*. Against these considerations, the Court awards the Applicant moral damages and therefore grant the Applicant moral damages to the tune of Tanzanian Shillings Seven Million (TZS 7,000,000).

B. Non-pecuniary reparations

- 125.** The Applicant prays the Court to vacate the death sentence; grant him retrial and order the Respondent State to amend the provision of its law on the mandatory death sentence to ensure respect for life.
- 126.** Noting that the Applicant also makes prayers in relation to the Respondent State's law providing for the mandatory death sentence, and in light of its earlier findings in the present Judgment, this Court considers it appropriate to first examine the prayer to amend the Penal Code.

i. Amend the law to ensure respect for life

- 127.** The Applicant prays the Court to order that the Respondent State should amend its law to ensure the respect for life.

35 *Amini Juma v Tanzania, idem; Armand Guehi v Tanzania, ibid*, § 177.

36 *Amini Juma v Tanzania, ibid*, §§ 152-158; *Gozbert Henerico v Tanzania, ibid*, §§ 185-189.

- 128.** The Court recalls that, in previous judgments dealing with the mandatory death penalty involving the same Respondent State, it had ordered that the concerned provisions be removed from the Penal Code in line with its international obligations.³⁷ Judicial notice is taken that, three (3) years after the first such judgment was issued, the Respondent State has not as at the date of the present judgment, implemented the said order. Identical orders were also issued in two other judgments delivered in 2021, and 2022, none of which has been implemented thus far.
- 129.** In the circumstances, the main reason in the previous cases remains most current regarding this Application, which is that persons in the same situation remain at the paramount risk of being executed or facing the mandatory death sentence. Given the critical importance of the order, the Court therefore finds it appropriate to restate the same in the present Application, and orders the Respondent State to repeal the provision for the mandatory death sentence in its Penal Code.

ii. Restitution

- 130.** The Applicant prays the Court to vacate the death sentence and grant him a new trial that conforms with the fair trial guarantees of the Charter.
- 131.** In the *Rajabu* judgment cited earlier, this Court held that, because it encroaches on judicial discretion in respect of sentencing, imposition of the mandatory death penalty requires a rehearing on sentence as an adequate remedy.³⁸ The Court had also, in the same decision, found that the sentence can only be re-examined to the extent of its mandatory nature given mainly that the finding of violation does not affect the Applicant's guilt and conviction.³⁹
- 132.** Although the present Application has peculiarities in respect of the facts, and situation of the Applicant, the findings of the Court in respect of the right to life are ultimately on all fours with those in the *Rajabu* case. It follows that while the prayer to vacate the sentence is valid in the light of the findings in this judgment, such request should be understood as aiming to set aside the mandatory death penalty but not to provide a blank exemption from sanction, whereas the commission of the offence as adjudicated by domestic courts has remained unaffected in the

37 *Gozbert Henerico v Tanzania*, *ibid*, § 207; *Amini Juma v Tanzania*, *ibid*, § 170.

38 *Ally Rajabu v Tanzania*, *ibid*, § 158.

39 *Idem*.

proceedings before this Court.

- 133.** This Court finds it only befitting to adopt the same remedial approach, and therefore decides to direct the Respondent State to take all necessary measures for the rehearing of the case on the sentencing of the Applicant through a process that does not allow a mandatory imposition of the death penalty, while upholding the full discretion of the judicial officer.

iii. Publication

- 134.** The Parties did not make any request in respect of publication.

- 135.** However, the Court considers that, for reasons now firmly established in its practice, and in the peculiar circumstances of this case as set out earlier, publication of this judgment is warranted. Notably, threats to life associated with the mandatory death penalty remain alive in the Respondent State, there has been no sign as to whether measures are being taken for the law to be amended, and the guarantees provided in the Charter and before this Court are still required to protect rights-holders. The Court thus finds it fit to make an order for publication.

iv. Implementation and reporting

- 136.** The Applicant prays the Court to order the Respondent State to take appropriate measures to remedy the violations within a reasonable time, and inform the Court within six (6) months of the judgment of the measures taken to implement the latter.

- 137.** Reasons stated in respect of the publication apply regarding the prayers on timeframe for implementation and reporting. Regarding implementation, the Court further notes that in its previous judgments issuing the order to repeal the provision on the mandatory death penalty as earlier recalled, the Respondent State was directed to implement within one (1) year.⁴⁰ Given the non-compliance established earlier in this judgment, the Court considers that restating the same timeframe in the present Application would not do justice to the paramount urgency to have the harming provision removed. Against these considerations, the Court decides to set the time for implementation at six (6) months from the date of the present judgment.

- 138.** As far as the prayer for reporting is concerned, the Court considers that it is required as a matter of judicial practice. With a particular

⁴⁰ *Ally Rajabu v Tanzania*, *ibid*, 171, xv, xvi; *Gozbert Henerico v Tanzania*, *ibid*, 203.

emphasis on timeframe, the Court notes that time allocated in judgments pending implementation have cumulatively reached three (3) years. For the same reasons as expounded while examining the orders for both publication and implementation, report should be provided within a period that is shorter than that set out in individual judgments. The Court considers that the appropriate time should be of six (6) months in the circumstance.

- 139.** The Court notes that the Respondent State has not implemented the orders in any of the said cases for which the deadline has expired. In view of this fact, the Court still considers that the orders are warranted both as an individual protective measure, and a general restatement of the obligation and urgency behoving on the Respondent State to repeal the mandatory death penalty and provide alternatives thereto.

IX. Costs

- 140.** In their submissions both Parties pray the Court to order that the other Party pays the costs.
- 141.** Pursuant to Rule 32(2) of the Rules, “unless otherwise decided by the Court, each party shall bear its own costs”.
- 142.** In the instant case, the Court decides that each Party shall bear its own costs.

X. Operative part

- 143.** For these reasons,

The Court

Unanimously,

On jurisdiction

- i. *Dismisses* the objection to its jurisdiction.
- ii. *Declares* that it has jurisdiction.

On admissibility

- iii. *Dismisses* the objections to the admissibility of the Application;
- iv. *Declares* the Application admissible.

On merits

- v. *Finds* that the Respondent State has violated the right to life protected under Article 4 of the Charter in relation to the provision in its Penal Code for the mandatory imposition of the death penalty as it removes the discretion of the judicial officer;
- vi. *Finds* that the Respondent State has violated the Applicant’s right to be tried without undue delay protected under Article 7(1)(d) of

the Charter;

- vii. *Finds* that the Respondent State has violated the Applicant's right not to be subjected to inhuman and degrading treatment protected under Article 5 of the Charter in relation to the lengthy pre-trial detention, detention in the death row, and confinement.

On reparations

Pecuniary reparations

- viii. *Grants* Tanzanian Shillings Seven Million (TZS 7,000,000) to the Applicant for moral damage that ensued from the violations found;
- ix. *Orders* the Respondent State to pay the amount indicated under subparagraphs (viii) free from taxes within six (6) months, effective from the notification of this judgment, failing which it will pay interest on arrears calculated on the basis of the applicable rate of the Bank of Tanzania throughout the period of delayed payment and until the accrued amount is fully paid.

Non-pecuniary reparations

- x. *Orders* the Respondent State to take all necessary measures, within six (6) months from the notification of this Judgment to remove the mandatory imposition of the death penalty from its laws;
- xi. *Orders* the Respondent State to take all necessary measures, within one (1) year of the notification of this judgment, for the rehearing of the case on the sentencing of the Applicant through a procedure that does not allow the mandatory imposition of the death sentence;
- xii. *Orders* the Respondent State to publish this judgment, within a period of three (3) months from the date of notification, on the websites of the Judiciary, and the Ministry for Constitutional and Legal Affairs, and ensure that the text of the judgment is accessible for at least one (1) year after the date of publication;
- xiii. *Orders* the Respondent State to submit to it within six (6) months from the date of notification of this judgment, a report on the status of implementation of the decision set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On costs

- xiv. *Orders* that each Party shall bear its own costs.

Separate Opinion: TCHIKAYA

1. The sixty-seventh session of the African Court was the session of “the death penalty”.
2. Despite the increasingly abolitionist, continental and universal position, the African Court, by three judgments, confirmed its position in its earlier decision in *Ally Rajabu and others v Tanzania* of 8 December 2019. I was unable to share the position taken by the majority of the honourable judges through these three judgments on the issue of the death penalty.
3. Since the beginning of the third millennium, 146 states have been classified as either abolitionist or de facto abolitionist¹ including the Respondent State in the three cases, namely: *Marthine Christian Msuguri*, *Igola Iguna* and *Ghati Mwita*, all dated 1 December 2022.²
4. *Marthine Christian Msuguri* was the first case examined by the Court. After committing murder, the Applicant in the aforementioned case was incarcerated at the central prison of Butimba (Mwanza) having been found guilty of the offence and sentenced to death. The second case involved Mr. *Igola Iguna*, who was incarcerated at Uyui Prison (in the Tabora Region). He was sentenced to death for murder. Finally, the third case involved *Ghati Mwita*, a woman convicted of murder, sentenced to death and incarcerated at the same Butimba Central Prison.
5. All in all, these three applicants challenged before this Court, *mutatis mutandis*, the violation of their rights in the proceedings before domestic courts, which resulted in the death penalty.
6. This opinion reformulates and supports the idea that the death penalty is vacuous in socio-human terms on the one hand, and on the other hand, highlights the wait-and-see attitude of the Court. This wait-and-see attitude is due to the fact that it denounces the irregular nature of the mandatory penalty imposed by the Respondent State without questioning the underlying principle.

1 The death penalty is enshrined in domestic law, but it is not applied.

2 ACtHPR, *Marthine Christian Msuguri v Tanzania; Igola Iguna v Tanzania, Ghati Mwita v Tanzania*, 1 December 2022. A fourth case, *Thomas Mgira v Tanzania* (Application No 003/2019), relating to the death penalty, was on the Court's list for this 67 session, but was deferred for further consideration.

Having stated the grounds of the judgments, the Court does not seem to dwell on the death penalty legal regime.

7. As in its 2019 decision in *Rajabu et al.*,³ the Court in these three judgments invalidates Tanzania's mandatory death penalty provisions but allows the death penalty to persist in the Respondent State's system. It should have taken the opportunity to strengthen international law on this issue. This assessment of the law on the death penalty, which makes a distinction between crime and offence, should no longer be supported because of the evolution of international human rights law. The Court, a human rights court, should keep pace with the evolution of international law.
8. As long as it is the task of international jurisdictions to develop the clarity of human rights, it seems useful to recall that *the right to life and the sanctity of human life* are not associated with the death penalty, of which they are the strict antidotes. For this reason, it seems unfortunate that the three decisions of the Court have maintained the old legal regime that apply a variant of the death penalty (I.). Next, it will be clarified that the current situation in which Article 4 of the Charter operates and the evolution of human rights, imposes an interpretation that rejects any form of death penalty (II.).
- I. **"Keeping the death penalty alive" through three judgments/decisions**
9. Three judgments have just been delivered by the Court. Common to all three is the fact that they recall the 2019 *Rajabu and Others v Tanzania* decision and by doing so, they keep the death penalty alive.

A. Confirmation of the 2019 precedent

10. The operative part of its 2019 decision in *Ally Rajabu and others* states:
 - § 8: Finds that the Respondent State violated the right to life guaranteed under Article 4 of the Charter in relation to the provision in

3 v The Individual Opinions in the 2019 *Ally Rajabu et al.* decision, Justices Bensaoula Chafika and B. Tchikaya.

its penal Code for the mandatory imposition of the death penalty as it removes the discretion of the judicial officer;

§ 9: Finds that the Respondent State has violated the right to dignity protected under Article 5 of the Charter in relation to the provision for the execution of the death penalty imposed in a mandatory manner.

11. By these grounds, the Court deplores various infringements of fundamental rights, but, as it does in the judgments that follow, it does not reject the empire of the death penalty. This approach is once again the focus of attention in the three cases.

12. In the *Marthine Christian Msuguri* judgment of 2022 the Court states in its operative part that:

“v Finds that the Respondent State has violated the right to life protected under Article 4 of the Charter in relation to the provision in its Penal Code for the mandatory imposition of the death penalty as it removes the discretion of the judicial officer;

...

vii. Finds that the Respondent State has violated the Applicant's right not to be subjected to inhuman and degrading treatment protected under Article 5 of the Charter in relation to the lengthy pre-trial detention, detention in the death row, and confinement”.⁴

13. There is one particular element in this provision. The Court rejects and condemns the fact that the applicant was subjected to long pre-trial detention, detention on death row and confinement. This is somewhat contradictory, as the death penalty is indirectly validated. The death penalty has often been synonymous with death row and confinement.

14. *Last but not least*, the Court, once again, made a point of recalling its constant jurisprudence. In the instant case, the legality of the mandatory death penalty under international law is challenged.⁵ The United Nations Human Rights Committee had declared that the mandatory death penalty: “constitutes an arbitrary deprivation of life, in violation of article 6 of the *International Covenant on Civil and Political Rights*”.⁶ It is clear that:

“the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without any possibility of taking into account the

4 ACTHPR, *Marthine Christian Msuguri v Tanzania*, *op. cit.* at § 143.

5 ACTHPR, *Rajabu et al.*

6 Human Rights Committee, *Pagdayawon Rolando v Philippines*, Communication No 1110/2002, UN Doc. CCPR/C/82/ D/1110/2002, 8 December 2004, § 5.2. 99; UN Doc. E/CN.4/1999/39, 6 January 1999, § 63. 100; UN Doc. E/CN.4/2005/7, 22 December 2004, § 80. See also *Woodson v North Carolina*, 428 U.S. 280 (1976).

defendant's personal circumstances or the circumstances of the particular offence"⁷.

15. These words are repeated in the *Igola Iguna* decision. Paragraph 55 states that:

"Having held that the Respondent State did not violate the rights of the Applicant, the Court nevertheless reiterates its finding in its previous cases that the mandatory death penalty is a violation of the right to life among other rights in the Charter and should thus be expunged from the laws of the Respondent State. Furthermore, the Applicant should be given a hearing on the sentencing through a procedure that does not allow the mandatory imposition of the death sentence and which upholds the full discretion of the judicial officer".⁸

16. The Court typifies the Applicant *Iguna* in demonstrating the need to comply with international law. Thus, Mr. *Igola Iguna* was the subject of an erroneous procedure and should not have been sentenced to death.

B. The specificity of the *Ghati Mwita* judgment

17. The *Ghati Mwita* case does not depart from this. The operative part states:

"xiii. Finds that the Respondent State has violated the right to life of the Applicant, protected by Article 4 of the Charter by reason of the mandatory nature of the death penalty;

"ix. Finds that the respondent state has violated the right to dignity under Article 5 of the Charter by prescribing hanging as the method of execution of the death penalty".⁹

18. As a result, the state "violated the right to life" and acted contrary to international law and its evolution.
19. Two violations of fundamental rights are involved: the violation of life and the violation of human dignity.
20. The *Ghati Mwita* decision introduces the idea that hanging is unacceptable, unlike other methods of enforcing the death penalty, without saying which.¹⁰ Moreover, no execution technique humanizes the death penalty or makes it lawful. The same goes for hanging. Europe was not mistaken in adopting a set of Rules that is mandatory for all European States, which prohibit trade of

7 Human Rights Committee, PACE document 12223 on the situation in Belarus, 27 April 2010.

8 ACtHPR, *Igola Iguna v Tanzania*, *op. cit.* at § 55.

9 ACtHPR, *Ghati Mwita v Tanzania*, *op. cit.* at § 184.

10 Points ix of the operative part.

instruments used in the enforcement of the death penalty.¹¹

21. The Court confirmed its displeasure in *Amini Juma v Tanzania* in 2021,¹² a case that was of particular interest to the Court. In that case, on 15 December 2003, the Applicant was charged with murder and sentenced to life imprisonment. The Applicant appealed the conviction and sentence, and the Respondent State also appealed, seeking an upward review of the sentence. The Applicant's appeal was dismissed and his sentence of life imprisonment was replaced by a sentence of death by hanging, thus granting the Respondent State's appeal.
22. In the 2021 *Amini Juma* case, like the three 2022 cases, and regarding the Appeal Court substituting life imprisonment for capital punishment by hanging, the Court found that the Respondent State violated Article 5 of the Charter insofar as it allowed the death penalty to be carried out "through a brutal manner, that is, by hanging" (§ 132).¹³
23. This decision also emphasises that hanging a person is [...] inherently degrading. Furthermore, [...] the mandatory imposition of the death sentence violates the right to life due to its arbitrary nature [...], the method of implementation of that sentence, that is, hanging, inevitably encroaches upon the dignity of a person in respect of the prohibition of torture and cruel, inhuman and degrading treatment..¹⁴
24. This reasoning was also found in *Rajabu et al*:
The Court observes that many methods used to implement the death penalty have the potential of amounting to torture, as well as cruel, inhuman and degrading treatment given the suffering inherent thereto. In line with the very rationale for prohibiting methods of execution that amount to torture or cruel, inhuman and degrading treatment, the prescription should therefore be that, in cases where the death penalty is permissible, methods of execution must exclude suffering or involve the least suffering possible.
25. The central question of respect for the right to life and the strict observance thereof, enshrined in international human rights law, is once again raised.

11 EU, Regulation No 2019/125 *concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment*, 5 April 2019.

12 ACHPR, *Amini Juma v Tanzania*, 30 September 2021.

13 v AU Commission on Human and Peoples' Rights, *Case of Interights and Ditshwanelo v Republic of Botswana*, 18 November 2015: "where the death penalty is applied by a state party for the most serious crimes, it must be carried out in such a way as to cause the least possible physical and mental suffering".

14 ACtHPR, *Amini Juma v Tanzania*, 30 September 2021, § 136.

II. The right to life and the end of the death penalty are already enshrined in international law

26. The question of the death penalty regime in Africa and its inevitable demise is considered. The fact that the current regime is contrary to Article 4 of the African Charter on the right to life gives rise to this reflection. This last aspect, mentioned earlier, deserves to be updated.

A. Human rights and the death penalty

27. We can detail the bumpy path of the Arusha Court on this issue. The death penalty has evolved, before becoming contrary to international rules and fundamental freedoms, for example, Article 2 § 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that “No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law”. While the death penalty regime is still contrasted in the Inter-American system,¹⁵ the jurisprudence of the ECHR has followed the trend towards the abolition of the death penalty in Council of Europe member states, thereby following the footsteps of the European Court of Human Rights.¹⁶ Protocol No 13 is clear in its reference. It speaks of abolition of the death penalty “in all circumstances”.¹⁷
28. It seems reasonable to discuss the death penalty in relation to other human rights. This was the approach of the Inter-American Court when it examined the death penalty regime with the right to life, in *the Case of Martínez Coronado v Guatemala* of 10 May

15 The death penalty is maintained in one-third of OAS member states. Of the 14 states that apply it, 12 are now in the English-speaking Caribbean. However, none of them has carried out executions for more than a decade. The United States is the only OAS country that carries out executions.

16 ECHR, *Al-Saadoon and Mufdhi v United Kingdom*, 2010, § 116: Following the opening for signature of Protocol No 6 to the Convention, the Parliamentary Assembly of the Council of Europe established a practice whereby states wishing to join the Council of Europe had to commit themselves to an immediate moratorium on executions, to abolish the death penalty in their domestic legislation, and to sign and ratify Protocol No 6.

17 Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, on the abolition of the death penalty in all circumstances. All member states of the Council of Europe have now signed this protocol, and ratified it, except Russia. Article 1 on the abolition of the death penalty states that “The death penalty is abolished. No one shall be condemned to such a penalty or executed”.

2019.¹⁸ The Inter-American Court showed its leaning towards an “abolitionist tendency” in its interpretation of this form of punishment, which implies that the use of the death penalty is exceptional.¹⁹ Clearly, this represents progress on the part of the said court.

29. The Court, therefore, remained committed to its position expressed in the judgment, *Ally Rajabu and others* (28 November 2019). It did not take a new position. While impugning the laws of Tanzania on the mandatory death penalty, it allows the death penalty to continue; it only rejects and challenges the so-called mandatory death penalty in the three decisions under discussion.
30. In this, the Court says:

“Given the framing of Article 4 of the Charter, and the broader developments in international law in relation to the death penalty, the Court holds that this type of punishment should exceptionally be reserved only for the most heinous of offences committed in seriously aggravating circumstances”.²⁰
31. Thus, deplorably, the death penalty is maintained.
32. It is of interest to note that in *Marthine Christian Msuguri*, the Court is persuaded that although the applicant’s arguments are admissible, they cannot prosper because of domestic legislation. The Court refrains from going further.
33. The Court noted that:

In this respect, this Court recalls its position in *Gozbert Henerico v United Republic of Tanzania*²¹ where it found that the failure of the High Court to consider the medical evaluation report of the Applicant’s mental health status, constituted a grave procedural irregularity that resulted in a violation of the Applicant’s right to a fair trial, as guaranteed under Article 7(1) of the Charter²²

18 IACHR, *Martínez Coronado v Guatemala*, merits, reparations and costs, 10 May 2019, Series C, n° 376, § 62. v *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, 8 June 1990, OASTS no 73. v also *Restrictions to the Death Penalty* (1983), Advisory Opinion, OC-3/83, IACHR (Ser A) no 3; L. Hennebel, *The American Convention on Human Rights: Mechanisms of Protection and Scope of Rights and Freedoms*, Bruylant, 2007, Pref.

19 The wording of Article 4: on the right to life states that “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life”. And, paragraph 6 adds that “Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority. The Convention gives elements of maintenance and attachment to life”.

20 ACTHPR, *Ghati Mwita*, § 66.

21 ACTHPR, *Gozbert Henerico v Tanzania* (merits and reparations), § 160.

22 ACTHPR, *Msuguri v Tanzania*, § 72.

In sum, the Court finds the insanity argument valid, but it cannot defeat the argument of the current death penalty legislation. One might think of the image of the *Wolf and the Lamb*, so dear to the fabulists.

B. Article 4 of the African Charter and total abolition of the death penalty

34. Relying on Article 4, which protects the right to life by declaring it sacred and inviolable,²³ the Court, in *Ghati Mwita*,²⁴ acknowledged the two trends, global and African, towards abolition of the death penalty. It acknowledged that

“[...] a global trend towards the abolition of the death penalty, including the adoption of the Second Option Protocol to the International Covenant on Civil and Political Rights (ICCPR)”²⁵ § 64.

However, the Court supports its position by arguing that:

“At the same time, [...] the death penalty remains on the statute books of some states and that no treaty, on the abolition of the death penalty has gained universal ratification.²⁶ Presently, the Second Optional Protocol to the ICCPR, the Court notes, has ninety (90) State Parties out of the one hundred-seventy three (173) State Parties to the ICCPR”, § 64.

35. The Court takes up the same idea in *Igola Iguna* where stands as an *obiter dictum* protecting the right to life:

“Having held that the Respondent State did not violate the rights of the Applicant, the Court nevertheless reiterates its finding in its previous cases that the mandatory death penalty is a violation of the right to life among other rights in the Charter and should thus be expunged from the laws of the Respondent State. Furthermore, the Applicant should be given a hearing on the sentencing through a procedure that does not allow the mandatory imposition of the death sentence and which upholds the full discretion of the judicial office”.²⁷

23 Trindade Antonio Augusto Cançado, The Inter-American Human Rights Protection System: Current Status and Prospects for Evolution at the Dawn of the 21st Century, *AFDI*, 2000, p. 548.

24 *Ghati Mwita* judgment, §§ 64 and 65.

25 *Amini Juma v United Republic of Tanzania*, ACTHPR, Application No 024/2016, Judgment of 30 September 2021 (merits and reparations), § 122 and *Ally Rajabu and others v United Republic of Tanzania*, ACTHPR, Application No 007/2015, Judgment of 28 November 2019 (merits and reparations), § 96. It should be noted that the Respondent State is not a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights.

26 For more comprehensive information on developments relating to the death penalty, see, United Nations General Assembly, Secretary-General's report on a moratorium on the use of the death penalty 8 August 2022.

27 Judgment, *Igola Iguna v Tanzania*, § 55.

36. The African continent is joining the international movement whose goal is the total abolition of the death penalty. 20 out of the 55 member states of the African Union (AU), no longer execute those sentenced to death, and nearly forty countries are abolitionist in law or in practice. It is possible to say that the majority of these states refuse this ultimate sanction.²⁸ It is well known that “the Respondent State violated Article 1 of the Charter by failing to amend its Penal Code which permits the mandatory death sentence as well as execution by hanging”.²⁹ It was, therefore, up to the Court to place this violation in its legal context: in addition to the right to life, the application of the death penalty was at stake.
37. This issue falls under the ambit of individual states, which determine their criminal policy and the hierarchy of penalties enshrined in their criminal law. As has already been written, the concept of reservation takes on its full meaning in international law. It applies to those “matters which are essentially within the domestic jurisdiction of a State”, within the meaning of Article 2(7) of the Charter,³⁰ and which are subject to their international commitments. The Court, using its praetorian power, should give impetus to this movement in order to uphold the right to life.
38. The European system, which, through Article 3 of its last Protocol prohibiting the death penalty, excludes reservations, sets the tone. It states that “No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol”. The Protocol takes care to emphasise that “The death penalty shall be abolished. No one shall be condemned to such penalty or executed.”³¹ It is further states that this constitutes a “final step in order to abolish the death penalty in all circumstances”.³²
39. In support of this opinion, it is useful to recall that the superiority of international law is a principle applicable to all categories of internal procedural and material rules. This commitment is sovereignly negotiated and fixed by the State with its peers. It is therefore up to the States to adapt their legal system. It is not certain that, for the law of treaties, States lose their sovereignty

28 As of this date, Congo-Brazzaville and Madagascar having abolished capital punishment in 2015 and Guinea in 2016 are the last African abolitionist states.

29 *Idem*, § 14.

30 Schabas (W.), *The abolition of the death penalty in International Law*, Grotius, Cambridge, 1993, 384 p.

31 Article 1, Protocol No 13, *Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances*, Vilnius, 3 May 2002

32 *Idem*, preamble to the Protocol

by their international commitment.³³

III. Conclusion

40. If the Court fails to keep up with the advances in international law, it is bound to be “caught up” by the international law patrol. Human rights doctrine and jurisprudence will note this. While listening to the majority position of my honourable colleagues, a question deserves to be asked: How can we understand that the Court maintains its jurisprudence behind the evolution of the applicable international law. There would be two regimes: one favourable to the full protection of the right to life³⁴ and the other less favourable.³⁵ A harmonization is necessary.

33 Whatever its relationship with international law, a State only commits itself to rights and duties which, when accepted by other States, become the law in force. This law takes precedence, otherwise it is unlawful. This also applies to its supranational relations in the field of human rights. A well-known formula of the Permanent Court underlines this. v P.C.I.J., A.C., *Pecuniary claims of Danzig railway employees who have entered Polish service against the Polish railway administration* (Jurisdiction of the Danzig courts), 3 March 1928, *Rec. Serie B*, No 15, pp. 18. In this same case, the Hague Court laid down the principle of the non-invocability of constitutional provisions against international law: “a State cannot, vis-à-vis another State, rely on the constitutional provisions of the latter but only on international law and international commitments validly entered into, on the other hand, and conversely, a State cannot invoke vis-à-vis another State its own Constitution in order to evade the obligations imposed upon it by international law”, *Treatment of Polish Nationals in Danzig*, 4 February 1932, Series A/B, No 44, pp. 24.

34 Breillat (D.), *L’abolition mondiale de la peine de mort*, A propos du 2e Protocole facultatif se rapportant au Pacte international relatif aux droits civils et politiques visant à abolir la peine de mort, *RSC*, 1991, p. 261.

35 The 2019 *Rajabu et al.* decision, and other 2022 decisions from this perspective, reflect a limited reading of Article 4 of the Charter.

Mwambipile & Anor v Tanzania (ruling) (2022) 6 AfCLR 925

Application 042/2020, *Tike Mwambipile and Equality Now v United Republic of Tanzania*

Ruling, 1 December 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA, SACKO and ADJEI

Recused under Article 22: ABOUD

The Applicants, a female citizen of the Respondent State and a non-governmental organisation with observer status before the African Commission on Human and Peoples' Rights, filed this Application. They alleged that the Respondent State's policy that bans pregnant and parenting girls from having access to public schools and education violates some Charter protected rights. In response to communication from the Court, the African Committee of Experts on the Rights and Welfare of Children in Africa informed the Court that a similar matter against the Respondent State was pending before it. In this ruling, the Court held that the Application was inadmissible because the matters in contention had been settled by another international forum.

Jurisdiction (material jurisdiction, 26-27)

Admissibility (settlement in accordance with AU principles, 43-61; cumulative nature of requirements 63)

Dissenting Opinion: TCHIKAYA

Admissibility (settlement in accordance with AU principles, 8-10)

Dissenting Opinion: BEN ACHOUR

Admissibility (settlement in accordance with AU principles, 3-4, 10)

Separate Opinion: BENSAOULA

Admissibility (settlement in accordance with AU principles, 5-7)

I. The Parties

1. The Applicants are Tike Mwambipile, a female national of the United Republic of Tanzania and Equality Now, a Non-Governmental Organisation (NGO) with Observer Status before the African Commission on Human and Peoples' Rights (hereinafter referred to as "the African Commission"). They challenge the Respondent State's policies that exclude pregnant and parenting girls from public schools.
2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples'

Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration provided for under Article 34(6) of the Protocol (hereinafter referred to as “the Declaration”), by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission an instrument withdrawing its Declaration. The Court has held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect, that is, one (1) year after its deposit, which is on 22 November 2020.¹

II. Subject of the Application

A. Facts of the matter

3. The Application concerns an alleged ban by the Respondent State of pregnant girls from attending public primary and secondary schools and preventing them from re-accessing the schools even after delivery. The Applicants allege that the ban violates the rights to education and non-discrimination.

B. Alleged violations

4. The Applicants allege that the Respondent State violated the rights of all girls in the Respondent State, notably:
 - i. The right to education protected by:
 - a. Articles 1 and 17(1) of the Charter;
 - b. Article 11 of the African Charter on the Rights and Welfare of the Child (hereinafter referred to as “the African Children’s Charter”);
 - c. Article 12 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (hereinafter referred to as “the Maputo Protocol”);
 - d. Articles 13 and 23 of the African Youth Charter;
 - e. Article 10 of the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter referred to as “CEDAW”);

¹ *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application No 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.

- f. Articles 28 and 29 of the Convention on the Rights of the Child (hereinafter referred to as “the CRC”);
 - g. Article 13 of the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as “ICESCR”);
 - h. Article 18(4) of the International Covenant on Civil and Political Rights (hereinafter referred to as “ICCPR”);
 - i. Articles 1, 3 and 4 of the United Nations Educational, Scientific and Cultural Organization Convention against Discrimination in Education (hereinafter referred to as “the Convention against Discrimination in Education”); and
 - j. Article 26 of the Universal Declaration of Human Rights.
- ii. The right to non-discrimination protected by:
- a. Articles 1, 2, 17(1) and 18(3) of the Charter;
 - b. Articles 1, 3, 4, 11 and 24 of the African Children’s Charter;
 - c. Articles 2 and 12 of the Maputo Protocol; and
 - d. Articles 1, 2, 3 and 4 of the Convention against Discrimination in Education.

III. Summary of the Procedure before the Court

5. The Application was filed on 19 November 2020 together with a request for provisional measures.
6. On 22 December 2020, the main Application together with the request for provisional measures and additional evidentiary documents were served on the Respondent State.
7. On 23 April 2021, the Registry wrote to the African Committee of Experts on the Rights and Welfare of the Child (hereinafter referred to as “the ACERWC”) and to the African Commission to seek confirmation whether the subject matter of this Application is related to a matter being examined by them. It also requested whether the ACERWC or the Commission, or through any of their Special Mechanisms, would be interested to act as *amicus curiae* in the case.
8. On 29 July 2021, the ACERWC informed the Court that it had received a similar communication as the present Application which was pending determination. The ACERWC further informed the Court that it had already declared the Communication submitted to it admissible and had communicated to the Applicants and the Respondent State that it would hold a hearing of the case in its upcoming Session to be held in November 2021. The hearing was scheduled during its previous 37th Session, however, it was deferred to the 38th Session due to the sudden passing of the late president of the Respondent State in the week of the hearing.

The ACERWC also informed the Court that since it was already considering the matter under its jurisdiction, it had decided that it would not be in the position to act as *amicus curiae*.

9. The African Commission did not respond to the Court's request.
10. On 24 September 2021, the Court wrote to the Registrar of the East African Court of Justice to seek confirmation whether the subject matter of this Application was related to a matter being examined by the East African Court of Justice.
11. On 4 October 2021, the Registrar of the East African Court of Justice informed the Court that there was a reference filed with the East African Court of Justice on the same subject matter as the present Application challenging the expulsion of pregnant girls backed by the Education (Expulsion and Exclusion of Pupils from Schools) Regulations which was pending determination.
12. On 29 November 2021, the Court decided to consider the request for provisional measures together with the merits of the Application.
13. On 21 February 2022, the Court requested the Respondent State to inform the Court about recent developments, if any, relating to this matter since the submission of its Response.
14. On 22 July 2022, the Respondent State filed submissions on the measures it had taken to address the issues raised by the Applicants in the present Application.
15. The Parties filed their pleadings within the time stipulated by the Court.
16. On 16 September 2022, the ACERWC submitted to the Court its decision in *Communication No: 0012/Com/001/2019 in the matter between Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) against the United Republic of Tanzania*, regarding the expulsion of pregnant girls and mothers from schools in the Respondent State, which it adopted during its 39th Ordinary Session held from 21 March to 1 April 2022.
17. During the proceedings before this Court, seven (7) organisations filed *amicus curiae* briefs which were duly notified to the Parties. These are: (i) Tanzanian Commission for Human Rights and Good Governance; (ii) Amnesty International; (iii) UNESCO; (iv) Tanzania Women Lawyers Association (TAWLA); (v) Msichana Initiative; (vi) Clooney Foundation for Justice; and (vii) a joint brief by the Initiative for Strategic Litigation in Africa (ISLA), Human Rights Watch (HRW) and Women's Link Worldwide.

18. Pleadings were closed on 22 September 2022 and the parties were duly notified.

IV. Prayers of the Parties

19. The Applicants pray the Court to:

- i. Declare that the expulsion and exclusion of pregnant girls and adolescent mothers from accessing public education in the Respondent State violates their right to education.
- ii. Declare that the current policy implemented by the Respondent State that prohibits pregnant girls and adolescent girls from attending school both in written policy and in State declarations is grossly unlawful, discriminatory, not in the best interest of the child and that it violates their right to non-discrimination.
- iii. Order the Respondent State to immediately revoke the prohibitive policy (both the expulsion regulation and implementation of declarations) and amend its legislation to protect the right to education.
- iv. Order the Respondent State to immediately repeal Regulation No 4 of the Education Regulations (Expulsion and Exclusion of Pupils from Schools) of 2002 to remove “wedlock” as a ground for expulsion and amend the Marriage Act of 1971 to harmonize the age of marriage to 18 for both boys and girls.
- v. Order the Respondent State to develop strategies, programmes and nationwide campaigns that focus on addressing the issue of teenage pregnancies through public education or awareness on sexual and reproductive health and rights as well as on ending child marriages, as this increased community knowledge on family planning and contraceptives will support efforts to address the high rate of teenage pregnancies.
- vi. Order the Respondent State to develop strategies and nationwide campaigns to enable teenage mothers to attend school. This may range from providing subsidies to enable girls with children to attend school, to developing alternative schooling offering the same quality and standard of education as offered in mainstream schools as well as developing and implementing relevant re-entry policies for girls who have given birth.
- vii. Order the Respondent State to put in place constitutional, legislative and administrative measures to guarantee the right to education, including its enforceability domestically, as well as a right to remedies, including reparations, and eradicate discriminatory laws and policies that impede the right to education within six (6) months.
- viii. Order the Respondent State to report to the Court within a period of six (6) months from the date of judgment on the implementation of this judgment and consequential orders.

- ix. Order the Respondent State to publish the judgment in this matter on the official website of its judiciary and of the Ministry responsible for legal affairs, within two (2) months from date of notification of the decision.
 - x. Declare violations of other human rights which were not specifically mentioned by the Applicants in this Application.
 - xi. Issue any other remedy and/or relief that the Court will deem necessary to grant.
 - xii. Order the Respondent State to pay the Applicants' costs.
- 20.** In its Response, with regard to the Court's jurisdiction and admissibility of the Application, the Respondent State prays the Court to order as follows:
- i. That the African Court on Human and Peoples' Rights is not vested with jurisdiction to adjudicate the Application.
 - ii. The Application has not met the admissibility requirements provided by Article 56 of the Charter and Rule 50 of the Rules.
 - iii. The Application be declared inadmissible.
 - iv. That the Application be dismissed.
- 21.** The Respondent State prays the Court to grant the following orders with respect to the merits of the Application:
- i. That the Respondent State has not violated Article 17(1) of the Charter, Article 11 of the African Children's Charter, and Article 12 of the Maputo Protocol.
 - ii. That the Application be dismissed for want of merit.
 - iii. That the cost of the Application be borne by the Applicants.

V. Jurisdiction

- 22.** The Court observes that Article 3 of the Protocol provides as follows:
- 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
 - 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
- 23.** The Court further observes that pursuant to Rule 49(1) of the Rules, it "shall conduct a preliminary examination of its jurisdiction [...] in accordance with the Charter, the Protocol and these Rules."
- 24.** In view of the foregoing, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.
- 25.** The Court notes that the Respondent State claims that it is not vested with jurisdiction to adjudicate this application because the

Applicants are aggrieved with the public declarations issued by some of the Respondent State's officials and Regulation No 4 of the Education Regulations (Expulsion and Exclusion of Pupils from Schools) of 2002 which are both challengeable under the national courts of the Respondent State in accordance with the provision of the Law Reform (Fatal Accident and Miscellaneous Provision) Act.

26. The Court recalls that by virtue of Article 3 of the Protocol, it has material jurisdiction so long as "the Application alleges violations of provisions of some of the international instruments to which the Respondent State is a party".² In the instant matter, the Applicants allege violations of rights guaranteed in the Charter and in other international human rights instruments ratified by the Respondent State.³
27. In light of the above, the Court dismisses the Respondent State's objection and holds that it has material jurisdiction.
28. Noting that nothing on record shows that it does not have jurisdiction in respect of other aspects of its jurisdiction, the Court holds that it has:
 - i. Personal jurisdiction, given that the Respondent State is a party to the Protocol and had deposited the Declaration under Article 34(6) thereof, which entitled the Applicants to access the Court in terms of Article 5(3) of the Protocol. In reference to paragraph 2 of this judgment, the Court recalls that it has held that the withdrawal of the Declaration does not have any retroactive effect and has no bearing on matters pending prior to the filing of the instrument withdrawing the Declaration, or on new cases filed before the withdrawal takes effect.⁴ This Application, having been filed before the withdrawal took effect, is thus not affected by it.
 - ii. Temporal jurisdiction, given that the alleged violations took place after the ratification of the Charter, the Protocol and the depositing of the Declaration by the Respondent State.
 - iii. Territorial jurisdiction, given that the facts on which the alleged violations are based occurred in the territory of the Respondent State.

2 See *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 36.

3 The Respondent State became a State Party to the Charter on 21 October 1986, to the African Children's Charter on 9 May 2003, to the Maputo Protocol on 7 May 2007, to the African Youth Charter on 21 March 2013, to CEDAW on 19 September 1985, to CRC on 10 July 1991, to ICESCR on 11 September 1976, to ICCPR on 11 September 1976 and to Convention against Discrimination in Education on 3 April 1979.

4 *Andrew Ambrose Cheusi v United Republic of Tanzania*, §§ 35-39.

29. In light of the above, the Court holds that it has jurisdiction to hear the present Application.

VI. Admissibility

30. Pursuant to Article 6(2) of the Protocol, “The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.

31. In line with Rule 50(1) of the Rules, “the Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules.”

32. The Court notes that Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

Applications filed before the Court shall comply with all of the following conditions:

- a. Indicate their authors even if the latter request anonymity;
- b. Are compatible with the Constitutive Act of the African Union and with the Charter;
- c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
- d. Are not based exclusively on news disseminated through the mass media;
- e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
- f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
- g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of African Union or the provisions of the Charter.

33. The Court notes that the Respondent State raises three objections to the admissibility of the Application. The Court will, therefore, consider first (A) the said objections, and then examine (B) other conditions of admissibility, as applicable.

A. Objections to the admissibility of the Application

34. The Respondent State raises three objections to the admissibility of the Application. The first objection relates to the contention that similar applications are already pending before the ACERWC and

the East African Court of Justice. The second objection relates to the requirement of exhaustion of local remedies and the third one concerns the question whether the Application was filed within a reasonable time.

35. Concerning the first objection, the Respondent State contends that a communication which raises similar allegations to the instant Application had been filed before the ACERWC, namely, *Communication No: 0012/Com/001/2019 in the matter between Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) against the United Republic of Tanzania*.
36. The Respondent State submits that the communication before the ACERWC raises allegations with respect to the right to education and non-discrimination as protected by the Charter and other regional and international instruments, including the African Children's Charter. The Respondent State refers to some of the allegations in the said communication, including the allegation that girls in primary and secondary school who are found to be pregnant are expelled from school with no possibility of re-admission.
37. Furthermore, the Respondent State refers to another Application instituted before the East African Court of Justice, namely *Reference No 10 of 2020 Inclusive Development for Citizens and Center for Strategic Litigation versus the Attorney General of the United Republic of Tanzania*, which it claims also raises similar allegations to the instant Application.
38. The Respondent State argues that under the circumstances, the instant Application cannot be admissible as similar allegations have been raised and are awaiting determination before another international forum with jurisdiction to determine it. The Respondent State submits that this Application is a fit case to apply the doctrine of *res subjudice* so as to prohibit two international courts of competent jurisdiction to simultaneously determine a matter raising similar allegations.

39. The Applicants claim that the Rules do not recognise *res subjudice* as per Rule 50(2)(g) of the Rules which restates in substance Article 56(7) of the Charter.

40. The Applicants submit that the question of the illegality of the education ban premised on Regulation No 4 of the Education Regulation (Expulsion and Exclusion of Pupils from Schools) and cemented by the public declarations as a government policy are yet to be determined by any forum of equivalent jurisdiction to the Court.
41. The Applicants maintain that the cases at issue were lodged by different parties, that they deal with distinguishable matters, are founded on different arguments and that no decision has been made by another body on the merits of the cases.
42. The Applicants, therefore, contend that since there are no similar applications that have been settled before courts of equivalent jurisdiction, that the Application before the Court does not fall within Article 56(7) of the Charter and is for that reason admissible.

43. The Court notes that the Respondent State avers that the applicable admissibility rule in the instant matter is that of *res subjudice*. However, the Court notes from the record that the ACERWC has already adopted its decision No 002/2022 in *Communication No: 0012/Com/001/2019 in the matter between Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) against the United Republic of Tanzania* during its 39th Ordinary Session held from 21 March to 1 April 2022.
44. The Court is, therefore, of the view that the issue at hand is no longer a question of *res subjudice*, but rather whether the matter has been settled in accordance with the principles of one of the instruments invoked in Article 56(7) of the Charter.
45. The Court notes that pursuant to Article 56(7) of the Charter, whose provisions are restated in Rule 50(2)(g) of the Rules, any application filed before it shall fulfil the requirement that they “[d]o not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of African Union or the provisions of the Charter”.
46. The Court recalls that the rationale behind the rule in Article 56(7) of the Charter is to prevent States from being asked to account more than once in respect of the same allegations of human

rights.⁵

47. The Court further recalls that in its earlier decisions in *Gombert Jean-Claude Roger v Republic of Côte d'Ivoire*⁶ and *Dexter Eddie Johnson v Republic of Ghana*,⁷ it developed three cumulative criteria to determine whether the admissibility criteria established in Article 56(7) of the Charter and Rule 50(2)(g) of the Rules have been met.
48. The Court stated in *Dexter Eddie Johnson v Republic of Ghana* that:

the notion of “settlement” implies the convergence of three major conditions: (1) the identity of the parties; 2) identity of the applications or their supplementary or alternative nature or whether the case flows from a request made in the initial case; and 3) the existence of a first decision on the merits.⁸
49. Regarding the first criterion, “identity of the parties”, the Court notes that the Respondent State in the proceedings before the ACERWC and in the present Application is the same. The Court notes, however, that the Applicants in the proceedings are different.⁹ Before the ACERWC, the Communication was filed by two NGOs, namely, the Legal and Human Rights Center and the Center for Reproductive Rights. Before the Court, the Application was filed by an individual and a different NGO, that is, Tike Mwambipile and Equality Now.
50. The Court considers, however, that both cases can be qualified as instances of public interest litigation. As the Court has established in its jurisprudence, the identity of parties in different Applications can be considered as being similar to the extent that they both aim to protect the interest of the public at large, rather than only

5 *Dexter Eddie Johnson v Republic of Ghana* (jurisdiction and admissibility) (28 March 2019) 3 AfCLR 99, § 55.

6 *Gombert v Côte d'Ivoire* (jurisdiction and admissibility) (2018) 2 AfCLR 270, § 45.

7 *Dexter Eddie Johnson v Republic of Ghana* (jurisdiction and admissibility) (28 March 2019) 3 AfCLR 99, § 48.

8 *Dexter Eddie Johnson v Republic of Ghana* (jurisdiction and admissibility) (28 March 2019) 3 AfCLR 99, § 48.

9 Before the ACERWC, the Application was brought on 17 June 2019 by two NGOs, the *Legal and Human Rights Center and the Center for Reproductive Rights*. Before the East African Court of Justice, the Application was brought on 24 April 2020 by two NGOs, *Inclusive Development for Citizens* and *Center for Strategic Litigation*. Before the African Court on Human and Peoples' Rights, the Application was brought on 19 November 2020 by a female national and an NGO, *Tike Mwambipile and Equality Now*.

specific private interests.¹⁰

51. Accordingly, the Court holds that the criterion of “same identity” of the parties has been met.
52. The second criterion concerns the similarity of the subject-matter of the applications. When considering the subject-matter of the applications, it becomes apparent that both applications challenge the same law, that is Regulation No 4 of the Education Regulations (Expulsion and Exclusion of Pupils from School) of 2002, and the same practice of excluding pregnant and young mothers from schools as well as other associated discriminatory practices, including mandatory pregnancy testing.
53. In the application before the ACERWC, the Applicants also claim, among others, that the right to non-discrimination and the right to education, is violated, as enshrined in Articles 3 and 11, respectively, of the African Children’s Charter. In their Communication they also argue that, in accordance with Article 46, the African Children’s Charter should be interpreted with reference to the African Charter, the Maputo Protocol, the CRC as well as other international human rights instruments. Specifically, and in relation to the present Application, the Applicants before the ACERWC refer to Article 2 (right to non-discrimination) and 17 (right to education) of the Charter as corresponding Articles to guarantee children’s right to non-discrimination and to education.
54. From these applications it also emerges that the same reliefs are sought, namely the establishment of a violation of the same provisions enshrined in the above-mentioned human rights treaties; orders to change the same legal and policy frameworks governing the issue of exclusion of pregnant girls and young mothers; orders to address the underlying issue of teenage pregnancies and inadequate sexual and reproductive education and health services.
55. The Court notes, in particular, the ACERWC’s decision in paragraph 109 where it is stated as follows:
 109. Based on the foregoing analysis, the Committee finds the Respondent State in violation of its obligations under article 1 (obligation of states parties), article 3 (non-discrimination), article 4 (best interests of the child), Article 10 (protection of privacy) article 11 (education), Article 14 (health and health services), Article 16 (protection against child abuse and torture), and article 21 (protection against harmful social and cultural practices). The Committee, therefore, recommends for the Respondent State to:

10 *Suy Bi Gohoré Emile & 8 Others v Republic of Côte d’Ivoire*, ACTHPR, Appl. No 044/2019, Judgment of 15 July 2020 (merits and reparations), § 105.

- Immediately prohibit mandatory pregnancy testing in schools and health facilities and publicly announce the prohibition;
- Review the Education (Expulsion and Exclusion of Pupils from School) Regulations, 2002 G.N. No 295 of 2002 and in doing so remove wedlock as a ground of expulsion and provide an indication that the moral ground of expulsion should be interpreted narrowly and should not apply in cases of pregnancy of schoolgirls;
- Undertake concrete steps to prevent the expulsion of pregnant and married girls from schools including by providing laws and policies on the same;
- Remove any policy of non-re-entry of schoolgirls including girls who have drop-out of school due to pregnancy or wedlock;
- Immediately re-admit schoolgirls who have been expelled due to pregnancy and wedlock and provide special support programmes to compensate for the lost years and ensure better learning outcomes for the returned girls;
- Provide clear guidance to school administrators that girls who drop out of school due to pregnancy or wedlock with their preference are allowed to come back to school with no preconditions;
- Investigate the cases of detention of pregnant girls and immediately release detained pregnant girls who are being interrogated to reveal who impregnated them and stop such kinds of illegal arrests of pregnant girls;
- Provide sexuality education for adolescent children and provide child friendly sexual reproductive and health services;
- Undertake extensive sensitization of teachers, health care providers, police and other actors with regards to the protection that should be accorded to pregnant and married girls;
- Undertake proactive measures towards the elimination of child marriage and other harmful practices that affect girls including by taking measures to address the underlying factors such as gender-based discrimination, poverty, and negative customary and societal norms;
- Create a conducive reporting and referral mechanism for survivors of sexual violence including child marriage, and provide psychosocial support, rehabilitation and reintegration services for the survivors;
- Investigate and prosecute perpetrators of sexual violence and child marriage;
- Take action against any actors who conduct forced pregnancy testing of any kind, or who discriminate against girls on the grounds of their pregnancy or marital statuses such as expulsion and detention; and

- Provide special support to pregnant and married girls to continue their education in a school of their choice and based on their consent.
56. The Court further notes that the ACERWC in its communication only found violations of the African Children's Charter and not of the Charter and of the other international legal instruments to which the Respondent State is a party. However, the Court also notes that the principles contained in the African Children's Charter, on which the ACERWC gave its views, overlap with the principles provided for in the provisions of the Charter and other human rights instruments referenced by the Applicants.¹¹
 57. Substantively, therefore, the Court considers that the ACERWC adjudicated on the same issues that the Applicants have brought before this Court.¹² The Court, therefore, finds that the second criterion has been met.
 58. Concerning the third criterion which interrogates whether a first decision on merits exists, the Court notes that the ACERWC, as an "institution that is legally mandated to consider the dispute at international level",¹³ has delivered a decision on merits.
 59. The Court, therefore, finds that this criterion has been met.
 60. In sum, the Court finds that the cumulative criteria set out in the cases *Gombert Jean-Claude Roger v Republic of Côte d'Ivoire* and in *Dexter Eddie Johnson v Republic of Ghana* relating to the admissibility requirement established in Article 56(7) have been fulfilled.
 61. For this reason, the Court finds that the instant Application raises issues that have already been settled within the meaning of Article 56(7) of the Charter and holds that this admissibility requirement has not been met.

B. Other conditions of admissibility

62. The Court recalls that the conditions of admissibility of an application filed before it are cumulative, such that if one condition

11 By way of example, Article 3 of the African Children's Charter provides for the right to non-discrimination, and this is mirrored by Article 2 of the Charter; and Article 11 of the African Children's Charter provides for the right to education and this is captured in Article 17 of the Charter.

12 *Dexter Eddie Johnson v Republic of Ghana* (jurisdiction and admissibility) (28 March 2019) 3 AfCLR 99, § 52.

13 *Dexter Eddie Johnson v Republic of Ghana* (jurisdiction and admissibility) (28 March 2019) 3 AfCLR 99, § 51.

is not fulfilled then the application becomes inadmissible.¹⁴ In the present case, since the Application has already been settled, the Court finds that the Application is inadmissible. The Court, therefore, dismisses it without needing to examine the other objections to admissibility raised by the Respondent State and the other admissibility requirements set out under Article 56 of the Charter and Rule 50 of the Rules.

VII. On the request for provisional measures

63. The Court recalls that on 29 November 2021, it had decided that it would consider the Applicants' request for provisional measures together with the merits of the Application.
64. The Court notes, however, that the present decision renders the said request moot.

VIII. Costs

65. The Applicants pray that the Court orders the Respondent State to pay their costs.
66. The Respondent State prays that costs be borne by the Applicants.

67. The Court notes that Rule 32(2) of the Rules of Court provides that: "unless otherwise decided by the Court, each party shall bear its own costs, if any".
68. The Court finds that there is nothing in the instant case warranting it to depart from this provision.
69. Consequently, the Court orders that each party shall bear its own costs.

¹⁴ *Jean Claude Roger Gombert v Côte d'Ivoire* (jurisdiction and admissibility) (22 March 2018) 2 AfCLR 270, § 61; *Dexter Eddie Johnson v Republic of Ghana* (jurisdiction and admissibility) (28 March 2019) 3 AfCLR 99, § 57.

IX. Operative part

70. For these reasons,
The Court

On jurisdiction

Unanimously,

i. *Declares* that it has jurisdiction.

On admissibility

By a majority of Eight (8) for, and Two (2) against, Justice Blaise TCHIKAYA and Justice Rafaâ BEN ACHOUR Dissenting

ii. *Declares* that the Application is inadmissible.

On costs

Unanimously,

iii. *Orders* that each Party shall bear its own costs.

Dissenting Opinion: TCHIKAYA

1. Regretfully, I am unable to agree with my honourable colleagues regarding the outcome of this case. The majority position did not seem to me to be well-founded.
2. It would have been more appropriate for the Court to render a decision on this major rights issue, unless there was a better reason for not doing so. This Opinion deplores the fact that it did not, although there was reason and cause to do so.
3. I regret that I cannot associate myself with the majority decision of the Court rendered by my Honourable Colleagues. The decision delivered on 1 December 2022 in the case of *Tike Mwambipile and Equality Now v Tanzania* does not seem to me to be sufficiently reasoned.

I. A partial perception

4. *Madam Tike Mwambipile*, a Tanzanian applicant associated with *Equality Now*, a non-governmental organization (NGO), challenged the Respondent State's rules and guidelines expelling

pregnant girls and adolescent mothers from public schools.¹

5. As is often the case in human rights matters, major rights are at stake in the instant case, which, we stress, requires the Court to decide accordingly.² In addition to the African Charter on Human and Peoples' Rights, this dispute over young children deprived of education is at the confluence of at least four international human rights instruments. The first is the *African Charter on the Rights and Welfare of the Child* (1990, Article 11); the second is the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2003, Article 12 of the Maputo Protocol); the third is the *African Youth Charter* (2006, Articles 13 and 23); and last but not least, the *Convention on the Elimination of All Forms of Discrimination against Women* (1979, Article 10). The Court could therefore not have failed to appreciate the legal gravity of the subject.
6. In the deliberations that followed the close of pleadings, the Court considered a question that relates to one of the three objections to admissibility raised by the Respondent State, namely, whether the case before the Court did not fall under the ambit of Article 56.7 of the African Charter on Human and Peoples' Rights in the sense that the Court's jurisdiction does not extend to:
(...) matters which have been settled by the States concerned in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union or the provisions of the Charter.

II. A partial assessment of Article 56(7)

7. In § 46 of the judgment, the Court rightly recalls that the purpose of Article 56(7) of the Charter is to prevent a case being brought against member states more than once for the same human rights violations. The result is twofold: a) the Court finds a violation of human rights; b) it decides if the Respondent State is legally liable for the said violations. It is worth recalling here that the Committee on the Rights and Welfare of the Child (ACERWC) issues well-advised communications but does not bring proceedings against States.

1 Pregnant girls were barred from attending public primary and secondary schools, even after giving birth, which, in the view of the Applicant, is discriminatory and violates the right to education.

2 No less than seven (7) organizations filed *amicus curiae* briefs: (i) the Tanzanian Commission for Human Rights and Good Governance; (ii) Amnesty International; (iii) UNESCO; (iv) Tanzania Women Lawyers Association (TAWLA); (v) Msichana Initiative; (vi) Clooney Justice Foundation; and (vii) Initiative for Strategic Litigation in Africa (ISLA), Human Rights Watch (HRW) and Women's Link Worldwide who submitted joint comments. See § 7 of the Judgment.

8. In paragraph 47, the Court recalls its previous decisions³ in which it set out three cumulative criteria for determining whether the admissibility requirements under Article 56(7) of the Charter and Rule 50(2)(g) of the Rules have been met. It would appear that the Court does not interpret them in a meaningful way. The outcome and settlement of this dispute does not appear to have taken into account key issues. Article 56(7) clearly provides that the jurisdiction of the Court does not extend to “[...]cases which have been settled by these States involved [...]”. For the sake of clarity, it would have been useful under Article 56(7) to demonstrate how the case could be considered settled.
9. While the Committee “shall draw inspiration from international law on human rights, particularly from the provisions of the African Charter on Human and Peoples’ Rights [...]”,⁴ the Committee’s mandate and procedures under Article 42 of the Charter are to “promote and protect the rights enshrined” in the Charter. The idea of promotion goes hand in hand with the idea of protection. There is no binding decision-making authority conferred on the Committee, other than its power to make proposals. However, this latter power does not in any way settle the instant case.
10. While the Committee produces Reports and Communications, it does not initiate legal proceedings against States. It does not produce the category of proceedings referred to in Article 56(7) of the Charter. It must be understood that international customary law recognises and approves all international dispute settlement initiatives.⁵ But this is another matter altogether. Such an initiative does not invalidate the proceedings before a court properly seized.
11. In any case, I fully agree with the finding that: “the ACERWC did indeed deliver [a] decision⁶ [...] the latter is merely a recommendation which does not decide the case or, to use the terms of Article 56 § 7 of the Charter, does not ‘settle’ the case

3 *Dexter Eddie Johnson v Ghana* (28 March 2019) 3 AfCLR 99, § 55; *Gombert v Côte d’Ivoire* (2018) 2 AfCLR 200, § 45.

4 Article 46 of the African Charter on the Rights and Welfare of the Child, 1990.

5 For this reason, the International Court of Justice (ICJ) recognizes that “before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by means of diplomatic negotiations”, ICJ, *Concessions in Palestine and Jerusalem, Greece v United Kingdom*, 30 August 1924, p. 15. See also ICJ, *Right of Passage in Indian Territory*, 26 November 1957. It is indeed specified that it is not excluded that any other procedure is subject to prior negotiation which is a treaty or customary obligation.

6 Decision No 0012/Com/001/2019.

within the meaning of Article 56 § 7 of the Charter.”⁷

12. As for the East African Court of Justice, this Court was simply informed that a case on the same matter had been filed with that court concerning the expulsion of pregnant girls in line with the Education (Expulsion and Exclusion from Schools) Regulations. The case was still pending.⁸
13. Recent developments in the Respondent State could possibly have been the ground for the Court declaring the case inadmissible. For, intermittently, it is noted that significant regulatory and legislative work has been done.⁹ In my opinion, a well-founded decision could have been rendered on this account.
14. There was no reason to withhold any decision as long as the issue of “girls expelled from schools” was pending and has not been settled judicially. Moreover, the Court does not cite any body vested with jurisdiction on such a judicial provision as a matter of substantive law.

7 Dissenting Opinion of Judge Rafea Ben Achour attached to the *Tike Mwambipile v Tanzania* (2022) decision.

8 ACtHPR, *Judgment cited above*, § 11. See The East African Court of Justice, an application was filed on 24 April 2020 by two NGOs, namely, Inclusive Development for Citizens and Center for Strategic Litigation.

9 Tanzania Secondary Education Quality Improvement Project (SEQUIP) approved on 31 March 2020 for the United Republic of Tanzania.

Dissenting Opinion: BEN ACHOUR

1. Regretfully, I strongly disagree with the majority of my colleagues who found the Respondent State's first objection to the admissibility of the Application well-founded¹ and accordingly declared inadmissible Application No 04/2020, *Tike Mwanbipile and Equality Now v United Republic of Tanzania*, received at the Registry on 19 November 2020.
2. My interpretation of Article 56 § 7 of the Charter, restated *verbatim* in Rule 50(2)(g) of the Rules of Court, according to which any application filed with the Court "[shall] not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the Charter", differs from the interpretation adopted by the majority of the Court.
3. To begin with, Article 56(7) of the Charter and Rule 50(2)(g) of the Rules of Court are intended to preserve legal certainty by preventing a situation where a case of human rights violations is decided by several international bodies at the same time, thereby resulting in divergent or even contradictory outcomes. It should be noted that the two provisions do not mention the bodies before which the *ne bis in idem* principle must be applied. They merely frame it in very laconic terms, referring to the principles of the United Nations Charter, the Constitutive Act of the African Union or the provisions of the [African] Charter. The term "principle" used in the text does not refer to anything specific.
4. Commentators on the Charter consider that neither the Charter nor the Rules "[d]eal with the important question of *lis pendens* that might arise in connection with an inter-State communication considered by the Commission, the subject-matter of which is already under consideration by another international body, such as the United Nations Human Rights Committee. Further, by not enshrining the *non bis in idem* principle, the two instruments do not address the issue of a possible re-examination of a case already examined by the Commission or another international

1 The Respondent State submitted that a communication raising allegations similar to those raised in the present Application was filed before the ACERWC, namely Communication No 0012/Com/001/2019 in the case of *Legal and Human Rights Centre and Centre for Reproductive Rights* (on behalf of Tanzanian girls) v the United Republic of Tanzania. In its view, the Application cannot be admissible insofar as the same allegations have been raised and are still pending before another international body with jurisdiction to deal with them. The Respondent State further submitted that the present Application is subject to the doctrine of *res subjudice* which prohibits two competent international jurisdictions from adjudicating concurrently on a case involving similar allegations.

body.”²

5. In response to this Application, which alleged a number of violations of the African Charter on Human and Peoples’ Rights (the Charter) and several other relevant human rights instruments to which the Respondent State is a party,³ by the Respondent State’s regulations and directives, which exclude pregnant girls and adolescent mothers from public primary and secondary schools and from being readmitted even after childbirth, the Court held that “[...] the instant Application raises issues that have already been settled within the meaning of Article 56(7) of the Charter and holds that this admissibility requirement has not been met.”⁴
6. Indeed, the Court found that the matter was settled by the Committee of Experts on the Rights and Welfare of the Child (ACERWC)⁵ before which a communication⁶ was brought on 17 June 2019 alleging that girls in primary and secondary schools are subjected to forced pregnancy tests and expelled from schools in the event that they are found to be pregnant or married.
7. In my opinion, not only was (II) the case not settled on the merits by the ACERWC, as the Court considers, but also (I) the formal conditions necessary for such a settlement were not met.

I. The necessary requirements of similarity are not met

8. In several previous decisions, the Court has set out the formal requirements that must be met in order to declare an application filed before the Court similar to one or more applications filed before other courts or human rights protection bodies. In its previous decisions, in particular in the cases of *Gombert*

2 F. Ouguergouz. *La Charte africaine des droits de l’homme et des peuples, une approche juridique des droits de l’homme entre tradition et modernité*, Geneva, Graduate Institute Publications, 1993, Chapter VIII, § 105.

3 African Charter on the Rights and Welfare of the Child; Maputo Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa; African Youth Charter; United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); United Nations Convention on the Rights of the Child; The International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the United Nations Educational, Scientific and Cultural Organization Convention against Discrimination in Education; and the Universal Declaration of Human Rights.

4 § 61 of the Ruling.

5 Decision No 012/Com/001/2019 adopted at the 39th Ordinary Session of the Committee held virtually from 21 March to 1 April 2022.

6 Communication No 001/2022.

*Jean-Claude Roger v Republic of Côte d'Ivoire*⁷ and *Dexter Eddie Johnson v Republic of Ghana*,⁸ the Court set out three cumulative criteria for concluding that various applications filed before it are similar to those filed before other courts or bodies. These are:

- Identity of the parties;
- Whether the requests are identical or whether they are supplementary or alternative in nature or whether the case arises from a request made in the original case; and
- The existence of a first decision on the merits.

9. In the case that is the subject of this dissenting opinion, and contrary to the Court's findings, none of these requirements were met by the Communication filed before the ACERWC in relation to the Application filed before this Court.

A. The “identity of the parties” criterion

10. First of all, as regards the first criterion, namely, the identity of the parties, although it is clear that the Respondent State before the Court is the same as the Respondent before the ACERWC, the Applicants before the Court and the complainants before the ACERWC are not the same. The Applicants before the Court are Tike Mwambipile, a Tanzanian national, and Equality Now, a non-governmental organization (NGO) with observer status before the African Commission on Human and Peoples' Rights. The complainants before the ACERWC are the Centre for Human and Legal Rights and the Centre for Reproductive Rights (on behalf of Tanzanian girls). The Court itself makes this point when it notes in paragraph 49 of the Ruling that “the Respondent State in the proceedings before ACERWC and in the present Application is the same, [but] however, that the Applicants in the proceedings are different”. However, the Court, instead of admitting that the parties in the two proceedings are different, ignores this fact and changes its position by “considering, however, that both cases can be qualified as instances of public interest litigation”.⁹ Instead of focusing on the identity of the parties, the Court invokes the nature of the two cases by stating that they are “public interest litigation” without, however, explaining what it means by this expression, which, in

7 *Gombert v Côte d'Ivoire*, Ruling of 22 March 2018, 2 *AfCLR*, 270, § 45.

8 *Dexter Eddie Johnson v Republic of Ghana*, Ruling of 28 March 2019, 3 *AfCLR*, 99, § 48.

9 § 50 of the Ruling.

any case, has nothing to do with the identity of the parties. The Court settles for a tautology by stating that “the identity of parties in different Applications can be considered as being similar to the extent that they both aim to protect the interest of the public at large, rather than only specific private interests”; and quite surprisingly it concludes from the public interest nature of the two proceedings that “[t]he criterion of “same identity” of the parties” is fulfilled, which objectively and factually is totally wrong.

B. The “identity of the applications” criterion

11. The criterion of identity of the applications refers to the similarity of applications filed with the same court or with two different bodies. Where two or more similar applications are filed with the same court, the latter may, of its own motion or at the request of the parties, join the two applications and render a single decision, notwithstanding the fact that the applications are filed by two or more different applicants. This principle is provided for in Rule 62 of the Rules of Court¹⁰ and has been applied by the Court on several occasions.¹¹ When two or more similar applications are filed with two or more different courts or bodies and have not yet been decided, the aim is to avoid *lis pendens*. This situation, which raises a risk of conflict of jurisdiction, is normally resolved by the court or body last seized declining jurisdiction, if one of the parties raises an objection as to jurisdiction or a declination of jurisdiction. If the first court or body seized decides the case, the objection of *lis pendens* becomes an objection of *res judicata*.¹²
12. Rule 37(1) of the Rules of Court expressly provides for the rule of litispence only in respect of cases pending before the African

10 “The Court may, at any stage of the proceedings, either on its own accord or upon an Application by any of the parties, order the joinder or disjoinder of cases and pleadings as it deems appropriate”.

11 The first case joinder decision adopted by the Court: *Tanganyika Law Society and The Legal Human Rights Centre* (Application 009/2011) and *Reverend Christopher Mtikila* (Application 011/2011). Order of 22 September 2011, 1 AfCLR, 32.

12 In its judgment of 25 August 1925, *Certain German Interests in Polish Upper Silesia (Preliminary Objections)*, the PCIJ stated that “it is clear that the essential elements which constitute litispence are not present. There is no question of two identical actions: the action still pending before the Germano-Polish Mixed Arbitral Tribunal at Paris seeks the restitution to a private company of the factory of which the latter claims to have been wrongfully deprived; on the other hand, the Permanent Court of International Justice is asked to give an interpretation of certain clauses of the Geneva Convention. The Parties are not the same, and, finally, the Mixed Arbitral Tribunals and the Permanent Court of International Justice are not courts of the same character, and, a fortiori, the same might be said with regard to the Court and the Polish Civil Tribunal of Kattowitz”. Series A, No 6, p. 20.

Commission on Human and Peoples' Rights, by providing that "[t]he Court shall, not consider any application or request for advisory opinion relating to a matter pending before the Commission, unless the matter has been formally withdrawn". However, this principle, which is highly controversial, cannot be applied whenever a case is pending before another court or human rights body, especially when the court and the body seized (in this case the ACTHPR and the ACERWC) are not, in the words of the PCIJ, "of the same order."¹³ It should be recalled that in the *Gombert v Côte d'Ivoire* ruling of 22 March 2018, the Court rightly applied Article 56(7) of the Charter because the case had been settled by a regional international court, namely, the ECOWAS Court of Justice, unlike the case of *Dexter Eddie Johnson v Republic of Ghana*, which was the subject of Views by a quasi-judicial body, the UNHRC, whose "decisions" do not have res judicata authority.¹⁴

13. Regardless of these considerations, the application before the Court and the communication before the ACERWC are undoubtedly similar, but not identical. In the application before the Court, the violations alleged are not reproduced *in extenso* before the Committee. Indeed, some of the violations alleged before the Court (§19 of the Ruling) were not alleged before the Committee. This is the case for Violations Nos. (iii) to (ix)¹⁵ and Violation No (xi).

13 See note 11 above.

14 See my dissenting opinion on *Dexter Eddie Johnson v Republic of Ghana*, Ruling of 28 March 2019, 3 *AFCLR*, 99.

15 "iii. Order the Respondent State to immediately revoke the prohibitive policy (both the expulsion regulation and implementation of declarations) and amend its legislation to protect the right to education.
iv. Order the Respondent State to immediately repeal Regulation No 4 of the Education Regulations (Expulsion and Exclusion of Pupils from Schools) of 2002 to remove "wedlock" as a ground for expulsion and amend the Marriage Act of 1971 to harmonize the age of marriage to 18 for both boys and girls.
v Order the Respondent State to develop strategies, programmes and nationwide campaigns that focus on addressing the issue of teenage pregnancies through public education or awareness on sexual and reproductive health and rights as well as on ending child marriages, as this increased community knowledge on family planning and contraceptives will support efforts to address the high rate of teenage pregnancies.
vi. Order the Respondent State to develop strategies and nationwide campaigns to enable teenage mothers to attend school. This may range from providing subsidies to enable girls with children to attend school, to developing alternative schooling offering the same quality and standard of education as offered in mainstream schools as well as developing and implementing relevant re-entry policies for girls who have given birth.
vii. Order the Respondent State to put in place constitutional, legislative and administrative measures to guarantee the right to education, including its enforceability domestically, as well as a right to remedies, including reparations, and eradicate discriminatory laws and policies that impede the right to education within six (6) months.

14. Thus, the applications are only partially identical. Unfortunately, the Court found that there was complete similarity between the application before it and the complaint before the Committee. It begins by noting that “[i]t becomes apparent that both applications challenge the same law, that is Regulation No 4 of the Education Regulations (Expulsion and Exclusion of Pupils from School) of 2002, and the same practice of expelling pregnant and young mothers from schools as well as other associated discriminatory practices, including mandatory pregnancy testing.”¹⁶ While this is the general tenor of the two cases, a court cannot be satisfied with general impressions. It then further held “[t]hat the ACERWC in its communication only found violations of the African Children’s Charter and not of the Charter and of the other international legal instruments to which the Respondent State is a party”.¹⁷ Thus, the Court expressly admits that only the Charter on the Rights and Welfare of the Child was invoked before the Committee. This is perfectly logical since the Committee only has jurisdiction to interpret and apply the said Charter. Curiously, after this observation, the Court backtracked by stating “[H]owever, the Court also notes that the principles contained in the African Children’s Charter, on which ACERWC gave its views, overlap with the principles provided for in the provisions of the Charter and other human rights instruments referenced by the Applicants” .¹⁸ Finally the Court held that, “[S]ubstantively, therefore, the Court considers that the ACERWC adjudicated on the same issues that the Applicants have brought before this Court” ¹⁹ and found that “the second criterion has been met”, which, as we have shown, is partially true.

viii. Order the Respondent State to report to the Court within a period of six (6) months from the date of judgment on the implementation of this judgment and consequential orders.

ix. Order the Respondent State to publish the judgment in this matter on the official website of its judiciary and of the Ministry responsible for legal affairs, within two (2) months from date of notification of the decision.

[...]

xi. Issue any other remedy and/or relief that the Court will deem necessary to grant.”

16 § 52 of the Ruling.

17 § 56 of the Ruling.

18 *Id.*

19 § 58 of the Ruling.

C. The “existence of a first decision on the merits” criterion

15. As to the last criterion, namely, the existence of a first decision on the merits, the Court noted that “[...]the ACERWC, “as an institution that is legally mandated to consider the dispute at international level”, has delivered a decision on merits”. However, while it is true that the Court notes that the ACERWC did indeed deliver Decision No 0012/Com/001/2019, the latter is merely a recommendation which does not decide the case or, to use the terms of Article 56 § 7 of the Charter, does not “settle” the case within the meaning of Article 56 § 7 of the Charter, which will be the subject of the second part of this opinion.

II. ACERWC did not “settle” the case

16. After finding that the three criteria of similarity between Application No 042/2020 and Communication 001/2019 are met,²⁰ the Court, relying on Decision No 0012/Com/001/2019 of the ACERWC, the Court notes that the ACERWC, and in particular in its § 109 (actually § 105), which it quotes *in extenso* without any analysis, concludes peremptorily that “the instant Application raises issues that have already been settled within the meaning of Article 56(7) of the Charter and holds that this admissibility requirement has not been met”. The Court did not take the trouble to compare the issues dealt with by the Committee with those raised in the application and, at the very least, to rule on the issues mentioned in paragraph 14 above, which were not raised before the Committee.
17. In my opinion, the case has not been “settled” by the ACERWC. Indeed, the document issued by the ACERWC, which is legally called “Decision”, and without wishing to underrate it, is adopted by a body that can at most be qualified as a quasi-judicial body,²¹ exactly like the African Commission on Human and Peoples’ Rights

20 § 60 of the judgment: “In sum, the Court finds that the cumulative criteria set out in the cases *Gombert Jean-Claude Roger v Republic of Côte d’Ivoire* and in *Dexter Eddie Johnson v Republic of Ghana* relating to the admissibility requirement established in Article 56(7) have been fulfilled”.

21 In international law, a quasi-judicial body is a body that is not formally a court.... This term refers to bodies that are empowered to receive claims relating to a legal dispute, such as the various United Nations commissions of experts, the Dispute Settlement Body of the World Trade Organization, or, on the black continent, the African Commission on Human and Peoples’ Rights (ADHP Commission).

or the United Nations treaty bodies.²² The Committee's "Decision" is not binding on the Respondent State. It merely "*recommends*" to the United Republic of Tanzania a certain number of actions likely to put an end to the violations of the Charter on the Rights and Welfare of the Child. The verb "*recommend*" is expressly used in the ACERWC decision, and it is most unfortunate that the Court did not discuss the legal status of the ACERWC decision. Indeed, in paragraph 109 of the decision, "[ACERWC] recommends for the Respondent State [...]". How then can it be considered that the case has been settled or, in other words, that there has been *res judicata*.

18. As I argued in my dissenting opinion on the *Dexter Eddie Johnson* case, only a decision of a judicial nature "settles" a case, that is, it closes the legal debate and orders the State to take a number of measures and actions likely to put an end to the violations of the law. This is what happened in the *Jean Claude Gombert* case, which was effectively settled by the ECOWAS Court of Justice.
19. A judicial decision settles the dispute, stating the law and imposing on the State a real legal obligation of result²³ to put an end to the violation. In case of non-compliance with the jurisdictional decision, the State commits a wrongful international act which engages its international responsibility. In the case of the ACERWC, the decision is a recommendation which only imposes on the State a simple obligation of means²⁴ which it must certainly fulfil in good faith, but which does not lead to its international responsibility being called into question.

22 Committee on the Elimination of Discrimination; Committee on Economic, Social and Cultural Rights; Human Rights Committee; Committee on the Elimination of Discrimination against Women; Committee against Torture; Subcommittee on Prevention of Torture; Committee on the Rights of the Child; Committee on the Rights of Migrant Workers; Committee on the Rights of Persons; Committee on Enforced Disappearances.

23 In the obligation of result, the service provider does not merely undertake to do their best to achieve the expected result, but *to provide the creditor with a precise, concrete and determined result from the outset*. Unlike the obligation of means, the means used by the debtor to achieve the result are not taken into consideration, only the result counts. The obligation of result is stricter; it *leaves no room for doubt or uncertainty*. The debtor has control over the things, events or persons entrusted to their care.

24 By the obligation of means, the debtor undertakes to use *all the means at his disposal* to perform the contract. The debtor is not bound to achieve a specific result, but they promise to take *all necessary steps* to fulfil their contractual obligation. In short, the must do "their best".

20. By declaring the application inadmissible on the ground that the case was settled by the ACERWC, the Court unfortunately left several issues relating to the right to education, women's rights, children's rights, non-discrimination, etc. unresolved, while it could have given the important ACERWC decision *res judicata* authority.

Separate Opinion: BENSAOULA

1. In this opinion, I would like to state my support for the grounds stated by the Court in its above-mentioned Ruling, in which it declared the application inadmissible on the basis that the measures sought by the Applicants are identical to those sought in the complaint brought before the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), which issued a decision in this regard at its 39th Session held from 21 March to 1 April 2022. However, I also raise a few issues that remain unaddressed and are food for thought.

I. My support for the Ruling

2. In its Ruling, the Court found that the Applicants in their Application filed with the Court on 19 November 2020, alleged violations of certain rights of pregnant girls in connection with the fact that they were barred from attending public primary and secondary schools both during pregnancy and after childbirth. According to the Applicants, such a restriction constitutes a flagrant violation of the affected girls' rights to education and non-discrimination.
3. However, it was noted during the course of the proceedings that other entities had filed applications before the ACERWC and the East African Community Court of Justice (EACJC) alleging the same violations.
4. It then became clear that while the application pending before the EACJC has not yet been decided, the application before the ACERWC was decided by decision issued in its 38th session, mentioned above, hence the Ruling that is the subject of this opinion. In the said Ruling, the Court decided to apply the admissibility requirement laid down in Article 56(7) of the African

Charter on Human and Peoples' Rights (the Charter), restated in Rule 50(2) of the Rules of Court (the Rules), and to declare the Application inadmissible on the ground that the claims have already been settled.

5. I fully agree with this finding for the good reason that paragraph 7 of Article 56 of the Charter in its French version clearly specifies that the application filed with the Court shall not concern cases that have been "settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter".
6. It is clear that the legislator did not, at any time, specify the entity that settles the case, but rather focused on the instruments applied in the settlement. The requirement is therefore related to the human rights jurisdiction of the entity concerned and to its jurisdiction to apply the relevant instrument, in the instant case, the Protocol.
7. It is important to remember that settling a dispute or a difference is not the exclusive jurisdiction of the judicial authorities. However, the settlement can take place after the intervention of any entity vested with jurisdiction to settle disputes (e.g., mediator, administration, conciliator, arbitrator, committees ...). If the definition of settlement is "to give a final solution to a question", the term "final" is unambiguous as regards the solution decided by entities other than judicial bodies, insofar as they are vested with the jurisdiction to settle disputes and enforce the proposed solutions will, in any case, depend on the will of the parties!
8. Even if Article 56 paragraph 7 of the Charter includes the words "settled by the States" – as is the case in the English version of the Charter – the Court specified in paragraphs 45 and 73 of the Ruling the reasons for this rule on the basis of a communication from the African Commission on Human and Peoples' Rights in which it was decided that the State could not be prosecuted and convicted more than once for the same alleged violation of human rights, on the one hand, and that the ACERWC is an institution with the legal mandate to examine the dispute at the international level, on the other.
9. It follows that the ACERWC, being an organ established by the African Union to monitor the implementation of the African Charter on the Rights and Welfare of the Child, can only render decisions that are binding on states. The principles of effectiveness and good faith execution of treaties enshrine this position in international law. Reference can be made in this respect to Article 26 of the Vienna Convention on the Law of Treaties and the judgment of

the Inter-American Court of Human Rights in *Loayza Tamayo v Peru* (17 September 1997 – merits). *Peru* (17 September 1997 – merits).

II. The remaining grey area

10. However, it appears from the Applicants' requests before the Court that, in addition to the allegations of human rights violations, they have specifically requested that the Respondent State be ordered to:
 - "Take constitutional, legislative and administrative measures to guarantee the right to education..... as well as a right to reparations...
 - Order the Respondent State to report to the Court within six months [...]
 - Order the Respondent State to publish the judgment in this matter on the official website [...]
 - Find a violation of human rights that were not specifically mentioned by the Petitioners...
 - to grant such other measures as the Court may deem necessary in the circumstances ..." (paragraph 19, subparagraphs 7, 8, 9, 10, 11 and 12 of the Application? (Paragraph 19 subparagraphs 7, 8, 9, 10, 11 and 12 of the Application)
11. In my opinion, the Court should have discussed jurisdiction and admissibility in respect of these requests, since they are not identical to those made before the ACERWC. On the other hand, and consequently, the Court had to address them, since the said requests would not have been settled.
12. The complementarity between these two African human rights bodies and the fact that they have the same sources of law, is not in doubt.
13. For the sake of this complementarity, the Court should have adjudicated these requests either by referring to the decision of the ACERWC to complete its findings and addressed the new claims cited above filed before it.
14. Alternatively, the Court should have dismissed the said requests on the ground that they had already been made and considered before the ACERWC.

Mwita v Tanzania (judgment) (2022) 6 AfCLR 955

Application 012/2019, *Ghati Mwita v United Republic of Tanzania*

Judgment, 1 December 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, CHIZUMILA, BENSOUALA, ANUKAM, NTSEBEZA, SACKO and ADJEI

Recused under Article 22: ABOUD

The Applicant, a citizen of the Respondent State, was in prison awaiting the execution of a death sentence when she brought this Application. She had been charged, tried, convicted, and sentenced to death for murder. The Applicant alleged that her trial, conviction, and sentence before the domestic courts were in violation of her human rights. The Court found that the Respondent State had violated some of the rights claimed by the Applicant and awarded some of the reparations requested by the Applicant.

Jurisdiction (material jurisdiction, 28-31; appellate jurisdiction, 29)

Admissibility (filing within a reasonable time, 41, 44-49; exhaustion of local remedies, 42-43)

Life (validity of the death sentence, 63-69; mandatory death sentence, 74, 78-80)

Dignity (death by hanging, 86; death row detention, 87-89)

Fair trial (trial within a reasonable time, 94-100; presumption of innocence, 104-107; credible trial before independent court, 110-117; effective legal representation, 121-128)

Reparations (basis of, 137; onus to provide evidence for, 138; purpose of, 122; measures of reparation, 139; currency of reparation, 140; material prejudice, 148-150; moral prejudice, 155-160; guarantees of non-repetition, 164-166; restoration of liberty, 169-171; restitution, 174)

Separate Opinion: TCHIKAYA

Life (mandatory death penalty, 8, 36)

I. The Parties

1. Ms. Ghati Mwita (hereinafter referred to as “the Applicant”) is a national of the United Republic of Tanzania. At the time of filing the Application, she was serving a death sentence at Butimba Central Prison, Mwanza, having been tried and convicted for the offence of murder. She alleges a violation of her rights in connection with her conviction and sentencing.
2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as “the Respondent State”), which

became a Party to the African Charter on Human and Peoples' Rights ("the Charter") on 21 October 1986 and the Protocol on 10 February 2006. It deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol through which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration. The Court has held that this withdrawal does not have any effect on pending cases as well as new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period one (1) year after its deposit.¹

II. Subject of the Application

A. Facts of the matter

3. It emerges from the record that on 4 February 2008, the Applicant allegedly set on fire Mr. Medadi Aloyce, a fisherman who was in her employment, after dousing him with kerosene, in retaliation for his alleged theft of the Applicant's fishing boat. Mr. Aloyce subsequently died as a result of injuries sustained.
4. On the same day, 4 February 2008, the Applicant was arrested and charged, before the High Court sitting at Mwanza, with the offence of murder. The preliminary hearing was conducted on 15 February 2010 and the trial commenced on 29 November 2010. In its judgment of 19 September 2011, the High Court found the Applicant guilty of murder and sentenced her to death by hanging.
5. On 11 March 2013, the Court of Appeal sitting at Mwanza dismissed the Applicant's appeal against her conviction and sentence. She subsequently filed an application for review of the Court of Appeal's decision, which was dismissed on 19 March 2015.

B. Alleged violations

6. The Applicant alleges a violation by Respondent State of Articles

¹ *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application No 004/2015, Judgment of 26 June 2020 (merits and reparations), § 38.

1, 4, 5 and 7 of the Charter as follows:

- a. A violation of the Applicant's right to a fair trial under Article 7 of the Charter by:
 - i. Detaining the Applicant for an unduly long period of time before bringing her to trial and conducting an overly lengthy trial.
 - ii. Disregarding the principle of presumption of innocence.
 - iii. Convicting the Applicant on insufficient evidence and the trial court, without justification, disregarding the fact that the trial assessors unanimously found the Applicant not guilty.
 - iv. Not providing the Applicant effective counsel during trial.
 - v. Imposing the death penalty despite failing to ensure that the Applicant was given a fair trial.
- b. A violation of the Applicant's right to life under Article 4 of the Charter by reason of her mandatory death sentence, insofar as:
 - i. The alleged offence fell outside of the narrow category of "most serious offences" to which the death penalty can lawfully be applied.
 - ii. The Respondent State did not take the personal situation of the Applicant or the alleged offence into account in imposing the death sentence.
- c. A violation of the right to dignity under Article 5 of the Charter by:
 - i. Sentencing mentally ill prisoner to death.
 - ii. Sentencing the Applicant to death by hanging, which constitutes "cruel, inhuman or degrading punishment."
 - iii. Subjecting the Applicant to the psychological torture of "death row phenomenon".
- d. A violation of Article 1 of the Charter by failing to give effect to the rights cited above.

III. Summary of the Procedure before the Court

7. The Application was received at the Registry on 24 April 2019.
8. On 10 May 2019, the Registry wrote to the Applicant requesting her to provide further information and documentation in relation to her claims.
9. On 6 August 2019, the Applicant filed her submissions on reparations and attached copies of the judgments of her trial before domestic courts.
10. On 16 September 2019, the Court, *suo motu*, granted the Applicant legal aid and appointed Counsel Dr. Paul Ogendi to represent her.
11. On 29 October 2019, the Applicant, through her Court-appointed Counsel, filed a request for provisional measures which was

notified to the Respondent State on 11 November 2019 for its Response thereto within fifteen (15) days of receipt. The Respondent State did not file a response.

12. On 9 April 2020, the Court issued an order for provisional measures staying the execution of the death penalty imposed on the Applicant pending the determination of the Application on the merits.
13. The Applicant filed an Amended Application on 14 April 2020, which was served on Respondent State on 24 April 2020.
14. On 1 June 2021, the Respondent State filed its Response to the amended Application and this was transmitted to the Applicant on 2 June 2021.
15. The Parties filed all their other pleadings within the time-limit permitted by the Court.
16. Pleadings were closed on 13 June 2022 and the Parties were duly notified.

IV. Prayers of the Parties

17. In her amended Application, the Applicant prays the Court for the following:
 - i. A Declaration that the Respondent State has violated her rights under Articles 1, 7 (right to fair trial), 4 (right to life) and 5 (right to dignity) of the Charter;
 - ii. An Order that the Respondent State release the Applicant from prison with immediate effect;
 - iii. An Order quashing the death sentence imposed by the Respondent State on the Applicant;
 - iv. An Order requiring the Respondent State to pay Reparations to the Applicant as follows:
 - a. Payment of Thirty-Four Thousand Three Hundred and Eight (34,308) United States Dollars as reparation for damage suffered by the Applicant;
 - b. Payment of reparations in an amount the Court considers reasonable on account of material prejudice suffered;
 - c. Payment of reparations in the amount of USD Thirteen Thousand (13,000) on account of legal and related expenses;
 - v. An order compelling the Respondent State to amend its Penal Code and related legislation pertaining to the death sentence in order to make it compliant with Article 4 of the Charter; and
 - vi. Such other measure(s) as the Court deems fit.
18. The Respondent State, as regards jurisdiction and admissibility,

prays the Court to rule as follows:

- i. Find that the Honourable Court lacks jurisdiction to hear the Application.
 - ii. Find that the Application has not met the admissibility requirements provided for in Article 56(6) of the Charter read together with Rule 50(2)(f) of the Rules of the Court, 2020.
 - iii. Declare the Application inadmissible.
- 19.** On the merits of the Application, the Respondent State prays the Court to:
- i. Find that it did not violate the Applicant's right to life, right to dignity and right to fair trial as provided for in Article 4, 5 and 7 of the African Charter on Human and Peoples' Rights.
 - ii. Find that it did not violate Article 1 of the African Charter on Human and Peoples' Rights.
 - iii. Find that the Applicant was tried and convicted in accordance with the relevant laws and international human rights standards.
 - iv. Dismiss the Application in its entirety with costs.
- 20.** In relation to reparations, the Respondent State prays the Court to:
- i. Find that the interpretation and application of the Protocol and the Charter does not confer jurisdiction on the Court to quash the death sentence and release the Applicant from prison;
 - ii. Find that the Respondent State did not violate Article 1,4,5 and 7 of the Charter and that the Applicant was accorded a fair trial by the Respondent State during the trial in domestic courts;
 - iii. Find that the death penalty is consistent with Article 4 of the African Charter;
 - iv. Dismiss the Application for Reparations;
 - v. Make any other Order this Honourable Court may deem right and just under the prevailing circumstances.

V. Jurisdiction

- 21.** The Court recalls that Article 3 of the Protocol provides as follows:
1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
- 22.** Under Rule 49(1) of the Rules, the Court "shall conduct a preliminary examination of its jurisdiction [...] in accordance with

the Charter, the Protocol and these Rules.”

23. Based on the above-mentioned provisions, the Court must conduct a preliminary assessment of its jurisdiction and dispose of objections thereto, if any.
24. In the instant Application, the Court notes that the Respondent State raises an objection to its material jurisdiction. The Court will thus consider the objection (A) before examining the other aspects of its jurisdiction (B) if necessary.

A. Objection to material jurisdiction

25. The Respondent State argues that the “Court is devoid of jurisdiction to entertain the Application before it.” It submits that the Court “is not vested with the jurisdiction to sit as an appellate court and adjudicate on matters that have been decided by the highest court in a Respondent State.”
26. It is the Respondent State’s submission, therefore, that the Court is not “vested with jurisdiction to adjudicate over this matter, particularly quashing the death sentence and release the Applicant from prison.”

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27. In her Reply, the Applicant, relying on the Court’s decision in *Kijiji Isiaga v Tanzania*, contends that the issues raised in the Application relate to specific violations of human rights that are protected by the Charter and that, therefore, the Court has material jurisdiction.

28. The Court recalls that by virtue of Article 3(1) of the Protocol it has jurisdiction to examine any application submitted to it provided that the rights of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.²
29. As regards the contention that the Court would be exercising appellate jurisdiction by examining certain claims which were

² *Kalebi Elisamehe v United Republic of Tanzania*, ACTHPR, Application No 028/2015, Judgment of 26 June 2020 (merits and reparations), § 18.

already determined by the Respondent State's domestic courts, the Court reiterates its position that it does not exercise appellate jurisdiction with respect to the decisions of domestic courts.³ At the same time, however, and notwithstanding that the Court is not an appellate court vis-à-vis domestic courts, it retains the power to assess the propriety of domestic proceedings against standards set out in international human rights instruments ratified by the State concerned,⁴ which does not make it an appellate court.

30. In relation to the contention that the Court lacks jurisdiction to order the Applicant's release from prison, the Court recalls that Article 27(1) of the Protocol provides that "[i]f the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation." Clearly, therefore, the Court has jurisdiction to grant various types of reparation, including release from prison, should the facts of a case so dictate.
31. In view of the above, the Court dismisses the Respondent State's objection to its material jurisdiction and holds that it has material jurisdiction to hear this Application.

B. Other aspects of jurisdiction

32. The Court notes that the Respondent State does not dispute its personal, temporal and territorial jurisdiction.
33. Having noted that nothing on record indicates that it lacks jurisdiction, the Court holds that it has:
 - i. Personal jurisdiction insofar as the Respondent State is a party to the Protocol and has deposited the Declaration. The Court recalls, as it did in paragraph 2 of this judgment, that on 21 November 2019, the Respondent State deposited an instrument withdrawing its Declaration. In this regard, the Court reiterates its position that the withdrawal of the Declaration has no bearing on cases pending before it took effect. Given that withdrawal takes effect twelve (12) months after the deposition of the instrument of withdrawal, in this case on 22 November 2020,⁵ it has no bearing on the instant

3 *Ernest Francis Mtingwi v Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, § 14; *Kennedy Ivan v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 26; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35.

4 *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; *Werema Wangoko Werema and another v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520, § 29 and *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 130.

5 *Ambrose Cheusi v Tanzania* (merits and reparations), §§ 35-39.

Application.

- ii. Temporal jurisdiction insofar as the violations alleged occurred after the Respondent State became a party to the Charter and the Protocol. Furthermore, the alleged violations are continuous in nature insofar as the Applicant is currently serving her sentence which, she contends, violates her rights under the Charter.⁶
 - iii. Territorial jurisdiction insofar as the violations alleged occurred within the Respondent State's territory.
- 34.** Accordingly, the Court holds that it has jurisdiction to examine this Application.

VI. Admissibility

- 35.** Pursuant to Rule 50(1) of the Rules, "[t]he Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules."
- 36.** According to Rule 50(2) of the Rules, which essentially restates Article 56 of the Charter:
- Applications filed before the Court shall comply with all of the following conditions:
- a. Indicate their authors even if the latter request anonymity;
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter;
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
 - d. Are not based exclusively on news disseminated through the mass media;
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 - f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the Charter.
- 37.** The Court notes that the Respondent State raises an objection to the admissibility of the Application on the ground that it was not

⁶ *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (jurisdiction) (21 June 2013) 1 AfCLR 197, §§ 71-77.

filed within a reasonable time from the date local remedies were exhausted as required by Article 56(6) of the Charter and Rule 50(2)(f) of the Rules. The Court will first consider this objection (A) and examine other conditions of admissibility (B) if necessary.

A. Objection based on failure to file the Application within a reasonable time

38. The Respondent State submits that “the judgment of the Appeal Court was delivered on 12 March 2013 while the Applicant filed the instant Application on 14 March 2019. This indicates that the Application before this Hon. Court has been filed six (6) years after local remedies were exhausted.” According to the Respondent State, therefore, the time taken to file this Application cannot be considered as reasonable.
39. The Respondent State further submits, based on the Court’s jurisprudence, that although Article 56(6) of the Charter does not set a time limit within which applications must be filed, the Court, in determining reasonableness of time, must take into consideration, *inter alia*, the particular situation of the Applicant. Given the preceding, the Respondent State submits that “the particular situation of the Applicant [...] do not constitute justifiable grounds for the fact that it took the Applicant six (6) years to file this Application.” Relying on the record of the proceedings before the High Court and Court of Appeal, the Respondent State further submits that the Applicant “is financially stable, that she is literate and had legal assistance and advocates throughout the proceedings in domestic courts.” It is also the Respondent State’s submission that “the Applicant has not advanced any grounds to account for the delay of up to six years before the filing of this matter.”

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40. In her Reply, the Applicant raises the following reasons as justifying the time it took for her to file the Application, after the exhaustion of local remedies:
 - a. After her conviction she remained incarcerated on death row with limited access to information and her movement was restricted;
 - b. The long years of incarceration and time on death row led to the deterioration of her mental and physical health and she suffered the “death row phenomenon” in addition to her pre-existing physical ailments caused by her HIV positive status. In the same vein, the Applicant was sometimes denied access to adequate treatment and medication for her illnesses. The Applicant was thus not in the

necessary physical or mental condition to educate herself as to the existence of the Court.

- c. The Applicant did not have legal counsel that may have enabled her awareness of the Court's existence until, in 2019, when the Court designated *pro bono* counsel to assist her.
- d. During the proceedings in domestic courts, she relied on public defenders appointed by the Respondent State who proved to be ineffective. In addition, the Applicant relied on the financial support of a family member to pay for advocates during the appeal proceedings.
- e. The Respondent State has not adduced evidence to support the claim that the Applicant is financially stable.

- 41. Pursuant to Article 56(6) of the Charter, as restated in Rule 50(2) (f) of the Rules, in order for an application to be admissible, it must be "submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter".
- 42. The Court notes that the Respondent State contests the admissibility of the Application on the basis of the Applicant's failure to file it within a reasonable time after exhaustion of local remedies. The Court observes, however, that it is incumbent on it to first satisfy itself that local remedies have been exhausted before determining the reasonableness of time taken by the Applicant to file an application.⁷ This is because an adverse finding as to the exhaustion of local remedies would render the exercise of determining whether the Application was filed within a reasonable time superfluous.
- 43. The Court recalls that the Applicant was convicted by the High Court sitting at Mwanza on 19 September 2011. She then appealed to the Court of Appeal which upheld her conviction on 11 March 2013. The Applicant's application for review of the Court of Appeal's decision was dismissed on 19 March 2015. Given that the Court of Appeal is the highest Court in the Respondent State, the Court finds that the Applicant exhausted local remedies

⁷ *Ramadhani Issa Malengo v United Republic of Tanzania*, ACtHPR, Application No 030/2015, Ruling of 4 July 2019 (Jurisdiction and admissibility), § 38.

before filing her Application.

44. As the Court has established: "...the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."⁸ In this connection, the Court has considered as relevant factors, the fact that an applicant is incarcerated,⁹ being lay in law without the benefit of legal assistance,¹⁰ their indigence, the time taken to pursue the review remedy before the Court of Appeal, or to access the documents on file,¹¹ intimidation and fear of reprisal,¹² the recent establishment of the Court, the need for time to reflect on the advisability of seizing the Court and determine the complaints to be submitted.¹³
45. The Court has previously stated that it is not enough for applicants to simply plead that they were incarcerated, are lay or indigent, for example, to justify their failure to file an Application within a reasonable period of time.¹⁴ It is also important for all Applicants to demonstrate how their personal situations prevented them from filing their applications within a reasonable period.
46. The Court recalls that the present Application was filed on 24 April 2019. The Respondent State's Court of Appeal rendered its judgment dismissing the Applicant's appeal on 11 March 2013. However, the record confirms that the Applicant's application for review of the Court of Appeal's decision was dismissed on 19 March 2015. In this regard, the Court further recalls that an Applicant should not be penalised for choosing to pursue the review of the decision of the highest appellate court in a country.¹⁵
47. Given that the Court has leeway under Rule 50(2)(f), to set the date from which the computation of reasonable time for

8 *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v Burkina Faso* (merits) (24 June 2014) 1 AfCLR 219, § 92. See also, *Alex Thomas v Tanzania* (merits), § 73.

9 *Diocles William v United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 426, § 52; and *Alex Thomas v Tanzania* (merits), § 74.

10 *Alex Thomas v Tanzania* (merits), § 73; *Christopher Jonas v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 54; *Amir Ramadhani v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 83.

11 *Nguza Viking and another v Tanzania* (merits), § 61.

12 *Association Pour le progress et la Defense des droits des Femmes Maliennes and the Institute for Human Rights and Development in Africa v Mali* (merits) (11 May 2018) 2 AfCLR 380, § 54.

13 *Norbert Zongo and Others v Burkina Faso* (preliminary objections), § 122.

14 *Layford Makene v United Republic of Tanzania*, ACtHPR, Application No 028/2017, Ruling of 2 December 2021 (admissibility), § 48.

15 *Nguza Viking and another v Tanzania* (merits), § 58.

filing an Application must be determined, the Court considers that reasonableness of time, in the instant case, should, be computed from the date of the decision of the Court of Appeal on the Applicant's application for review which is 19 March 2015. Given that the Application was filed on 24 April 2019, the time at stake is four (4) years, one (1) month and five (5) days. It is this period that the Court must assess in determining whether or not the Application was filed within a reasonable time as required by Article 56(6) of the Charter.

48. In the present Application, the Court notes that the Applicant is not only incarcerated but has been on death row since her conviction. The Court takes special cognisance of the fact that she attempted to avail herself of the review procedure after the Court of Appeal dismissed her appeal. Given that the Applicant was entitled to wait for the outcome of the review process, the Court cannot penalise her for having recourse to this remedy. In the circumstances, the Court finds that the period of four (4) years, one (1) month and five (5) days is reasonable within the meaning of Article 56(6) of the Charter.¹⁶
49. The Court thus dismisses the Respondent State's objection alleging that the Application was not filed within a reasonable time.

B. Other conditions of admissibility

50. The Court notes that although no objection has been raised regarding the conditions set out in Rule 50(2)(a), (b), (c), (d), (e) and (g) of the Rules, it must ensure that the Application fulfils these requirements.
51. From the record, the Court notes that, the Applicant has been clearly identified by name in fulfilment of Rule 50(2)(a) of the Rules.
52. The Court also notes that the claims made by the Applicant seek to protect her rights guaranteed under the Charter. Furthermore, one of the objectives of the Constitutive Act of the African Union, as stated in Article 3(h) thereof, is the promotion and protection of human and peoples' rights. Additionally, the Application does not contain any claim or prayer that is incompatible with a provision of the said Act. Therefore, the Court considers that the Application is compatible with the Constitutive Act of the African Union and the

16 *Nguza Viking and another v Tanzania* (merits), §§ 60-61; *Armand Guehi v Tanzania* (merits and reparations), § 56.

Charter and holds that it meets the requirement of Rule 50(2)(b) of the Rules.

53. The Court further notes that the Application does not contain any disparaging or insulting language with regard to the Respondent State or its institutions, in compliance with the Rule 50(2)(c) of the Rules.
54. The Application is also not based exclusively on news disseminated through mass media, rather it is based on documents from the municipal courts of the Respondent State. Thus the Application complies with Rule 50(2)(d) of the Rules.
55. The condition set out in Rule 50(2)(e) of the Rules is that an application should be filed after exhaustion of local remedies. In this regard, the Court has held that, the Respondent State is deemed to have had the opportunity to redress the violations alleged by the Applicant that arose from those proceedings insofar as the criminal proceedings against an applicant have been determined by the highest appellate court.¹⁷
56. In the instant case, the Court notes that the Applicant's appeal before the Court of Appeal, the highest judicial organ of the Respondent State, was determined when that Court rendered its judgment on 12 March 2013. Thereafter, the Applicant's application for review was dismissed by the Court of Appeal on 19 March 2015. The Court holds, therefore, that the Respondent State had the opportunity to address the violations alleged by the Applicant arising from her trial in the various courts. Consequently, the Application has complied with the requirement under Rule 50(2)(e) of the Rules.
57. The Court also holds that the Application does not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union as required under Rule 50(2)(g) of the Rules.
58. As a consequence of the foregoing, the Court finds that the Application fulfils all the requirements set out under Article 56 of the Charter as restated in Rule 50(2) of the Rules and accordingly finds the Application admissible.

17 *Mohamed Abubakari v United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, § 76.

VII. Merits

59. The Applicant alleges that the Respondent State has violated her right to life, right to dignity and right to a fair trial as guaranteed under Articles 4, 5 and 7 of the Charter, respectively. She further alleges that by failing to give effect to these rights, the Respondent State also violated Article 1 of the Charter.

A. Alleged violation of the right to life

60. The Applicant alleges that the Respondent State violated her right to life by imposing the death penalty outside the category of cases to which it can lawfully be applied and also by imposing the death penalty without considering the circumstances of the offender and offence.

i. Imposition of the death penalty

61. The Applicant refers to jurisprudence from various jurisdictions to support her submission that death sentences should be imposed for the most serious offences, the most gruesome, the most extreme, “the rarest of the rare” and “the worst of the worst”.¹⁸ The Applicant submits that a court should consider that the nature of the offence must be interpreted with a restrictive lens and pertinently, the offence should be assessed against other murder cases and not with ordinary “civilised” behaviour. According to the Applicant, the Respondent State did not apply this high threshold when imposing the death penalty on her thereby violating her right to life.

62. In response, the Respondent State submits that the death penalty is a lawful sentence for the offence of murder as provided for under Section 197 of its Penal Code and this sentence has been

18 Human Rights Committee (HRC), Communication 1421/2005, *Larranaga v Philippines*, Views adopted on July 24, 2006, § 7.2; *Republic v Jamuson White*, Criminal Case No 74 of 2008 (unreported), High Court of Malawi; *Trimmingham v The Queen* [2009] UKPC 25, § 21; and HRC Communication No 4701/1991, *Kindler v Canada*, Views adopted on 30 July 1993, §14.3.

upheld by its Court of Appeal. Further, the Respondent State argues that “looking at the wording of Article 4 of the African Charter, death penalty is permitted provided that it is carried out in accordance with the law.” Specifically in relation to the Applicant, the Respondent State submits that her death sentence is lawful because “the facts constituting her offence are ‘worst of the worst’ as the murder was premeditated” and “was carried out through setting the deceased on fire.” The Respondent State also disputes the Applicant’s allegation that she is a person of good character.

63. The Court observes that Article 4 of the Charter provides that “[h]uman beings are inviolable. Every human being shall be entitled to respect for [their] life and the integrity of [their] person. No one may be arbitrarily deprived of this right.”
64. At the outset, the Court acknowledges global trends towards the abolition of the death penalty, represented, in part, by the adoption of the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).¹⁹ At the same time, however, it notes that the death penalty remains on the statute books of some states and that no treaty, on the abolition of the death penalty has gained universal ratification.²⁰ Presently, the Second Optional Protocol to the ICCPR, the Court notes, has ninety (90) State Parties out of the one hundred-seventy three (173) State Parties to the ICCPR.
65. Specifically in relation to Africa, the Court takes cognisance of the continent-wide developments in relation to the death penalty. By way of illustration, in 1990, only one country, Cape Verde, had abolished the death penalty. Today, out of the fifty-five (55) African Union member States, twenty-five (25) have abolished the death penalty in law, fifteen (15) have placed a long-term moratorium

19 *Amini Juma v United Republic of Tanzania*, ACtHPR, Application No024/2016, Judgment of 30 September 2021 (merits and reparations), § 122 and *Ally Rajabu and Others v United Republic of Tanzania*, ACtHPR, Application No 007/2015, Judgment of 28 November 2019 (merits and reparations), § 96. Notably, the Respondent State is not a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights.

20 For a comprehensive statement on developments in relation to the death penalty, see, United Nations General Assembly *Moratorium on the use of the death penalty – Report of the Secretary General* 8 August 2022.

on executions while fifteen (15) retain capital punishment. Most recently in 2020, Chad abolished the death penalty, followed by Sierra Leone in 2021 and the Central African Republic and Equatorial Guinea in 2022.

66. Given the framing of Article 4 of the Charter, and the broader developments in international law in relation to the death penalty, the Court holds that this type of punishment should exceptionally be reserved only for the most heinous of offences committed in seriously aggravating circumstances. However, since the circumstances for which the death penalty may be appropriate, cannot be categorised with exactitude, the determination of incidents of crimes warranting the imposition of the death penalty must be left to domestic courts to decide on a case-by-case basis.
67. As to the Applicant's contention that she was sentenced to death in circumstances that do not justify the penalty, the Court recalls that both the High Court and the Court of Appeal established that the Applicant caused the death of one Medadi Aloyce by setting him on fire. The High Court's findings, which were confirmed by the Court of Appeal, were that the Applicant's intention to cause death was established by her failure to offer any assistance to Medadi Aloyce "when she saw him burning, shouting or screaming for help" and also "despite having a car, she desisted from assisting by rushing [the victim] to hospital for treatment." These findings have not been discredited before this Court.
68. In the circumstances, the Court finds that the Applicant has failed to offer cogent argument(s) or evidence to contradict the facts established by the domestic courts in relation to the circumstances of Medadi Aloyce's death and her role in the death. Given that no patent error(s) by the trial court or even the appellate court has been noted, the Court holds that there is no reason to question the grounds for the decisions of the said courts.
69. Given the preceding, the Court dismisses the Applicant's allegation that the death penalty was improperly imposed on her without considering the nature of the offence she committed.

ii. Denial of discretion in the imposition of the death penalty

70. The Applicant argues that the mandatory death penalty limits the discretion of judicial officers to consider mitigating evidence. Relying on the Court's decision in *Ally Rajabu v Tanzania*, she submits that this results in the death penalty being imposed mechanically or generically.

71. With regard to her trial, the Applicant submits that the Respondent State should have taken into account her lack of intent to kill the victim, but that to substantiate her intention to kill, the trial judge adopted the characterisation put forth by the prosecution of her as a “cruel woman”. The Applicant also alleges that she has experienced severe hardships including child abuse, female genital mutilation, attempted forced marriage at the age of twelve (12) years, domestic physical violence meted by her first husband, rape by superior police officer while serving in the police force, living with HIV, and the death of her second husband in her second year of imprisonment.
72. It is also the Applicant’s submission that the High Court overlooked her demonstrable capacity for rehabilitation and reform in view of the fact that she did not have a prior criminal record and the twelve (12) years she served as a police officer and her charitable pursuits. She also points to the fact that she is now sixty (60) years old, which means that she has already served her life-time imprisonment and should be released.

73. In response, the Respondent State reiterates its submission about the lawfulness of the death penalty in its territory. It also points out that “the Applicant’s allegation as to the good character is a mere afterthought since she, with malice aforethought murdered the deceased. And that is not definitely an attribute of a person with good character.”

74. The Court notes that the grounds that the Applicant raises in support of her allegation of the violation of Article 4 of the Charter are based on the fact that the mandatory death penalty constitutes an arbitrary deprivation of the right to life by virtue of the fact that it constrains the discretionary power of a trial court. The Court observes that the specific grounds invoked by the Applicant relate to the reasons for which she believes the domestic courts ought

to have passed an individuated sentence on her.

75. In assessing the arbitrariness of the Applicant's death sentence, the Court recalls its established jurisprudence in relation to the criteria for such assessment, namely, whether or not there is a legal basis for the death sentence; whether the death sentence was meted out by a competent court and whether due process was observed in the proceedings that culminated in the imposition of a death sentence.²¹
76. With regard to the first criterion, the Court notes that the death sentence is provided for in Section 197 of the Penal Code of the Respondent State. This requirement is, therefore, met.
77. In relation to the second criterion, the Court observes that the Applicant's contention is not based on the fact that the courts of the Respondent State lacked jurisdiction to hear the case that led to her being sentenced to death but on the fact that the High Court could only impose the death sentence because it is the only one provided for in law for murder, thus denying the judge the discretionary power to pronounce any other sentence.²² Given that no grounds have been led by the Applicant to establish that domestic courts acted in want or even in excess of their jurisdiction in determining the case against the Applicant, the Court thus finds that the death sentence imposed on the Applicant was meted by a competent court.
78. In relation to compliance with due process, the Court finds that the mandatory nature of the death penalty, as provided for under Section 197 of the Respondent State's Penal Code, leaves the national courts with no choice but to sentence a convict to death, resulting in arbitrary deprivation of life.²³ By taking away the discretionary power of a judge to impose a sentence on the basis of proportionality and the personal situation of a convicted person, the mandatory death sentence does not comply with the requirements of due process in criminal proceedings. The

21 *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, Communications 137/94 139/94, 154/96, 161/97 (2000) AHRLR 212 (ACHPR 1998), §§ 1-10 and, § 103; *Forum of Conscience v Sierra Leone*, Communication 223/98 (2000) 293 (ACHPR 2000), § 20.; See, Article 6(2), ICCPR; and *Eversley Thompson v St. Vincent & the Grenadines*, Comm. No 806/1998, U.N. Doc. CCPR/C70IO/806/1998 (2000) (U.N.H.C.R.), 8.2; See also *Ally Rajabu and Others v Tanzania* (merits and reparations), § 104.

22 *Ally Rajabu and Others v Tanzania* (merits and reparations), § 106; *Gozbert Henerico v United Republic of Tanzania*, ACtHPR, Application No 004/2015, Judgment of 10 January 2022 (merits and reparations), § 147.

23 *Amini Juma v Tanzania* (merits and reparations), § 130; *Ally Rajabu and others v Tanzania* (merits and reparations), § 109; *Gozbert Henerico v Tanzania* (merits and reparations), § 148.

Court considers that if the domestic courts of the Respondent State were vested with discretion to determine the sentencing of persons found culpable of murder, the High Court, by way of illustration, could have legitimately considered all the factors that the Applicant has raised before this Court in possible mitigation of her sentence.

79. In the circumstances, the Court holds that the death sentence, as prescribed by section 197 of the Respondent State's Penal Code, does not pass the third criterion for assessing arbitrariness of the sentence. It further holds, in line with its jurisprudence, that the mandatory death penalty constitutes an arbitrary deprivation of the right to life under Article 4 of the Charter.²⁴
80. The Court thus finds that the Respondent State violated Article 4 of the Charter by sentencing the Applicant to death under a regime that did not provide her an opportunity to mitigate her sentence upon conviction.

B. Alleged violation of the right to dignity

81. The Applicant submits that, by imposing the death penalty, the Respondent State violated her right to dignity because "she suffers from depression and anxiety, and is predisposed to mental health problems." Specifically, she submits that in the past she was diagnosed with Major Depressive Disorder and currently she suffers from Persistent Depressive Disorder. She also argues that "the designated method of execution – hanging – is plainly a "cruel, inhuman or degrading punishment." Lastly, she argues that she is "experiencing the psychological torture of "death row phenomenon", which is widely regarded as a "cruel, inhuman or degrading punishment". The Applicant also points out that her mental and physical well-being has been complicated by her pre-existing physical ailments caused by her HIV positive status.

82. The Respondent State submits that the three (3) grounds raised by the Applicant be dismissed. Firstly, the Respondent State reiterates that Applicant was found guilty and sentenced in

24 *Ally Rajabu and others v Tanzania* (merits and reparations), § 114.

accordance with the law, so that her death penalty is a lawful sentence. Secondly, that the Applicant's claims relating to mental health are neither substantiated nor were they raised in her defence during the trial. Thirdly, that the Applicant does not establish a causal link between the murder and the allegations that she is a victim of rape, forced marriage and female genital mutilation which, in any case, have not been substantiated by any evidence. In the Respondent State's view, "the murder is connected with her grievance over her missing boat and not gender-based violence."

83. The Court notes that Article 5 of the Charter provides as follows:
Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of [their] legal status. All forms of exploitation and degradation of [human beings], particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.
84. The Court recalls the Applicant's first contention, where she asserts that the Respondent State did not consider that sentencing a mentally ill person to death violates Article 5 of the Charter. The Court finds that the issue for determination is rather whether the mandatory death penalty pronounced following the proceedings complies with the guarantees of the right to a fair trial, especially Article 7(1) of the Charter which provides that: "[e]very individual shall have the right to have his cause heard."²⁵
85. In this regard, the Court notes that there is nothing on record to indicate that the Applicant or her representatives raised her mental health status, at the preliminary hearing, during the trial proceedings or as a ground of appeal before the Court of Appeal. The Court also notes that the Applicant did not submit that it was apparent to the trial court that she was mentally incompetent during her trial. In the absence of probative proof of the Applicant's mental health at the time of her trial before the High Court, the Court has no basis, relating to the Applicant's mental health, to

25 *Gozbert Henerico v Tanzania* (merits and reparations), § 156.

fault the findings of the trial court.²⁶ In the circumstances, the plea that the Respondent State sentenced a person suffering from mental illness to death is merely an argument invoked after the sentence had been passed. In view of the preceding, the Court finds that the Respondent State did not violate Article 7(1)(d) of the Charter.

86. In relation to the second and third contentions raised by the Applicant, the Court notes that the Applicant challenges the implementation of the death penalty by hanging. The Court recalls that it has previously held in *Ally Rajabu and Others v Tanzania* that, the implementation of the death penalty by hanging, where such a penalty is permitted, is “inherently degrading” and “encroaches upon dignity in respect of the prohibition of [...] cruel, inhuman and degrading treatment”.²⁷ The Court, therefore, finds that the Respondent State violated Article 5 of the Charter for prescribing the death sentence by hanging.
87. The Court confirms, specifically with regard to the Applicant’s contention in respect of the effects of her spending a long time on death row, that the period of waiting for an execution can cause stress on persons sentenced to death particularly when the wait is long. The Court emphasises that detention on death row is inherently inhuman and encroaches upon human dignity. This Court considers that the stress associated with detention on the death row stems from the natural fear of death that a condemned prisoner has to live with.²⁸ However, given that a person sentenced to death is still entitled to exhaust all judicial processes, a balance must be struck between permitting one to access the available judicial remedies while not keeping individuals whose sentences have been confirmed by the highest court on death row indefinitely.²⁹ In such a case, states such as the Respondent are encouraged to determine appropriate sentences for persons originally sentenced to death which remove the constant possibility of the enforcement of the death penalty that persons on death row have to endure.

26 Cf. Communication No 684/1996, *RS v Trinidad and Tobago* (Human Rights Committee), § 7.2 (2 April 2022).

27 *Ally Rajabu and others v Tanzania* (merits and reparations), §§ 119-120 and *Amini Juma v Tanzania* (merits and reparations), § 36.

28 *Attorney General v Susan Kigula and 417 others*, Constitutional Appeal No 3 of 2006 (Supreme Court of Uganda) and *Attorney General of the Commonwealth of the Bahamas v Farrington and Ministry of Public Safety and Immigration and others* [1997] AC 413 421-425.

29 *Attorney General v Kigula* (as above).

88. The Court recalls that in the instant case, the Applicant was found guilty and sentenced to death on 19 September 2011. The final judicial pronouncement, in relation to her case, was the decision of the Court of Appeal dismissing her application for review on 19 March 2015. To date, therefore, the Applicant has spent at least seven (7) years on death row, after the conclusion of all judicial proceedings in her case.
89. The Court considers that such detention and the length of time thereof have inevitably caused the Applicant to endure a level of suffering that infringes upon her dignity. The Court, therefore, finds that the Respondent State violated the Applicant's right to dignity guaranteed under Article 5 of the Charter.

C. Alleged violation of the right to a fair trial

90. The Applicant alleges that by virtue of the proceedings leading up to her being found guilty of murder and sentenced to death, her right to a fair trial guaranteed under Article 7 of the Charter was violated as follows:

i. The delay between the Applicant's arrest and her trial

91. The Applicant alleges that she spent three (3) years, six (6) months in custody, being the period between her arrest and conviction, which she submits "constitutes unreasonable delay according to settled international law." More specifically, the Applicant points out that she was arrested in February 2008, charged with the offence of murder on 22 September 2009. Subsequently, her trial commenced in November 2010, and she was sentenced in September 2011.
92. Relying on the Court's decisions in *Alex Thomas v Tanzania*, *Mariam Kouma & Ousmane Diabate v Mali*, *Wilfred Onyango and others v Tanzania* and *Armand Guehi v Tanzania*, the Applicant submits that the Court interpreted the terms "unreasonable delay" based on three (3) criteria.³⁰ First, as regards the complexity of the case she avers that her prosecution was based exclusively on the testimony of four (4) eyewitnesses only, hence the trial ought to have been concluded at a quicker pace. Second, as regards the behaviour of the parties, she argues that the delay

30 *Alex Thomas v Tanzania*, § 104; *Mariam Kouma and Ousmane Diabate v Mali* (admissibility) (21 March 2018) 2 AfCLR 237, § 38; *Wilfred Onyango Nganyi and others v United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 507, § 136; *Armand Guehi v Tanzania* (merits and reparations), § 122.

was attributable to the Respondent State inasmuch as the public hearing was adjourned several times notwithstanding that she neither called witnesses nor filed multiple applications before the trial court. Finally, as regards the behaviour of the judicial authorities, the Applicant submits that there is nothing to suggest that any delay was attributable to her conduct.

93. The Respondent State submits that the Applicant was tried within a reasonable time hence there was no violation of Article 7(1)(d) of the Charter. The Respondent State further submits that the Applicant was first arraigned before the District Court for committal proceedings as her offence is only triable by the High Court. Further, the Respondent State avers that the whole process of committal proceedings takes time. Citing the Court's decision in *Onyango Nganyi and others v Tanzania* case, the Respondent State submits that the Court has held that the determination of unreasonable delay must be done on a case-by-case basis. According to the Respondent State, the Court should consider that owing to the seriousness and complexity of the offence and proceedings involved, the time spent between the arrest and conviction of the Applicant was reasonable within the meaning of Article 7(1)(d) of the Charter.

94. The Court recalls that Article 7(1)(d) of the Charter stipulates that "[e]very individual shall have the right to have [their] cause heard. This comprises...the right to be tried within a reasonable time by an impartial court or tribunal."
95. The Court further recalls that in *Wilfred Onyango and another v Tanzania* it held that in determining whether or not the duration of a trial is reasonable, each case must be treated on its own merits and that three (3) criteria should be determinative, namely, the complexity of the case, the behaviour of the Applicant, and the

behaviour of the national judicial authorities.³¹

96. The Court recalls that the Applicant was arrested on 4 February 2008, that the preliminary hearing was conducted on 15 February 2010, that her trial commenced on 29 November 2010 and that the High Court found the Applicant guilty and sentenced her on 19 September 2011. In total, the High Court proceedings leading to the Applicant's conviction, therefore, were concluded after three (3) years, seven (7) months.
97. As regards the time period the between the arrest of the Applicant and the commencement of her trial, the Court further recalls that two (2) years, nine (9) months and twenty-five (25) days elapsed. Regarding the argument in respect of the undue prolongation of the trial, the Court notes that from the date of commencement of the trial to the conclusion of the same, a period of nine (9) months and sixteen (16) days elapsed. The Court will thus take into account this timeline in determining whether or not the time taken to conclude the Applicant's trial is reasonable.
98. As regards the time it took to commence proceedings against the Applicant, the Court observes that the Respondent State offers only a general explanation, to the effect that committal proceedings at the District Court are often prolonged, an explanation that, in any case, is not supported with evidence. The Court notes that there is nothing on record to justify delay in the commencement of the trial inasmuch as, for example, the prosecution principally relied on eye witnesses to the murder.³² The Court notes that the Respondent State also does not make any argument to demonstrate that the delayed commencement of the trial was due to the Applicant's conduct. In the circumstances, the Court finds that the period of two (2) years, nine (9) months and twenty-five (25) days between the Applicant's arrest and the commencement of her trial is an inexcusable delay in the domestic procedures and, therefore, constitutes a violation of Article 7(1)(d) of the Charter.
99. The Court further observes that the record of proceedings at the High Court shows two (2) interrelated adjournments. The Court notes that the Prosecution closed its case on 30 November 2010. On the same day, the Applicant's defence lawyer sought leave of the Court to begin the defence case. The trial judge dismissed this prayer as, "the case was fixed for trial for only two (2) days and today is the last day for this case". For the court, the alternative

31 *Wilfred Onyango Nganyi and others v Tanzania* (merits), §§135-136.

32 *Cf. Gozbert Henerico v Tanzania*, § 88.

was to adjourn the case to another date. At the behest of the court, this date was to be fixed by the District Registrar who, on 8 July 2011, set the period from 26 July 2011 to 27 July 2011 for the defence to stage its case.

- 100.** In light of the above, the nature of the offence and the trial on the whole, the Court finds that the period of nine (9) months and sixteen (16) days taken to conclude the trial is reasonable. Consequently, the Court finds that the Respondent State did not violate Article 7(1)(d) of the Charter by reason of the time it took to conclude the Applicant's trial before the High Court.

ii. Alleged bias during the Applicant's trial

- 101.** The Applicant alleges that the trial court violated Article 7(1)(b) of the Charter by contravening the principle of presumption of innocence and by shifting the burden of proof to the Applicant when it observed that it was inconceivable why the Applicant failed to call witnesses to corroborate her defence. Additionally, the Applicant alleges that the record of proceedings demonstrates that the assessors cross-examined witnesses throughout the proceedings, which is unlawful.
- 102.** In her Reply, the Applicant submits that the trial judge was prejudiced against her, which was demonstrated in two (2) respects, first, by relying on the prosecution's "discriminatory preconceptions" that the Applicant is a "cruel woman", rather than on the evidence of guilt. Second, the trial judge did not take into account the mitigating circumstances of the Applicant during sentencing.

- 103.** The Respondent State submits that these claims be dismissed by making reference to the Court of Appeal's decision, which, allegedly, addressed the Applicant's contentions. The Respondent State also submits that the burden of proof was not shifted, thus the trial was free from bias, and that the assessors are, by law, allowed to put questions to accused persons, which is what they did during the Applicant's trial.

104. The Court observes that Article 7(1)(b) of the Charter provides that, “[e]very individual shall have the right to have [their] cause heard. This comprises...the right to be presumed innocent until proved guilty by a competent court or tribunal.”
105. With regard to the grounds invoked by the trial judge in relation to the Applicant, particularly the allegation that she was described as a “cruel woman”, the Court notes that this issue was considered by the Court of Appeal in order to determine if the trial court had indeed shifted the burden of proof. The Court of Appeal found that the burden of proof was not shifted and that the proceedings before the High Court were fair.
106. On its own perusal of the record, the Court finds that no grounds have been made out on the basis of which the Court of Appeal’s findings can be impeached, particularly in relation to the alleged violation of Article 7(1)(b) of the Charter. In view of the preceding, the Court dismisses the Applicant’s allegation of a violation of Article 7(1)(b) of the Charter on the ground that the High Court shifted the burden of proof.
107. In relation to the argument on the role of the assessors in the Applicant’s trial, the Court observes, from the record, that during the trial the assessors sought clarifications from the Applicant. The Court notes that the Applicant has failed to demonstrate how this constitutes a violation her right to be presumed innocent under Article 7(1)(b) of the Charter. The Court takes particular cognisance of the fact that under Tanzanian law, assessors are permitted to seek clarifications from accused persons. It thus behoves the Applicant to prove that, in a particular case, the assessors went beyond merely seeking clarifications, which was not shown to be the case in the instant matter. Consequently, the Court dismisses the Applicant’s claim that the Respondent State violated her right to be presumed innocent and be tried by an impartial tribunal protected by Article 7(1)(b) of the Charter.

iii. The Applicant was sentenced based on insufficient, unreliable and circumstantial evidence

108. The Applicant argues that the prosecution witness’ testimony was inconsistent and lacked credibility, that the trial court used circumstantial evidence to convict her; that the requirement of malicious intent was not proven and that the trial judge disregarded

the assessors finding that the Applicant was not guilty.

109. The Respondent State submits that following the Applicant's appeal, the Court of Appeal examined the alleged inconsistencies of the witness testimonies and the issue of reliance on circumstantial evidence, and upheld the Applicant's guilty verdict nonetheless. In all, the Respondent State avers that these inconsistencies were too trivial to cast doubt on the guilt of the Applicant. In addition, the Respondent State submits that the opinion of the assessors is not binding on the trial judge pursuant to Section 298(2) of its Criminal Procedure Act.

110. The Court underscores that Article 7 of the Charter can be read in the light of Article 14 of the ICCPR, which deals with fair trial rights in great detail.³³ It follows, from a combined reading of these provisions that the right to a fair trial includes the right to a public hearing before a competent, independent and impartial court.

111. The Court considers, as it has consistently held, that upholding the right to have one's cause heard requires that, in criminal matters, the accused is convicted only upon being clearly proven guilty.³⁴ This requirement applies with even greater relevance where an accused person is at risk of incurring a severe penalty³⁵ and particularly in instances involving the death sentence as is the case in the instant Application.

³³ See *Armand Guehi v Tanzania* (merits and reparations), § 73. See also *Wilfred Onyango Nganyi and Others v Tanzania* (merits), §§ 33-36. The Respondent State became a Party to the ICCPR on 11 July 1976.

³⁴ *Armand Guehi v Tanzania* (merits and reparations), §§ 105-111. See also, *Werema Wangoko Werema and another v Tanzania* (merits), §§ 59-64; and *Mohamed Abubakari v Tanzania* (merits), §§ 174, 193 and 194.

³⁵ See, *Oscar Josiah v Tanzania* (merits) (28 March 2019) 3 AfCLR 83, § 51 and *Kijiji Isiaga v United Republic of Tanzania*, ACTHPR, Application No 032/2015, Judgment of 25 June 2021 (merits), §§ 78, 79.

- 112.** The Court further observes that, while it does not substitute national courts when it comes to assessing the evidence adduced in domestic proceedings, it retains the power to examine whether the manner in which such evidence was considered is compatible with international human rights norms.³⁶ One critical concern in this connection is to ensure that the consideration of facts and evidence by domestic courts was not manifestly arbitrary or did not result in a miscarriage of justice.³⁷
- 113.** In the present case, the Court notes that it has to assess, in view of the alleged inconsistency and lack of credibility of the prosecution witness testimony, the trial court's reliance on circumstantial evidence to convict the Applicant; the fact that malice aforethought was not proven; and the disregard of the assessors' finding by the trial judge. It is based on this assessment that the Court will determine whether the guilty verdict and the ensuing sentence are compatible with standards set out earlier.
- 114.** Although the alleged evidentiary issues highlighted by the Applicant relate to the trial before the High Court, the Court observes that the record of Appeal shows that the Court of Appeal also considered the same and decided to uphold the High Court's findings. In the Court's own assessment, the insufficiency or unreliability of the evidence adduced before the High Court is not supported by the facts on record. Given that the High Court heard all the witnesses, the Court cannot, in line with its constant jurisprudence, consider the grounds invoked by the said courts unless there are manifest errors, which is not the case in the instant Application.
- 115.** The Court also holds that the domestic courts examined what the Applicant calls circumstantial evidence and found no manifest errors warranting its intervention. Similarly, the Court notes that the High Court clearly outlined the ground on which it found that the Applicant acted with malicious intent, i.e., the Applicant did not attempt to assist the victim when he was on fire as well as her failure/refusal to offer transport to take the deceased to hospital.
- 116.** The Court also notes that, as pointed out earlier, in the Respondent State's system the judge is not bound by the opinion of the assessors. It is thus unable to infer a violation of the Applicant's right to a fair trial simply because the trial judge overruled the assessors.

36 See, *Mohamed Abubakari v Tanzania* (merits), §§ 26, 173; *Armand Guehi v Tanzania* (merits and reparations), §§ 105-111; and *Werema Wangoko Werema and another v Tanzania* (merits), §§ 59-64.

37 See, *Mohamed Abubakari v Tanzania* (merits), §§ 26 and 173.

117. Given that the evidence on record does not reveal any manifest error(s), which occasioned a miscarriage of justice to the Applicant, the Court holds that the Respondent State did not violate the Applicant's right to a fair hearing as protected under Article 7 of the Charter.

iv. Alleged violation of the right to effective representation

118. The Applicant alleges that her State-appointed defence counsel was ineffective, which resulted in a violation of Article 7(1)(c) of the Charter. Specifically, she alleges that her counsel, before the High Court, demonstrated ineptitude by not calling witnesses to testify on her behalf. This, according to the Applicant, is a "manifest lack of effective legal representation." The Applicant also faults the conduct of her defence counsel for failing to call character witnesses who would have refuted the prosecution's claim that she was a cruel woman.

119. The Respondent State submits that the Applicant was effectively represented throughout her trial and even during her appeal. It also submits that the Applicant's claim that her trial was "undermined" by ineffective counsel "is baseless since it is not proven that she really intended to call any witness." The Respondent State further submits that if the Applicant's counsel was indeed ineffective, she had the avenue of "recusing the counsel before the trial Judge, of which she did not avail herself." Citing *Onyango Nganyi v Tanzania*, the Respondent State submits that "a State cannot be held liable for every misconduct on the part of the counsel appointed for legal aid."

120. The Court observes that Article 7(1)(c) of the Charter provides that, "[e]very individual shall have the right to have [their] cause heard. This comprises...the right to defence, including the right to

be defended by counsel of [their] choice.”

121. The Court recalls that it has held that Article 7(1)(c) of the Charter, as read together with Article 14(3)(d) of the ICCPR, guarantees for anyone charged with a serious criminal offence, the right to be automatically assigned counsel free of charge whenever the interests of justice so require.³⁸
122. The Court further recalls that it has previously considered the issue of effective representation in the matter of *Evodius Rutechura v Tanzania*, where it held that the right to free legal assistance comprises the right to be defended by counsel. However, the right to be defended by counsel of one’s choice is not absolute when the choice is made through a free legal assistance scheme.³⁹ It further held that what matters is whether the accused is given effective legal representation rather than whether he or she is allowed to be represented by a lawyer of their own choosing.⁴⁰ The Court reiterates that it is the duty of the Respondent State to provide adequate representation to an accused person and intervene only when the representation is not adequate.⁴¹ If, however, there are allegations of ineffective legal representation, it is important, that all such allegations must be backed by evidence.⁴²
123. As was recognised in *Gozbert Henrico v Tanzania*,⁴³ a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes. The quality of the defence provided depends, essentially, on the relationship between the client and his representative. The State should intervene only where the lawyer’s manifest failure to provide effective representation is brought to its attention. The Court, however, recalls that with regard to effective legal representation through a free legal assistance scheme, it is not sufficient for a State to provide counsel. The State must also ensure that those who provide legal assistance under that scheme have enough time and facilities to prepare an adequate defence, and to provide robust representation at all stages of the legal process starting from the arrest of the individual for whom such representation is

38 *Alex Thomas v Tanzania* (merits), § 124.

39 ECHR, *Croissant v Germany* (1993) App No 13611/89, § 29; *Kamasinski v Austria* (1989) App No 9783/82, § 65.

40 ECHR, *Lagerblom v Sweden* (2003) App No 26891/95, §§ 54-56.

41 ECHR, *Kamasinski v Austria*, § 65.

42 *Ibid.*, § 75.

43 *Gozbert Henerico v Tanzania* (merits and reparations), §§ 108-109.

being provided.

124. In the instant Application, the question that arises is whether the Respondent State discharged its obligation to provide the Applicant with effective free legal assistance, and ensured that Counsel had adequate time and facilities to enable the preparation of the Applicant's defence.
125. The Court notes that the Respondent State provided the Applicant counsel at its expense during the proceedings before the High Court. The Court in particular notes that during her arraignment and the preliminary hearing, the Applicant was represented by Advocate Laurian, while during the trial before the High Court, she was represented by Advocates Nasimire and Deo Mgengeli. At the Court of Appeal, the Applicant had the services of two learned advocates, Mr. Salum Amani Magongo, who was assigned to the Applicant by the Respondent State, and Mr. James Andrew Bwana, who was privately hired by the Applicant herself.
126. The Court further notes that there is nothing on record to demonstrate that the Respondent State impeded the earlier listed counsel from accessing the Applicant in order to consult and prepare for her defence. The record also does not demonstrate that the Respondent State denied the Applicant's counsel adequate time and facilities required to prepare the Applicant's defence.
127. The Court further finds that there is nothing on the record to demonstrate that the Applicant informed the High Court or the Court of Appeal of any shortcomings in counsel's conduct of her defence. There is also no evidence on record to demonstrate that the Applicant intended to call witnesses but was hindered in this due to the conduct of her counsel. The Court notes that the Applicant was free to raise, with the domestic courts, her discontent about the manner in which she was represented, in particular, the fact that no defence witnesses were called to counter the prosecution's case. The Court takes special notice of the fact that, before the Court of Appeal, the Applicant was represented by counsel of her own choice, in addition to the one appointed by the Respondent State.
128. Given all the above, the Court finds that the Respondent State did not violate the Applicant's right to effective representation and, therefore, did not violate Article 7(1)(c) of the Charter.

v Allegation that mandatory death penalty stemmed from an unfair trial

- 129.** The Applicant contends that the alleged violations of Article 7(1) outlined earlier in this judgment have in turn occasioned a violation of her right to life under Article 4 of the Charter, by virtue of the mandatory death sentence.

- 130.** The Respondent State submits that the Applicant's trial, conviction and sentence were in accordance with the law. It also contends that the Applicant was accorded the right to be heard and that the trial court properly considered the evidence of both parties. Similarly, the Court of Appeal ensured that the charges against the Applicant were proven beyond reasonable doubt and confirmed the impugned decision. It is the Respondent State's submission, therefore, that the Applicant's trial met all the criteria for a fair trial as enshrined in Article 7 of the Charter.

- 131.** Given the findings herein earlier, the Court reiterates that the Respondent State violated the Applicant's right to a fair trial only to the extent that there was an unreasonable delay between her arrest and the commencement of her trial before the High Court. However, the Court does not find the same to have vitiated the entirety of the Applicant's trial before the domestic courts. In the circumstances, the Court holds that the sentence imposed on the Applicant did not flow from a process that breached the principle of fair trial and, therefore, dismisses the Applicant's allegations.

D. Alleged violation of Article 1 of the Charter

- 132.** The Applicant alleges that the Respondent State violated Article 1 of the Charter by failing to amend its Penal Code which permits

the mandatory death sentence as well as execution by hanging.

- 133.** The Respondent State submits that the Applicant was tried, convicted and sentenced in accordance with law and that the Court of Appeal was satisfied that the case against the Applicant was proven beyond reasonable doubt. It thus avers that the allegation of a violation of Article 1 of the Charter should be dismissed for lack of merit.

- 134.** The Court notes that it has consistently held that “when the Court finds that any of the rights, duties and freedoms set out in the Charter are violated, this necessarily means that the obligation set out under Article 1 of the Charter has not been complied with or that it has been violated.”⁴⁴
- 135.** In the instant case, the Court has held that the Respondent State has violated Articles 4, 5, 7(1)(d) of the Charter. On the basis of the foregoing, the Court finds that the Respondent State also violated Article 1 of the Charter.

VIII. Reparations

- 136.** The Court notes that Article 27(1) of the Protocol stipulates that “[i]f the Court finds that there has been violation of a human or peoples’ right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.”
- 137.** As per the Court’s jurisprudence, for reparations to be granted, the Respondent State should first be responsible for the wrongful act. Second, causation should be established between the wrongful

⁴⁴ *Alex Thomas v Tanzania* (merits), § 135; *Norbert Zongo and Others v Burkina Faso* (merits), § 199; *Kennedy Owino Onyachi and another v Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 159.

act and the alleged prejudice. Furthermore, where granted, reparations should cover the full damage suffered.

138. The Court reiterates that the onus is on the Applicant to provide evidence in support of his/her allegation.⁴⁵ With regard to moral damages, the Court has consistently held that it is presumed and that the requirement of proof is not strict.⁴⁶
139. The Court also restates that the measures that a State can take to remedy a violation of human rights includes restitution, compensation and rehabilitation of the victim, as well as measures to ensure non-repetition of the violations, considering the circumstances of each case.⁴⁷
140. In the instant Application, the Applicant's claims for pecuniary reparations are quoted in United States Dollars. As the Court has established, generally, damages will be awarded in the currency of the State in which loss was incurred.⁴⁸ In the instant Application, therefore, the Court will apply this standard and monetary reparations, if any, will be assessed in Tanzanian Shillings.
141. As this Court has earlier found, the Respondent State violated the Applicant's right to life, right to dignity and right to a fair trial, guaranteed respectively under Articles 4 and 5 and 7 of the Charter. The Court, therefore, finds that the Respondent State's responsibility has been established. The prayers for reparations will, therefore, be examined against these findings.

A. Pecuniary reparations

142. The Applicant claims pecuniary reparations for both the material and moral prejudice which she alleges is a result of the violations suffered due to the Respondent State's conduct.

45 *Kennedy Gihana and others v Rwanda* (merits and reparations) (28 November 2019) 3 AfCLR 655, § 139; See also *Reverend Christopher R. Mtikila v Tanzania* (reparations) (13 June 2014) 1 AfCLR 72, § 40; *Lohé Issa Konaté v Burkina Faso* (reparations) (3 June 2016) 1 AfCLR 346, § 15(d); and *Kalebi Elisamehe v Tanzania* (merits and reparations), § 97.

46 *Ally Rajabu and Others v Tanzania* (merits and reparations), § 136; *Armand Guehi v Tanzania* (merits and reparations), § 55; *Lucien Ikili Rashidi v United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 13, § 119; *Norbert Zongo and Others v Burkina Faso* (reparations), § 55.

47 *Ingabire Victoire Umuhoza v Republic of Rwanda* (reparations) (7 December 2018) 2 AfCLR 202, § 20. See also, *Kalebi Elisamehe v Tanzania* (merits and reparations), § 96.

48 See, *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 120 and *Ingabire Victoire Umuhoza v Rwanda* (reparations), § 45.

i. Material prejudice

143. The Applicant alleges that upon her arrest, the police seized her car and motorcycle, which at the time of filing this Application, had not been returned to her family. The Applicant, therefore, prays the Court to order the return of the items in the same condition as before seizure. In terms of the quantum of damages, the Applicant submits that “a new Land Rover Discovery retails from hundred and six thousand, three hundred (USD 106,300) United States Dollars and a used Land Rover Discovery of a similar model and age (but taking into account depreciation and wear and tear for the period the Respondent was incarcerated) retails from approximately Forty Thousand Five Hundred (40,500) USD.”
144. The Applicant prays the Court to grant her a reasonable award for the material prejudice suffered, taking into account the principle of equity and the ten (10) years in prison.
145. The Applicant also requests the reimbursement of Mrs. Barbara Doerner, her sister-in-law, for expenses incurred during her appeal procedure. In addition, the applicant prays for Five Thousand (USD 5,000) United States Dollars to cater for counsel's preparation and lodging her grounds of appeal and Eight Thousand (USD 8,000) United States Dollars to cater for counsel's representation in arguing the appeal. In total, the Applicant requests the payment of Thirteen Thousand (USD 13,000) United States Dollars in legal fees.
146. In her Reply, the Applicant submitted that she is not in a position to produce the log book for her motor vehicle registration number T382 ADJ Land Rover Discovery-TDI 300 since it was seized by the police. She also stated that she cannot produce the logbook for the motor cycle registration number T 292 AWD since she does not remember who has the logbook. The Applicant also stated that she is unable to produce business permits for her fishing business since she was operating this on a small and informal scale.

147. The Respondent State submits that the claim for monetary damages as a result of the alleged appropriation of her car and motorcycle is unsubstantiated as the Applicant has not adduced any proof of her ownership of the alleged properties or that the

alleged properties were taken by the police. The Respondent State thus prays the Court to dismiss the claim for monetary damages.

148. The Court notes that for reparations for material prejudice to be granted, there must be a causal link between the violation established by the Court and the prejudice suffered, but the Applicant must also specify the nature of the prejudice and the proof thereof.⁴⁹
149. In the instant Application, the Court has established that the Applicant's rights protected by Articles 4, 5 and 7 of the Charter were violated. However, the Court notes that the Applicant has not established the causal link between the violation of her earlier stated rights and the alleged loss of her motorcycle and car.
150. The Court reiterates that with regard to material prejudice, the general rule is that the burden of proof is on the Applicant.⁵⁰ Given the absence of documentary proof to support the Applicant's claims, the Court dismisses the prayer for reparation for material prejudice.
151. In relation to the claim for legal costs, the Court recalls its established case-law that reparations paid to victims of human rights violations may also include the reimbursement of lawyers' fees.⁵¹ However, in the present case, the Court finds that the Applicant has failed to provide evidence in support of her request for reimbursement of legal costs. Consequently, the Court dismisses the Applicant's prayer on this point.

ii. Moral prejudice

152. The Applicant prays the Court to award her reparations for moral prejudice based on two pleas. The first relates to the disruption of

49 *Kijiji Isiaga v United Republic of Tanzania*, ACTHPR, Application No 032/2015, Judgment of 25 June 2021 (reparations), § 20.

50 *Lohé Issa Konaté v Burkina Faso* (reparations), § 15. *Mohamed Abubakari v Tanzania* (reparations) (4 July 2019) 3 AfCLR 334, § 22; *Kijiji Isiaga v Tanzania* (reparations), § 15.

51 *Norbert Zongo and others v Burkina Faso* (reparations), § 79; *Mtikila v Tanzania* (reparations), § 39. *Mohamed Abubakari v Tanzania* (reparations), § 81.

her life plan due to her arrest, conviction and detention on death row. The Applicant submits that prior to the criminal proceedings against her, she had set up a charity for fighting against female genital mutilation. She further avers that she also worked with local women's groups. Further, she submits that her incarceration has separated her from her family and friends as well as her daughter. In the second plea, the Applicant submits that the eight (8) years on death row have been traumatic and particularly hard on her due to her advanced age and illness.

153. In light of the above, the Applicant prays the Court to grant her:

- i. Based on precedent awards ordered in *Lohé Issa Konate v Burkina Faso* (Judgment on Reparations), Decision of 3 June 2016, Application No 4 of 2013, a lump sum of Twenty Thousand 20,000 USD as compensation for moral damage suffered by her, with an additional uplift of ten thousand (10,000) USD in recognition of the exceptional suffering the Applicant endured due to her imprisonment on death row; or
- ii. Based on the precedent awards ordered in the Zongo Case, *supra*, we pray the Court grants a sum based on the current Tanzanian average yearly minimum wage of USD 1,593 multiplied by the 10 years the Applicant has been imprisoned under death row, amounting to a total of USD 17,523, with an additional uplift of USD 10,000 in recognition of the exceptional suffering the Applicant endured due to her imprisonment on death row; or
- iii. Based on the precedent awards ordered in the Zongo Case, *supra*, we pray the Court grant a sum based on the Value of a Statistical Life (VSL) in Tanzania at USD 158,000 given a life expectancy of approximately 65 years (Income Elasticities and Global Values of a Statistical Life, Journal of Benefit-Cost Analysis (2017), p. 247), amounting to a value of USD 24,308 for the 10 years of life the Applicant lost due to her imprisonment, in addition to an additional uplift of USD 10,000 in recognition of the exceptional suffering the Applicant endured due to her imprisonment on death row.

154. The Respondent State submits that there is neither violation nor any harm which it committed against the Applicant. Further, that there is neither proof that substantiates the causal link between the harm suffered and the purported violation of the Applicant's rights.

155. The Court recalls its established case-law where it has held that moral prejudice is presumed in cases of human rights violations and the quantum of damages in this respect is assessed based on equity, taking into account the circumstances of the case.⁵² The Court has, thus, adopted the practice of granting a lump sum in such instances.⁵³
156. The Court notes that the Respondent State violated the Applicant's right to life, right to dignity and right to a fair trial on account of which she suffered moral prejudice. Accordingly, the Applicant is entitled to moral damages.
157. The Court also notes that the disruption of Applicant's life plan is related to her incarceration. However, since the Court has not found the Applicant's incarceration to be unlawful, it can therefore not award any reparations for harm suffered.
158. The Court, however, recalls that it has found the mandatory nature of the death penalty constitutes a violation of Articles 4 and 5 of the Charter and that the delayed commencement of the Applicant's trial infringed Article 7(1)(d) of the Charter. It thus reiterates its case-law to the effect that, in respect of human rights violations, reparations for moral prejudice are awarded in equity on the basis of the Court's discretion.
159. The Court recalls that the High Court sentenced the Applicant to death by hanging on 19 September 2011 and the sentence was upheld by the Court of Appeal on 11 March 2013. This Court finds that the Applicant suffered prejudice as from the date of her sentencing. The uncertainty of waiting for both the outcome of the appeal and thereafter the possible execution only added to the psychological tension experienced by the Applicant. The Applicant's prejudice was also exacerbated by the delay she endured before the commencement of her trial. In the circumstances it is beyond doubt that the Applicant has suffered

52 *Norbert Zongo and Others v Burkina Faso* (reparations), § 55; *Ingabire Victoire Umuhoza v Rwanda* (reparations), § 59; *Christopher Jonas v United Republic of Tanzania* ACTHPR, Application No 011/2015, Judgment of 25 September 2020 (reparations), § 23.

53 *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 119; *Minani Evarist v United Republic of Tanzania* (merits and reparations) (21 September 2018) 2 AfCLR 402 (merits), § 84-85; *Armand Guehi v Tanzania* (merits and reparations), § 177; *Christopher Jonas v Tanzania* (reparations), § 24.

trauma.

- 160.** In view of the above, the Court finds that the Applicant has endured moral and psychological suffering and decides to grant her moral damages in the sum of Tanzanian Shillings Seven Million (TZS 7,000,000).

B. Non-pecuniary reparations

- 161.** The Applicant prays the Court to quash her sentence and set her free. Noting that the Applicant also makes prayers in relation to the Respondent State's law providing for the mandatory death sentence, and in the light of its earlier findings in the present Judgment, this Court considers it appropriate to first examine the prayer to amend the Penal Code.

i. Guarantees of non-repetition

- 162.** The Applicant prays the Court to order the Respondent State to amend its laws to ensure the protection of the right to life under Article 4 of the Charter, by removing the mandatory death sentence for the offence of murder.

- 163.** The Respondent State did not submit on this request.

- 164.** The Court recalls that, in previous judgments dealing with the mandatory death penalty involving the same Respondent State, it had ordered that the provisions in its Penal Code providing for the mandatory death penalty be removed to align with the country's international obligations.⁵⁴ The Court takes judicial notice of the fact that three (3) years after the first such judgment was issued,

⁵⁴ *Gozbert Henerico v Tanzania*, § 207; *Amini Juma v Tanzania*, § 170.

the Respondent State has not, as at the date of the present judgment, implemented the said order. Notably, identical orders were also issued in two other judgments delivered in 2021 and 2022, none of which has been implemented thus far.

165. The result of the Respondent State's non-compliance with the Court's earlier decisions is that persons in a similar position to the Applicant remain at the risk of being executed if convicted or facing the mandatory death sentence if tried.
166. In order to guarantee the non-repetition of the violations at issue herein, the Court orders the Respondent State to undertake all necessary measures to repeal the provision for the mandatory death penalty in its Penal Code.⁵⁵

ii. Restoration of liberty

167. According to the Applicant, there are compelling reasons for the Court to order her release. She contends, in particular, that re-opening the defence case or holding a re-trial would "result in prejudice and occasion miscarriage of justice", given the following circumstances: the passage of time since the alleged offence; the unfairness of the Applicant remaining in custody pending a retrial after ten years in detention; the risk that a re-trial may be subject to an unlawful mandatory death sentence; the existence of tainted evidence that is not capable of being corrected in fresh proceedings; and the Applicant's rehabilitation.

168. The Respondent State submits that the Court should dismiss this prayer insofar as the Applicant was arrested, found culpable and sentenced in accordance with the law.

55 *Ally Rajabu and Others v Tanzania* (merits and reparations), § 136.

169. Regarding the request to be set free, the Court recalls that it can only make such order in compelling circumstances. The Court notes that its findings in the present Application only pertain to the sentencing and do not therefore affect the conviction of the Applicant. The prayer for release is therefore not warranted, and the Court consequently dismisses the same.
170. The Court however consider that, while the Applicant states not wishing for the reopening of the defence case or a retrial, a related order is in the interest of justice to give effect to the correlated order that the domestic provision on the mandatory death sentence be removed. The findings of this Court that the Respondent State violated Articles 4, 5 and 7 of the Charter have a bearing on the sentence pronounced against the Applicant on account of the mandatory nature of the death penalty, hence warranting remedial measures.
171. Consequently, the Court orders the Respondent State to take all necessary measures for the rehearing of the case on the sentencing of the Applicant through a process that does not allow a mandatory imposition of the death penalty, while upholding the full discretion of the judicial officer.

iii. Restitution

172. The Applicant points out that she cannot be returned to the state she was in prior to her incarceration. Relying on *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v Sudan*, she submits that she be paid damages in the quest to restore her to the situation prior to the occurrence of the violations.

173. The Respondent State submits that the since the Applicant is not a victim of its deliberate actions or negligence, she cannot pray for damages under the umbrella of restitution.

174. The Court notes that the Applicant claims for damages as a form of restitution. However, given the Court's earlier orders for compensation to be paid to the Applicant for the moral prejudice she has suffered; the order for the Respondent State to hold a sentencing hearing for the Applicant; and the Court's pronouncement on the incompatibility of the mandatory death penalty with the Charter, it is the Court's finding that the claim for restitution has already been catered for. Accordingly, the Court dismisses the Applicant's claim for damages as a form of restitution.

iv. Publication

175. None of the parties made any submissions in respect of the publication of this judgment.

176. The Court considers, however, that for reasons now firmly established in its practice, and in the peculiar circumstances of this case, publication of this judgment is necessary. Given the current state of law in the Respondent State, threats to life associated with the mandatory death penalty persist in the Respondent State. There is also no indication as to whether measures are being taken for the law to be amended and aligned with the Respondent State's international human rights obligations, with the result that the guarantees provided in the Charter are still not certain for rights-holders. The Court thus finds it appropriate to order publication of this judgment.

v Implementation and reporting

177. Both Parties, apart from making a generic prayer that the Court should grant other reliefs as it deems fit, did not make specific prayers in respect of implementation and reporting.

- 178.** The justification provided earlier in respect of the Court's decision to order publication of the judgment notwithstanding the absence of express prayers by the Parties is equally applicable in respect of implementation and reporting. Specifically in relation to implementation, the Court notes that in its previous judgments issuing the order to repeal the provision on the mandatory death penalty, the Respondent State was directed to implement the decisions within one (1) year of issuance of the same.⁵⁶ Given the non-compliance demonstrated earlier in this judgment, the Court considers that restating the same timeframe in the present Application would undermine the urgency of having the impugned provision removed from the Respondent State's Penal Code. In the circumstances, the Court decides to set the time for implementation at six (6) months from the date of the present judgment.
- 179.** As regards reporting, the Court considers that this is required as a matter of judicial practice. With particular emphasis on timeframe, the Court notes that time allocated in judgments pending implementation have cumulatively reached three (3) years. For the same reasons as expounded while examining the orders for both publication and implementation, a report should be provided within a period that is shorter than that set out in individual judgments. The Court considers that the appropriate time should, therefore, be six (6) months in the circumstances.
- 180.** The Court also notes that the Respondent State has not implemented the orders in any of the earlier referred to cases where it was ordered to repeal the mandatory death penalty and the deadlines that the Court set have since lapsed. In view of this fact, the Court still considers that the orders are warranted both as an individual protective measure, and a general restatement of the obligation and urgency behoving on the Respondent State to scrap the mandatory death penalty and provide alternatives thereto.

IX. Costs

- 181.** None of the Parties made submissions on costs.

⁵⁶ *Ally Rajabu v Tanzania*, *ibid*, § 171, xv, xvi; *Gozbert Henerico v Tanzania*, *ibid*, § 203.

182. According to Rule 32(2) of the Rules, “[u]nless otherwise decided by the Court, each party shall bear its own costs, if any.”

183. The Court notes that in the instant case, there is no reason to depart from this principle. Accordingly, the Court decides that each party shall bear its own costs.

X. Operative part

184. For these reasons,

The Court

Unanimously,

On jurisdiction

- i. *Dismisses* the objection to its jurisdiction raised by the Respondent State;
- ii. *Declares* that it has jurisdiction.

On admissibility

- iii. *Dismisses* the objection to the admissibility of the Application;
- iv. *Declares* that the Application is admissible.

On merits

- v. *Finds* that the Respondent State has not violated the Applicant’s right to fair trial under Article 7(1) (b) of the Charter with regard to being presumed innocent until proven guilty by a competent court;
- vi. *Finds* that the Respondent State has not violated the Applicant’s right to effective counsel under Article 7(1)(c) of the Charter;
- vii. *Finds* that the Respondent State has not violated the Applicant’s right to a fair trial enshrined in Article 7(1) of the Charter, with regard to the allegation of conviction on the basis of insufficient, unreliable and circumstantial evidence;
- viii. *Finds* that the Respondent State has violated the Applicant’s right to life under Article 4 of the Charter in relation to the mandatory nature of the death penalty;
- ix. *Finds* that the Respondent State has violated the right to dignity under Article 5 of the Charter by prescribing hanging as a method of the execution of the death penalty;
- x. *Finds* that the Respondent State has violated the right to be tried within a reasonable time protected under Article 7(1)(d) of the Charter;

- xi. *Finds* that the Respondent State has violated Article 1 of the Charter.

On reparations

Pecuniary reparations

- xii. *Dismisses* the Applicant's prayer for damages for material prejudice;
- xiii. *Dismisses* the Applicant's prayer related to reimbursement of legal fees;
- xiv. *Grants* the Applicant's prayer for reparations for the moral prejudice and awards her the sum of Tanzanian Shillings Seven Million (TZS 7 000 000);
- xv. *Orders* the Respondent State to pay the amount set out under (xiv) above, tax free, as fair compensation, within six (6) months from the date of notification of judgment, failure to which, it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Bank of Tanzania throughout the period of delayed payment until the accrued amount is fully paid.

Non-pecuniary reparations

- xvi. *Dismisses* the Applicant's prayer for release from prison;
- xvii. *Orders* the Respondent State to take all necessary measures upon notification of this Judgment, within six (6) months, to remove the mandatory death penalty from its laws;
- xviii. *Orders* the Respondent State to take all necessary measures, through its internal processes and within one (1) year of the notification of this Judgment, for the rehearing of the case on the sentencing of the Applicant through a procedure that does not allow for the mandatory imposition of the death sentence;
- xix. *Orders* the Respondent State to publish this judgment, within a period of three (3) months from the date of notification, on the websites of the Judiciary, and the Ministry for Constitutional and Legal Affairs, and ensure that the text of the judgment is accessible for at least one (1) year after the date of publication;
- xx. *Orders* the Respondent State to submit to it, within six (6) months from the date of notification of this judgment, a report on the status of implementation of the orders set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On costs

- xxi. *Orders* that each Party shall bear its own costs.

Noudehouenou v Benin (judgment) (2022) 6 AfCLR 1000

Application 028/2020, *Houngue Éric Noudehouenou v Republic of Benin*

Judgment, 1 December 2022. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA, SACKO and ADJEI

The Applicant is a politician and a national of the Respondent State. He brought this Application alleging that a 2018 law that amended an earlier law on the High Judicial Council in that State undermined judicial independence and violated his human rights. He also alleged that the eligibility criteria for contesting elections in that State was in violation of some human rights. The Court held that the Respondent State had violated some of the rights claimed by the Applicant. Accordingly, the Court awarded some of the reparations requested by the Applicant, including the award of damages for moral prejudice and an order that the Respondent State takes measures to restructure its High Judicial Council to bring it in line with Article 26 of the African Charter.

Jurisdiction (personal jurisdiction, 28-30, material, 31)

Admissibility (exhaustion of local remedies, 43-53; filing within a reasonable time, 54-59)

Independence of judiciary (composite independence, 69; implications for inter-arm relationship, 70-73, 81-83)

African Charter (meaning of judgment, 96; report on execution of judgment, 98-100)

Opinion and expression (nature of right, 106; restrictions on right, 107-114)

Fair trial (effective remedy, 123, 127-130, 132-136)

Reparations (basis of, 157-158; onus to provide evidence for, 158; measures of, 159; scope of, 159; pecuniary reparations, 167-169; moral prejudice, 173-177; non-pecuniary reparations, 182-183, 184-185, 189, 190-194)

Provisional measures (moot, 196-197)

Dissenting Opinion: BENSAOULA

Rules of Court (enforcement power of court, 10-13)

Dissenting Opinion: ADJEI

Procedure (enforcement of judgment, 9-10)

I. The Parties

1. Mr. Houngue Éric Noudehouenou (hereinafter referred to as “the Applicant”) is a politician and a national of Benin. He challenges the law of 2 July 2018¹ amending and supplementing the organic law of 18 March 1999² pertaining to the High Judicial Council (hereinafter “HJC”) and its constitutionality. He also challenges the eligibility criteria for contesting elections in his country.
2. The Application is filed against the Republic of Benin (hereinafter referred to as “the Respondent State”), which became a party to the African Charter on Human and Peoples’ Rights (hereinafter referred to “the Charter” on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (hereinafter “the Protocol”) on 22 August 2014. On 8 February 2016, the Respondent State deposited the Declaration provided for in Article 34(6) of the said Protocol (hereinafter referred to as “the Declaration”) by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 25 March 2020, the Respondent State deposited with the African Union Commission the instrument of withdrawal of the said Declaration. The Court has held that this withdrawal has no effect on pending cases and on new cases filed before the entry into force of the said withdrawal, that is, one year after its deposit, which is on 26 March 2021.³

II. Subject of the Application

A. Facts of the matter

3. It emerges from the Application that on 2 July 2018, the Respondent State passed Law No 2018-02 amending and supplementing Organic Law No 94-027 of 18 March 1999 relating to the HJC. He avers that the said law contains provisions that violate the principle of independence of the judiciary. He claims that the executive wields undue influence over the HJC and that

1 Law No 2018-02 of 2 July 2018.

2 Law No 94-027 of 18 March 1999.

3 *Houngue Éric Noudehouenou v Republic of Benin*, ACtHPR, Application No 004/2020, Ruling of 6 May 2020 (provisional measures), §§ 4-5 and corrigendum of 29 July 2020.

judges have no remedy against sanctions pronounced against them by the HJC.

4. He also challenges Law No 2018-16 of 4 January 2018 pertaining to the status of the judiciary, which bars judges from going on strike. He notes that although the said law was declared unconstitutional by the Constitutional Court by Decision No DCC 18-003 of 22 January 2018, the same Court, by Decision DCC 18-141 of 28 June 2018, reversed the earlier decision by declaring the same law consistent with the Constitution.
5. The Applicant also challenges Law No 2019-40 of 7 November 2019 amending the Respondent State's Constitution of 11 December 1990 (hereinafter referred to as "the Constitutional amendment") and Law No 2019-43 of 15 November 2019 pertaining to the Electoral Code (hereinafter referred to as "the Electoral Code"), which were ruled constitutional by the Constitutional Court in Decisions Nos. DCC 19-504 of 6 November 2019 and DCC 19-525 of 14 November 2019 respectively. Finally, he challenges Memorandum No 914/MEF/DC//SGM/DGI of 13 December 2017 issued by the Director General of Taxes.

B. Alleged violations

6. The Applicant alleges a violation of the following rights:
 - i. the right to judicial independence protected by Article 26 of the Charter, Articles 2 and 14(1) of the International Covenant on Civil and Political Rights (ICCPR), Articles 10 and 30 of the Universal Declaration of Human Rights (UDHR), Article 1(h) and 33 of the ECOWAS Protocol on Democracy;
 - ii. the right of judges to strike protected by Article 8 of the Charter, and consequently the violation of their right to information, freedom of opinion and expression, their right to form associations freely, and their right to freedom of assembly, protected respectively by Articles 9, 10 and 11 of the Charter;
 - iii. the right to a remedy enshrined in Article 56(5) of the Charter, Article 8 of the UDHR, Article 1(h) of the ECOWAS Protocol on Democracy, Article 7(1) of the Charter, and Articles 2(3), 14(1-3) and 19 of the ICCPR;
 - iv. the right to freedom of the media protected by Article 19(2) of the ICCPR;
 - v. the right to freedom of religion protected by Article 18 of the ICCPR;
 - vi. the obligation to ensure that the competent authorities respond appropriately to any remedy found to be well-founded, protected by Article 2(3)(c) of the ICCPR, and of the right to reparation protected by Articles 27 and 30 of the Protocol;

- vii. the right to the effective guarantee, protection and enjoyment of fundamental rights protected by Article 1 of the Charter, Article 2(1) and (2) of the ICCPR and Article 1(h) of the ECOWAS Protocol on Democracy;
- viii. the obligation to establish and strengthen independent and impartial national electoral management bodies protected by Article 17(1) of the African Charter on Democracy, Elections and Governance (ACDEG);
- ix. the right to participate freely in the conduct of the public affairs of one's country protected by Article 13(1) of the Charter and Article 21 of the UDHR;
- x. the right to vote and to be elected at genuine periodic elections based on universal and equal suffrage and secret ballot, ensuring the free expression of the will of the electorate as protected by Article 25(b) of the ICCPR;
- xi. the right of defence, protected by Article 7(1)(c) of the Charter;
- xii. the right to associate freely with others protected by Article 22(1) of the ICCPR;
- xiii. the right to non-discrimination protected by Article 2 of the Charter;
- xiv. the obligation to reject and condemn unconstitutional changes of government protected by Article 3(10) of the ACDEG;
- xv. the obligation to sanction any amendment or review of constitutions or legal instruments that undermines the principle of democratic change of government protected by Article 23(5) of the ACDEG;
- xvi. the right to privacy protected by Article 17 of the ICCPR;
- xvii. the obligation to ensure the effectiveness of the rights guaranteed by the Covenant protected by Article 2 of the ICCPR.

III. Summary of the Procedure before the Court

- 7. The Applicant filed the Application on 17 September 2020 followed by a request for provisional measures on 28 September 2020. These were served on the Respondent State on 16 October 2020 for its Response within ninety (90) and fifteen (15) days, respectively. On 30 October 2020, the Respondent State filed its Response to the request for provisional measures.
- 8. On 27 November 2020, the Court issued a ruling dismissing the request for provisional measures. It was served on the Parties on 28 November 2020.
- 9. On 4 January 2021, the Applicant filed with the Registry supplementary pleadings to the Application and another request for provisional measures which were notified to the Respondent State on 14 January 2021 for its Response within 30 days of receipt. The Respondent State did not file a Response to the

request for provisional measures.

10. On 1 February 2021, the Applicant filed a second supplementary submission in support of the Application, which was notified to the Respondent State on 22 February 2021 for its Response within 15 days of receipt.
11. On 29 March 2021, the Court issued a Ruling dismissing the request for provisional measures filed on 4 January 2021. The Ruling was served on the Parties on 9 April 2021.
12. On 30 June 2021, the Registry reminded the Respondent State that it had not filed its Response either to the Application or to the supplementary pleadings of the Applicant. The Registry notified the Respondent State that it had been granted an additional 30 days' extension to file its Response and drew its attention to the provisions of Rule 63 of the Rules. However, the Respondent State did not file any Response to the main Application or to the said supplementary pleadings.
13. On 14 July 2022, the Applicant filed a third request for provisional measures which was notified to the Respondent State on 25 July 2022 for its Response within fifteen (15) days from receipt.
14. On 2 August 2022, the Respondent State filed its Response to the said request for provisional measures. On the same day, the said Response was notified to the Applicant, who filed his Reply.
15. On 15 September 2022, the Applicant filed a fourth request for provisional measures. It was notified to the Respondent State on 10 October 2022 for information as the Court decided to examine the said request as well as the request filed on 14 July 2022 at the same time as the Application on the merits.
16. Pleadings were closed on 7 November 2022 and the Parties were duly informed.

IV. Prayers of the Parties

17. In the Application and the supplementary pleadings, the Applicant prays the Court to:
 - i. Declare that it has jurisdiction;
 - ii. Declare the Application admissible;
 - iii. Declare that he has the right to have effect given to the rights protected by the instruments to which the Respondent State is a party within the meaning of Article 1(h) of the ECOWAS Protocol on Democracy and Article 1 of the Charter;
 - iv. Find that the allegations of violations of the Applicant's human rights are founded and that the Respondent State indeed violated the human rights protected by Articles 1, 2, 3, 7(1), 9, 10, 11, 26 and 56(5) of the Charter, Articles 2, 5(2), 14(1), 19 and 26 of the ICCPR,

Articles 8, 10, 19 and 30 of the UDHR, Article 10(1) of the ACDEG, Article 1(h) and 33 of the ECOWAS Democracy Protocol;

- v. Order all necessary measures for the Respondent State to execute diligently the decisions of the Court rendered in Applications Nos. 013/2017, 059/2019, 062/2019, 003/2020, 004/2020, 008/2020, 010/2020;
- vi. Order the Respondent to take all measures to vacate and erase all the effects and consequences of the violations for which it was found responsible by the Court in the present Application;
- vii. Order the Respondent State to bring its domestic legislation into compliance with Article 26 of the Charter, by removing from the HJC all members of the executive branch and by instituting the election of the members of the HJC by an absolute majority in free and transparent elections within the body of professional judges democratically elected by their peers;
- viii. Order the Respondent State to ensure that Article 20 of the Organic Law on the HJC complies with Articles 7(1) and 26 of the Charter and 26 of the ICCPR by affording judges an effective and satisfactory remedy against any decision taken against them by the HJC;
- ix. Order the Respondent State to repeal Article 20 of Law No 2018-01 on the status of the judiciary to comply with Articles 1, 9, 10, 11 and 26 of the Charter, Article 1(h) of the ECOWAS Protocol on Democracy, and Article 10(1) of the ACDEG, and thereby cease the violations of the Applicant's rights to judicial independence and protection against arbitrariness;
- x. Order the Respondent State to take appropriate measures to remove all impediments to the Applicant's right to an effective remedy provided for and protected by Article 1(h) of the ECOWAS Protocol on Democracy and Article 8 of the UDHR;
- xi. Order the Respondent State to publish the decision of this Court on the official website of the Ministry of Justice continuously for two years, in the Official Gazette of the Republic of Benin and at the Tribunals and Courts of the Respondent State;
- xii. Order the Respondent State to bring Article 410 paragraph 3 of the Beninese penal code in compliance with Article 19(2) of the ICCPR by deleting the expressions "specialized journals" and "purely" so as to recognize the right to freedom of choice of means of communication as well as the right to make technical comments against court decisions, the word "purely" being a source of arbitrariness;
- xiii. Order such measures as the Court may deem necessary to ensure non-repetition, as well as measures ensuring compliance with the decision, including a prohibition on the Respondent State's agents taking reprisal actions against the Applicant and/or his family and Counsel in relation to this case, in accordance with Article 2(3) of the ICCPR and paragraph 12(b) of United Nations Resolution 60/147 of 16 December 2005;

- xiv. Order that all Member States of the African Union take all necessary measures to neutralise the effects and consequences of the Respondent State's failure to comply with the decisions of this Court;
- xv. Order the Respondent State to bring Article 53 of Law No 90-32 of 11 December 1990 on the Constitution of the Respondent State in line with Article 18 of the ICCPR by deleting the expression "before the spirits of the ancestors" within three months of the Court's decision;
- xvi. Order the Respondent State to repeal Memorandum No 914/MEF/DC/SGM/DGI of 13 December 2017 on the issuance of tax clearance, within one month of notification of this decision and before any election in the Republic of Benin;
- xvii. Order the Respondent State to vacate the following Decisions of the Constitutional Court of the Respondent State, DCC 20-641 of 19 November 2020, DCC 021-008, DCC 021-010 and DCC 011-021 of 7 January 2021 and Decision DCC 18-141 of 28 June 2018;
- xviii. Order the Respondent State to restore his rights as a candidate;
- xix. Order the Respondent State to have the parliament of the Respondent State recomposed by virtue of the judgments of 27 September 2020 – Application Nos 059/2020 and 010/2020, and judgment of 4 December 2020 – Application Nos 062/2019 and 003/2020;
- xx. Order the Respondent State to pay interest for the non-execution of the Rulings of 5 May 2020 and 25 September 2020 and by the judgment of 4 December 2020 delivered in Application No 003/2020, to the tune of Five Hundred Million (500,000,000) CFA francs for each month of delayed execution until the full and perfect execution of the said judgment of 4 December 2020 in Application No 003/2020;
- xxi. Order the Respondent State to bear all costs in respect of these proceedings to the tune of Fifteen Million (15,000,000) CFA francs for the lawyer's fees and Five Hundred Thousand (500,000) CFA francs for the costs of mail and communication, as well as Five Hundred Million (500,000,000) CFA francs for the moral prejudice that he suffered owing to the failure of the Respondent State to execute the decisions rendered by this Court in favour of the Applicant;
- xxii. Order the Respondent State, in view of its failure to comply with previous decisions of this Court, to pay lump sum interest on the award in the amount of One Billion (1.000.000.000) CFA per month for failure to comply with the decision of the Court, from the date of notification of the decision of this Court until the Respondent State has fully and completely implemented the said decision;
- xxiii. Order the Respondent State to publish the Court's decision in the official gazette of the Respondent State on the websites of the Constitutional Court of Benin (CCB), the National Independent Electoral Commission (CENA) and the *France-Soir* newspaper, for an uninterrupted period of two years from the date of notification of this Court's decision.

18. The Respondent State did not submit any prayers in response

to the Application on the merits. It however requested the Court to decline jurisdiction in respect of the request for provisional measures of 14 July 2022.

V. Jurisdiction

- 19.** Article 3 of the Protocol provides that:
 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
- 20.** Furthermore, under Rule 49(1) of the Rules of Court, “[t]he Court shall conduct a preliminary examination of its jurisdiction (...) in accordance with the Charter, the Protocol and these Rules.”⁴
- 21.** Based on the above provisions, the Court must, in each application, ascertain its jurisdiction and rule on objections to its jurisdiction, if any.
- 22.** In its Response to the request for provisional measures of 14 July 2022, the Respondent State raises an objection to the personal jurisdiction of the Court.

A. Objection to the personal jurisdiction of the Court

- 23.** The Respondent State submits that the Court no longer has jurisdiction to entertain new applications from individuals or non-governmental organisations. It further submits that although the request for provisional measures is based on an application submitted before the withdrawal of the Declaration took effect, the Court has no jurisdiction to consider the said request.
- 24.** The Applicant submits in reply that by virtue of Article 27(2) of the Protocol and Article 59(1)⁵ of the Rules of Court, the Court is empowered to adopt provisional measures in cases of urgency, the existence of irreparable harm, or imminent violations of fundamental rights, or to preserve the interests of justice and/or the parties, or to preserve the effectiveness of the judgment on the merits.
- 25.** He further contends that, in any event, the Court does not have to be satisfied that it has jurisdiction as regards the merits of the

4 Rule 39(1) of the Rules of 2 June 2010.

5 Rule of 25 September 2020.

matter but merely that it has *prima facie* jurisdiction.

26. Furthermore, referring to Article 3(1) of the Protocol, the Applicant considers that the Court has jurisdiction insofar as the Respondent State has ratified the African Charter, the Protocol, deposited the Declaration, and insofar as the Application contains alleged violations of rights protected under human rights instruments.
27. He avers that although the Respondent State deposited the instrument of withdrawal of the Declaration on 25 March 2020, the withdrawal only took effect from 26 March 2021 and therefore has no bearing on his Application, which was filed before that date.

28. The Court notes that the Respondent State is a party to the Charter, the Protocol and has deposited the Declaration. The Court recalls, as indicated in paragraph 2 of this Judgment, that on 25 March 2020, the Respondent State deposited the instrument of withdrawal of its Declaration. According to the Court's jurisprudence, the withdrawal by the Respondent State of its Declaration has no retroactive effect, nor does it affect cases pending at the time of the said withdrawal or new cases brought before it prior to its entry into force. Since the withdrawal of the Declaration takes effect twelve (12) months after the deposition of the instrument relating thereto, that is, on 26 March 2021, it has no bearing on the Application, which was filed on 17 September 2020.⁶
29. The Court further notes that although the request for provisional measures was filed after the withdrawal of the Declaration took effect on 26 March 2021, its personal jurisdiction in the present case is not affected, since the said request relates and is subsidiary, to the initial Application filed on 17 September 2020, that is, before the said withdrawal took effect. Consequently, the said withdrawal does not affect the personal jurisdiction of the Court.
30. In view of the foregoing, the Court dismisses the objection to jurisdiction and finds that it has personal jurisdiction to hear the present Application.

6 See paragraph 2 of this judgment.

B. Other aspects of the Court's jurisdiction

31. The Court notes that it has material jurisdiction, insofar as the Applicant alleges violations of the Charter, the ACDEG, the ICCPR and the ECOWAS Protocol on Democracy, to which the Respondent State is a Party.⁷
32. The Court considers that it has temporal jurisdiction insofar as the alleged violations occurred after the Respondent State became a party to the Charter and the Protocol and deposited the Declaration.
33. As regards its territorial jurisdiction the Court finds that it has temporal jurisdiction insofar as the alleged violations occurred on the territory of the Respondent State.
34. Accordingly, the Court finds that it has jurisdiction to consider the Application.

VI. Admissibility

35. Article 6(2) of the Protocol provides that “the Court shall rule on the admissibility of cases taking into account the provisions of Article of the Charter “.
36. In accordance with Rule 50(1) the Rules of Court,⁸ “the Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules”.
37. Rule 50(2) of the Rules of Procedure, which in substance reproduces Article 56 of the Charter, provides that:
Applications to the Court must meet all of the following requirements:
 - a. Indicate their authors even if the latter request anonymity;
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter;
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
 - d. Are not based exclusively on news disseminated through the mass media;
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 - f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date the Commission is seized with the

7 The Respondent State ratified the ICCPR on 12 March 1992, the ACDEG on 11 July 2012, and the ECOWAS Protocol on 21 December 2001.

8 Rule 40 of the Rules of 2 June 2010.

matter, and;

- g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the Charter.

38. The Respondent State does not raise any objection to the admissibility of the Application on the merits. Nonetheless, the Court must examine whether the requirements of the above-mentioned provisions have been met.

A. On the requirement relating to the identity of the Applicant

39. In this regard, it notes that in accordance with Rule 50(2)(a) the Applicant has clearly indicated his identity.

B. On the requirement relating to the compatibility of the application with the Constitutive Act of the African Union

40. The Court also notes that the Applicant's requests seek to protect his rights under the Charter. Furthermore, one of the objectives of the Constitutive Act of the African Union, as set out in Article 3(h), is the promotion and protection of human and peoples' rights. Furthermore, there is nothing on record to show that the Application is incompatible with any provision of the Constitutive Act. The Court therefore considers that the Application is compatible with the Constitutive Act of the African Union and the Charter, and therefore finds that it meets the requirement of Rule 50(2)(b) of the Rules.

C. On the requirement relating to the use of disparaging or insulting language

41. The Court further notes that the Application does not contain any language that is disparaging or insulting to the Respondent State, its institutions or the African Union, as required under Rule 50(2)(c).

D. On the requirement relating to news disseminated through the mass media

42. The Court further finds that the Application meets the requirement of Rule 50(2)(d) of the Rules since it is not based on news disseminated through the mass media, but rather relates to decisions, laws and regulations of the Respondent State.

E. On the requirement relating to the exhaustion of local remedies

43. The Court notes, with regard to the exhaustion of local remedies under Rule 50(2)(e), that the Application is based on allegations of human rights violations in relation to Law No 2018-02 amending and supplementing Organic Law No 94-027 of 18 March 1999 on the HJC, Memorandum No 914/MEF/DC//SGM/DGI of 13 December 2017 on the issuance of tax clearance, Law No 2019-40 of 1 November 2019 on constitutional amendment and Law No 2019-43 of 15 November 2019 on the Electoral Code.
44. The Court recalls that the local remedies to be exhausted must be available, effective and satisfactory. The Court has held that it is not sufficient for a remedy to exist in order to meet the rule of exhaustion of remedies; an Applicant is, in fact, required to exhaust a remedy only to the extent that it offers prospects of success.⁹
45. As regards Memorandum No 914/MEF/DC//SGM/DGI of 13 December 2017, the Court recalls that the Applicant contests the said Memorandum on the ground that it vests exclusive jurisdiction with the Director General of Taxes to issue tax clearance, which is a requirement for running in elections. The Court notes that under Article 53¹⁰ of Law No 2001-37 of 27 August 2002 on the organisation of the judiciary, the courts of first instance have

9 *Beneficiaries of the late Norbert Zongo, Aboulaye Nikiema dit Ablasse, Ernest Zongo and Blaise Ilboudo and Mouvement Burkinabè des droits de l'homme et des peuples v Burkina Faso*, Judgment (merits) (28 March 2014), 1 AfCLR 219 § 68; *Ibid. Konaté v Burkina Faso* (merits) 31 § 92 and 108; *Sébastien Germain Marie Aikoué Ajavon v Republic of Benin*, ACTHPR, Application No 062/2019, Judgment of 4 December 2020, §§ 99.

10 Article 53 "In administrative matters, they shall have first instance jurisdiction to hear disputes concerning all acts issued by the administrative authorities within their jurisdiction. The following shall fall within the scope of this litigation: (www.droit-afrique.com Benin Judicial organisation 15 1) appeals for annulment on the grounds of excess of decision-making power of the administrative authorities; 2) appeals for interpretation of the acts of the said authorities on referral from the judicial authorities; 3) full litigation involving a legal person under public law, except for the exceptions provided for by law; 4) claims by private individuals for damage

jurisdiction to hear disputes over administrative acts, in particular, by way of a remedy for excess of power or that of full litigation.

46. It follows that a local remedy against the Memorandum of 13 December 2017 was available. This remedy is also effective since it allows the contentious acts to be annulled.
47. The Court notes that the Applicant does not provide evidence that he pursued this administrative remedy, let alone that he exhausted it before the courts of the Respondent State. It follows, with regard to Memorandum No 914/MEF/DC//SGM/DGI of 13 December 2017, that local remedies were not exhausted. Consequently, the Court declares all the allegations relating to the said Memorandum inadmissible.
48. With regard to the contested legislative provisions, the Court underlines that under Articles 114¹¹ and 122¹² of the Constitution of the Respondent State, the Constitutional Court is the judge of the constitutionality of laws and guarantees the fundamental rights of the human person and public freedoms and mandatorily rules on the constitutionality of organic laws and laws in general prior to promulgation. It hears in first and last instance any action concerning a violation of human rights brought by any citizen of the Respondent State. Consequently, a local remedy exists and is available.
49. The Court further notes that Article 1121 of the Constitution¹³ stipulates that the Constitutional Court rules on the constitutionality of laws prior to promulgation, and at the request of the President of the Republic or any member of the National Assembly.
50. In this respect, the Court underlines that the Charter is an integral part of the Constitution of the Respondent State.¹⁴ As a result, the constitutionality review, which relates to both the procedure

caused by the personal acts of contractors holding concessions and administrators of the administration; 5) tax litigation.

- 11 "The Constitutional Court is the highest court of the State in constitutional matters. It rules on the constitutionality of laws and guarantees the fundamental rights of the human person and public freedoms (...)"
- 12 "Any citizen may refer to the Constitutional Court the constitutionality of laws, either directly or through the exceptional procedure based on unconstitutionality invoked in a case that concerns him before a court.
- 13 See also Article 19 of Law No 91-009 of 4 March 1991 on the organic law on the Constitutional Court, as amended by the Law of 31 May 2001.
- 14 Article 7 of the Constitution of Benin provides: "The rights and duties proclaimed and guaranteed by the African Charter on Human and Peoples' Rights, adopted in 1981 by the Organization of African Unity and ratified by Benin on 20 January 1986, are an integral part of the (...) Constitution and of the law".

followed for the adoption of the law and its content,¹⁵ is carried out in relation to “the constitutional bloc that constitutes the Constitution and the Charter”.¹⁶ Through this procedure, the Constitutional Court of the Respondent State is required to verify that the laws are consistent with human rights instruments.¹⁷

51. In the present case, the Applicant alleges human rights violations that derive from Law No 2018-16 of 4 January 2018 on the status of the judiciary, Law No 2018-02 of 2 July 2018 of the Supreme Council of the Judiciary, Law No 2019-40 of 7 November 2019 amending the Constitution and Law No 2019-43 of 15 November 2019 on the Electoral Code. All of these laws were, at the behest of the President of the Republic pursuant to Article 121 of the Constitution, reviewed by the Constitutional Court *a priori* and were declared constitutional, respectively, by the Constitutional Court's Decisions Nos. DCC 18-141 of 18 June 2018, DCC 18-142 of 18 June 2018, DCC 19-504 of 6 November 2019 and DCC 19-525 of 14 November 2019.
52. In view of the foregoing, the Court considers that it would not be reasonable to direct the Applicant to submit to the Constitutional Court issues on which the same court has already ruled.
53. Accordingly, the Court finds that the Applicant exhausted local remedies in respect of the alleged violations in relation to the impugned legislation and that in this respect the Application meets the requirement of Rule 50(2)(e).

F. On the requirement to file the Application within a reasonable time

54. With regard to the requirement under Rule 50(2)(f) that the application should be filed within a reasonable time, the Court recalls that it has taken a case-by-case approach to assessing what constitutes reasonable time, taking into account the particular circumstances of each case.¹⁸ The Court has taken into

15 Article 35 of the Rules of Procedure of the Constitution provides, in the context of the review of constitutionality: “The Constitutional Court shall rule on the law as a whole, both on its content and on the procedure for its drafting”

16 High Council of the Republic (HCR) of Benin sitting as Constitutional Court, Decision 3DC of 2 July 1991.

17 *Sébastien Germain Marie Aikoué Ajavon v Republic of Benin*, ACTHPR, Application No 062/2019, Judgment of 4 December 2020, §§ 102.

18 *Beneficiaries of the late Norbert Zongo and Others v Burkina Faso* (21 June 2013) (Preliminary Objections) 1 AfCLR 195, § 121; *Alex Thomas v United Republic of Tanzania* (20 November 2015) (merits), 1 AfCLR482, § 73.

consideration the following circumstances, *inter alia*, that impact on the reasonable time within which to file an application with the Court: the incarceration of the Applicant, the fact that the Applicant is lay, does not have legal aid,¹⁹ is indigent, illiterate, is not aware of the existence of the Court, was being intimidated and fearing reprisals²⁰ as well as the exhaustion of extraordinary remedies.²¹

55. The Court recalls that it has held that local remedies were exhausted as regards the alleged human rights violations relating to Laws No2018-16 of 4 January 2018 on the status of the judiciary, Law No2018-02 of 2 July 2018 of the HJC, Law No2019-40 of 7 November 2019 on the revision of the Constitution and Law No 2019-43 of 15 November 2019 on the Electoral Code, which were declared to be constitutional, respectively by Decisions DCC 18-141 of 18 June 2018, DCC 18-142 of 18 June 2018, DCC 19-504 of 6 November 2019 and DCC 19-525 of 14 November 2019 of the Constitutional Court.
56. The Court considers that the count of a reasonable time for its seizure starts from the dates the Constitutional Court issued its decisions, that is, 18 June 2018, 6 November 2019 and 14 November 2019. Between these dates and that of the filing of the Application, that is, 17 September 2020, two (2) years, two (2) months, twenty-nine (29) days, ten (10) months and ten (10) days and ten (10) months and three (3) days elapsed respectively. The issue to be determined is whether these periods of time are reasonable within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.
57. The Court notes that to justify the length of time it took him to file the Application, the Applicant asserts that he was deprived of his right to information as a result of his detention from 20 February 2018 to 31 October 2018, as he did not have free access to general information websites and the official newspaper of the Respondent State. In this regard, the Court finds in particular that the failure to file an application within a reasonable time due to incarceration cannot be justified by general assertions or

19 *Alex Thomas v Tanzania* (merits), *op.cit.* § 73; *Christopher Jonas v Tanzania* (merits) *op.cit.*, § 54, *Ramadhani v Tanzania* (11 May 2018) (merits), 2 AfCLR 344, § 83.

20 *Association pour le progrès et la défense des droits des femmes maliennes et Institute for Human Rights and Development in Africa v Republic of Mali* (11 May 2018) (merits) 2 AfCLR 380, § 54.

21 *Armand Guéhi v Tanzania* (merits and reparations) *op.cit.* § 56; *Werema Wangoko v United Republic of Tanzania* (merits) (7 December 2018), 2 AfCLR 520, § 49; *Alfred Agbesi Woyome v Republic of Ghana* (merits and reparations) (28 June 2019), 3 AfCLR 235, §§ 83-86.

assumptions but must be proven with evidence.

58. The Court notes that it emerges from the records that the Applicant, who was detained on 20 February 2018, escaped on 31 October 2018. The Court considers that as a result of this detention, the Applicant's access to information was significantly reduced so that he could not be aware of legislative and regulatory developments and decisions made in this regard. The Court also notes that owing to his escape, access to information and documents for the purpose of initiating actions before the Court of Appeal became more difficult.
59. In the circumstances of this case, the Court considers that the time taken to bring the case before it is reasonable. Accordingly, the requirement of Rule 50(2)(f) is met.

G. On the requirement relating to cases which have been settled by the Parties

60. Finally, the Court notes that, pursuant to Rule 50(2)(g) of the Rules, there is no indication that the present Application relates to a matter already settled by the parties in accordance with either the principles of the Charter of the United Nations or the Constitutive Act of the African Union, or the provisions of the Charter.
61. In view of the foregoing, the Court finds that the Application meets all the requirements of Article 56 of the Charter and of Rule 50(2) of the Rules. Accordingly, the Court declares it admissible.

VII. Merits

62. The Applicant alleges human rights violations in relation to (A) the subservience of the HJC, (B) the right of judges to strike, (C) the non-execution of the decisions of this Court, (D) Article 401(3) of the Criminal Code, (D) the remedy before the Constitutional Court, and (E) the constitutional amendment and the Electoral Codee and the COS-LEPI.

A. On the allegations relating to the subservience of the High Judicial Council

63. The Applicant alleges a violation of the independence of the judiciary due to the massive interference of the executive power in the composition of the.
64. He asserts that the independence of the judiciary, protected by Article 26 of the Charter, is violated due to the lack of separation of powers insofar as the executive branch influences the judiciary

through the composition of the HJC and that, consequently, the Constitutional Court, by Decision DCC 18-142 of 28 June 2018, could not declare to be constitutional Law 2018-2 of 2 July 2018 amending and supplementing Organic Law No 94-27 of 18 March 1999 relating to the HJC.

65. He submits that it emerges from the (new) Article 1 of the law of 2 July 2018 on the HJC that the latter is mostly composed of members of the executive, including the President of the Republic who is the President, the Minister of Justice, the Minister of Economy and Finance and the Minister of Public Service.
66. He further contends that the President of the Republic holds sway in the deliberations of the HJC and that the executive appoints fourteen (14) out of its seventeen (17) members. He further submits that of the nine (9) judges who are members of the HJC, only two are elected by the general assembly of judges, the others being appointed by the executive. He concludes that in view of this composition, which speaks to the control of the executive power over the HJC, the Respondent State violated Article 26 of the Charter.
67. The Respondent State did not submit on this allegation.

68. The Court recalls that Article 26 of the Charter provides that “States [...] have the duty to guarantee the independence of the Courts [...]”.
69. The Court notes that this provision does not only enshrine the independence of courts, as judicial bodies, but also that of the judiciary as a whole, similar to that of the executive power and the legislative power.²²
70. In this regard, the Court endorses the Commission’s position that “[...] the doctrine of separation of powers requires the three (3) pillars of the state to exercise powers independently. The executive branch must be seen to be separate from the judiciary, and parliament. Likewise in order to guarantee its independence, the judiciary, must be seen to be independent from the executive

22 *Sébastien Germain Marie Aikoué Ajavon v Republic of Benin*, ACtHPR, Application No 062/2019, Judgment of 4 December 2020, § 310.

and parliament".²³

71. The Court notes that in the instant case, it emerges from Articles 125²⁴ and 127 of the Respondent State's Constitution that judicial power, exercised by the Supreme Court, the courts and tribunals, is independent of the legislative and executive powers. The Court further notes that the President of the Republic is the sole guarantor of the said independence by virtue of Article 127 of the said Constitution,²⁵ that is, he must ensure that this independence of the judiciary is given force and substance both in law and in fact.
72. The Court therefore considers that the judiciary should not be subordinate to any other authority. It follows that neither the executive power nor the legislative power should interfere, directly or indirectly, in all matters relating to the organisation and functioning of the judiciary, including those of the entities that manage the careers of judges.
73. The Court underlines that it emerges from Article 11 of the organic law relating to the HJC that the latter is the body that manages the career of judges from the day they take their oath until they retire. The Court observes that this ensures discipline within the judiciary. The HJC is therefore the guarantor of the independence of the judiciary and also a bulwark against interference by other powers. In the Court's opinion, such a body, in order to support the independence of the judiciary, must be statutorily and functionally independent of the other branches of government.
74. It is therefore for the Court to assess whether such guarantees exist within the HJC.
75. The Court notes that the (new) Article 1 of its parent law, the HJC comprises fifteen (15) members including four (4) ex officio members coming directly from the executive branch, namely, the President of the Republic, the Minister of Justice, the Minister of Civil Service and the Minister of Finance. The President of the Republic appoints four (4) other members selected from outside the judiciary.²⁶ It should be noted that these persons appointed

23 ACHPR, *Kevin Mgwanga Gunme and others v Cameroon*, Communication 266/03, § 211 and 212, 45th ordinary session, 13-27 May 2009.

24 "The judiciary power is independent of the legislature and the executive powers. It shall be exercised by the Supreme Court, the courts and tribunals established in accordance with this Constitution".

25 "The President of the Republic is the guarantor of the independence of the judiciary. He is assisted by the High Judicial Council"

26 Ex-officio members by right: The President of the Republic, President; The President of the Supreme Court, First Vice President; The Keeper of the Seals, Minister of Justice, Second Vice President; The Presidents of the Chambers of

from outside the judiciary and their alternates are appointed from a list of seven (7) full members and seven (7) alternates designated by the Bureau of the Respondent State's National Assembly.

76. It also notes that the President of the Republic is the President of the HJC while the Keeper of the Seals is the second vice-President. The Court also notes that the President of the HJC has the casting vote in the deliberations.²⁷
77. Moreover, according to Article 127 of the Constitution²⁸ and Article 11 of the law on the HJC,²⁹ the HJC assists the president of the Republic in his mission as guardian of the independence of the judiciary. For the Court, requiring the HJC to assist the President of the Republic clearly puts it under the control and tutelage of the latter.
78. The Court notes that the Constitutional Court has addressed the constitutionality of the HJC law on two occasions, first, by Decision DCC 18-005 of 23 January 2018 which declared the said law consistent with the Constitution and, secondly, by Decision DCC 18-142 of 28 June 2018 which reversed the first decision.
79. The Court holds the same view as the Constitutional Court's initial interpretation which declared that Article 1 of the said law was contrary to the Constitution insofar as "The composition of this council must reflect the concern for the independence of the judiciary. By retaining as ex officio members, in addition to the President of the Republic, guarantor of the independence of the judiciary and the Keeper of the Seals, minister in charge of managing the careers of magistrates, the minister in charge of the Civil Service and the Minister of Finance, Article 1 of the law is contrary to the Constitution."
80. On that same occasion, the Constitutional Court further held that "the legislator, in the interests of the independence of the judiciary,

the Supreme Court, members; The Prosecutor General of the Supreme Court, member; A President of a Court of Appeal, member; A Public Prosecutor of a Court of Appeal, member; The Minister of Public Service, member; The Minister of Finance, member; The other members: Four (4) personalities from outside the judiciary, two (2) magistrates including one (1) from the public prosecutor's office. Non-ex-officio members are appointed by decree of the President of the Republic.

- 27 Article 13 of the law on the HJC Act: "In the event of a tie, the President shall have the casting vote".
- 28 Constitution of 2 December 1990, Article 127(2): "The President of the Republic shall guarantee the independence of the judiciary. He is assisted by the High Judicial Council "
- 29 Article 11 of the law on the HJC "the High Judicial Council assists the President of the Republic in his mission as guarantor of the independence of the judiciary; to this end, it is consulted on any question concerning the independence of the judiciary and the security of judges.

must provide for a certain balance in the composition of the HJC [...] It is important to specify that the external persons likely to be appointed by the Bureau of the National Assembly must be appointed on an equal basis on account of proposals emanating from the parliamentary minority and majority”.

81. Furthermore, the Court notes that the Minister of Justice, who is responsible for the administrative management of the judiciary, exercises direct and sometimes discretionary authority over the careers of judges. He is the main person responsible for the planning and management of resources in the judiciary. As such, he determines the human resources needs in the judicial sector and it is on his proposals that magistrates are presented for appointment by the President of the Republic.
82. In the light of the above, the Court finds that the appointment procedure and the composition of the HJC are skewed in favour of the executive power and that, consequently, the conditions for the independence of the HJC are not met.
83. Consequently, the Court considers that the Respondent State violated Article 26 of the Charter.

B. On the alleged violation of the right of judges to strike

84. The Applicant asserts that the prohibition of judges from striking by Article 20 of Law No 2018-01 of 4 January 2018 on the status of the judiciary, is arbitrary insofar as it is not justified in terms of compliance with Article 27(2) of the Charter and does not respect the fair balance between the requirements of the general interest of the community and the imperatives of protecting fundamental individual rights.
85. He states that the withdrawal of this right is illegal and violates international human rights instruments in particular Article 8 of the Charter as well as the principle of the supremacy of the Constitution since Article 31 of the Respondent State’s Constitution expressly guarantees the right to strike of all persons. According to him, what is guaranteed cannot be withdrawn but only regulated.
86. He further contends that the violation of the judges’ right to strike consequently leads to the violation of their right to information, freedom of opinion and of expression, their right to free association, and their right to assemble freely, protected respectively by Articles 9, 10 and 11 of the Charter.

87. The Respondent State did not submit on this allegation.

88. The Court notes that Law No 2018-01 of 4 January 2018 on the status of the judiciary was repealed by Law No2018-33 of 5 October 2018, thereby preserving judges' right to strike.

89. It follows, that the allegations of violation of the judges' right to strike and the violation of related rights made by the Applicant are moot.

C. On the alleged violation of Article 30 of the Protocol for non-execution of the decisions of the Court.

90. The Applicant submits that the Court has rendered several decisions against the Respondent State, namely, the Ruling of 9 December 2018 and the judgments of 29 March and 29 November 2019 in Application No 013/2017 *Sébastien Ajavon v Benin*; the judgment of 27 November 2020 in Application No 059/2019 *XYZ v Benin*; the Ruling of 17 April 2020 and the judgment of 4 December 2020 in Application No 062/2019 *Sébastien Germain Ajavon v Benin*; the Rulings of 5 May and 25 September 2020, the judgment of 4 December 2020 in Application No 003/2020 *Houngue Eric Noudéhouenou v Benin*; the judgment of 27 November 2020 in Application No 010/2020 *XYZ v Benin*.

91. He asserts that by these decisions, the Court had ordered the Respondent State to take the necessary measures, among others, to repeal the Electoral Code and subsequent laws before any election; to suspend the effects of the 25 July 2019 ruling of the CRIET; and to remove all impediments to his participation in presidential, municipal and communal elections.

92. He contends that the Respondent State did not implement any of these decisions and did not submit any report showing that it did.

93. The Applicant considers that, by failing to comply with these decisions, the Respondent State violated Article 30 of the Protocol.

94. The Respondent State did not submit on this allegation.

95. Article 30 of the Protocol provides that:
The States parties to the present Protocol undertake to with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.
96. The Court notes that the term “judgment” includes both its judgments and its rulings, the binding nature of which is confirmed by Rule 72(2) of the Rules, which provides that “The decisions shall be binding on the parties and are enforceable as provided under Article 30 of the Protocol”.
97. The Court observes that the fact that the Applicant refers to the non-execution of several decisions it has rendered notwithstanding, it considers that it must take into account only the decisions in which the Applicant was a party, in particular the rulings on provisional measures of 5 May and 25 September 2020, and the judgment of 4 December 2020 – Application No 003/2020 – *Houngue Eric Noudéhouenou v Benin*.
98. In this regard, the Court notes that all the violations alleged by the Applicant relate in one way or another, directly or indirectly, to the non-execution of the aforementioned decisions.
99. The Court also notes that it has not received any report from the Respondent State on the execution of the said decisions, nor does the Respondent State dispute that it has not executed them.
100. In view of the foregoing, the Court considers that the Respondent State violated Article 30 of the Protocol.

D. On the alleged violation of the right to freedom of opinion and expression

101. The Applicant points out that Article 410(1)(3) of the Respondent State’s Penal Code provides that:
Any person who, by acts, speech or writings, publicly seeks to discredit a judicial act or decision, under conditions likely to undermine the authority of the judiciary or its independence, shall be liable to one (1) month to six (06) months’ imprisonment and a fine of One Hundred Thousand (100,000) to One Million (1,000,000) CFA francs, or to one of these two penalties only.
...The foregoing provisions shall in no case be applied to purely technical comments in specialized journals, nor to acts, speech or writings calling for the revision of a conviction.
102. He alleges that these provisions infringe the freedom of opinion and expression protected by Article 19 of the ICCPR by restricting the right to freedom of the media to specialized journals and by granting the freedom to criticize a court decision only in respect of the review of a conviction, rather than in respect of the exercise of all remedies.

103. The Respondent State did not submit on this allegation.

- 104.** Article 9(2) of the Charter states that “[e]very individual shall have the right to express and disseminate his opinions within the law.”
- 105.** Article 19 of the ICCPR provides that “[e]veryone shall have the right to hold opinions without interference” and that “everyone shall have the right to freedom of expression”, subject to such restrictions as are prescribed by law and are necessary “for respect of the rights or reputations of others, for the protection of national security or of public order, or of public health or morals”.
- 106.** It follows from these texts that, on the one hand, freedom of opinion and freedom of expression are the foundation of any democratic society, and are closely linked, freedom of expression being the vehicle for the exchange and development of opinions. The two freedoms will therefore be examined together. On the other hand, freedom of expression is not absolute since it must be exercised “within the framework of the law”. It may therefore be subject to restrictions provided for by law, which must, moreover, be for legitimate purposes and be necessary and proportionate. These elements are assessed on a case-by-case basis and in the context of a democratic society.
- 107.** The Court considers that the issue in the instant case is whether the restrictions on the rights to freedom of opinion and of expression, of which the Applicant alleges a violation, are prescribed by law and, if so, whether they are necessary, legitimate and proportionate.
- 108.** The Court notes in the instant case that Article 410 of the Criminal Code punishes anyone who publicly seeks to discredit a judicial act or decision, by acts, speech or writing, under conditions likely to undermine the authority of the judiciary or its independence. Excluded from criminal liability (or incrimination) are purely technical comments in specialised journals as well as acts, speech or writings calling for the review of a conviction.
- 109.** The Court notes, first, that the restrictions on certain rights and freedoms must be prescribed by law, and be consistent with international human rights standards and that domestic laws restricting freedom of expression be clear, foreseeable and consistent with the purpose of the Charter and international human rights instruments. They must also apply to all persons,

which is the case here.³⁰

110. Second, regarding the legitimacy of the purpose of the restriction, the Court underlines that the general restriction clause under Article 27(2) of the Charter refers to respect for the rights of others, collective security, morality and the common good. The Court also considers that national security, public order and public morality are legitimate restrictions.³¹
111. In the instant case, the Court notes that the Respondent State restricted comments to specialised journals only. However, the Court is of the opinion that specialised journals are not the only means of communication for the dissemination of technical opinions on court decisions. These means of communication may also be the Internet, newspapers, radio or television broadcasts, or courses developed by teachers, etc.
112. The Court also notes in the present case that the restrictions provided for in paragraph 3 of Article 410 of the Criminal Code are vague and do not pursue a legitimate aim, since there is no compelling need to restrict citizens to certain means of communication thereby depriving them of having recourse to others which are available to them to make technical comments on court decisions and thus to exercise their right to freedom of expression.
113. The Court also considers that there are no national security, public order or public morality considerations for such a restriction since paragraph 1 of the Article already punishes the discrediting of a judicial decision with the aim of undermining the authority or independence of the judiciary.
114. In view of the foregoing, the Court considers that the Respondent State violated the right to freedom of opinion and expression protected by Article 9(2) of the Charter read together with Article 19 of the ICCPR.

E. On the alleged violation of the right to an effective remedy for the protection of human rights

115. The Applicant asserts that citizens have no remedy to contest laws passed by parliament prior to promulgation. He avers that the same is true for judges with regard to measures taken by the HJC against them.

30 *Sébastien Germain Marie Aikoué Ajavon v Republic of Benin*, ACtHPR, Application No 062/2019, Judgment of 4 December 2020, § 122.

31 *Idem*, § 123.

116. As regards citizens, he submits that according to Article 97(3) of the Constitution, organic laws may be promulgated only after the Constitutional Court has declared them consistent with the Constitution. He avers that Article 121 of the Constitution bars citizens from pursuing this remedy to challenge the constitutionality of bills prior to promulgation by conferring this jurisdiction solely on the President of the Republic and the members of the National Assembly.
117. He further contends that under Article 121 of the Constitution, a citizen may contest the constitutionality of a law before the Constitutional Court only after the said law has been passed.
118. He further contends that the Respondent State violates the right of judges by not affording them any remedy against the decisions of the HJC.
119. He avers that the fact that the Respondent State prevents citizens from intervening prior to the law being passed and does not afford judges a remedy to challenge the decisions of the HJC constitutes a violation of Article 1(h) of the ECOWAS Protocol on Democracy and Article 8 of the UDHR.
120. The Respondent State did not submit on this allegation.

121. Article 7(1)(a) of the Charter provides that:
“Everyone shall have the right to have his cause heard. This comprises (a) the right to an appeal to competent national organs against any act violating his fundamental rights recognized and guaranteed to him by conventions, laws, regulations and customs in force”;
122. This Article will be read together with Article 2(3)(a) of the ACDEG, Article 1(h) of the ECOWAS Protocol on Democracy and Article 8 of the UDHR Article which respectively provides:
“Each State Party to the present Covenant undertakes [...] to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”,
“Each individual or organisation shall be free to have recourse to the common or civil law courts, a court of special jurisdiction, or any other national institution established within the framework of an international instrument on Human Rights, to ensure the protection of his/her rights”

“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”.

123. The Court recalls that the right to an effective remedy has three (3) components. Firstly, the remedy must be effective. This means that it must not be formal but must be of a nature to redress violations of fundamental rights. This implies that the person concerned has effective access to a court. Secondly, the scope of the provision must relate to laws, conventions, regulations and customs. Thirdly, the competent body to deal with allegations of violations of fundamental rights must be a judicial body.
124. Therefore, the Court considers that it is important to know whether the Respondent State’s legislation allows citizens and judges to assert their rights in court in the event of human rights violations.

i. Citizens

125. The Court notes that Article 117 of the 11 December 1990 Constitution of the Respondent State provides that:
The Constitutional Court shall rule mandatorily on the constitutionality of laws and regulatory acts allegedly infringing fundamental human rights and public freedoms in general, in relation to human rights violation.
126. The Court further observes that in accordance with Articles 122³² of the Constitution, 22³³ and 24³⁴ of Law No 91-009 of 4 March 1991 pertaining to the Organic Law on the Constitutional Court, the President of the Republic, any member of the National Assembly, any citizen, any association or non-governmental organisation for the defence of human rights may initiate proceedings before

32 Article 122 “Any citizen may refer to the Constitutional Court the constitutionality of laws, either directly or by the exceptional procedure based on unconstitutionality invoked in a case which concerns him before a court. The latter shall stay proceedings until the Constitutional Court has issued its decision, which must be issued within thirty days.

33 Article 22 “Similarly, laws and regulatory acts that are alleged to infringe on fundamental human rights and public freedoms, and in general, on the violation of human rights, shall be referred to the Constitutional Court either by the President of the Republic or by any citizen, association or non-governmental organisation for the defence of human rights”

34 Article 24 “Any citizen may, by a letter stating his name, surname and precise address, bring a case directly to the Constitutional Court on the constitutionality of laws.
He may also, in a case which concerns him, raise the objection based on unconstitutionality before a court.
The latter, following the exceptional procedure of unconstitutionality, must immediately and at the latest within eight days refer the matter to the Constitutional Court and suspend the ruling until the decision of the Constitutional Court.

the said Court against all laws and regulatory acts alleged to infringe on fundamental human rights and public freedoms and, in general, against the violation of human rights.

127. The Court notes that the *a posteriori* power conferred by these articles on ordinary citizens to bring cases before the Constitutional Court is perfectly understandable insofar as the law has been promulgated and has entered into force and therefore applies to everyone. It follows that citizens have the avenue and the right to challenge this law if they consider that it infringes their fundamental rights.
128. As regards the restriction of referral provided for in Article 121 of the Constitution, the Court notes that the said referral relates to a law that has not yet been promulgated and therefore does not affect the rights of citizens. The Court therefore considers that the said restriction of referral is justified insofar as it allows those entitled to lay the bill or draft law before the National Assembly (the deputies and the executive)³⁵ with a view to amend or delete the provision of the law which would possibly be declared unconstitutional by the Constitutional Court.
129. In any case, the Court notes that in accordance with Article 44 of Law No 2022-9 of 27 June 2022 on the Organic Law on the Constitutional Court, laws which are ruled unconstitutional upon referral pursuant to either Article 121 or Article 122 of the Constitution, have similar consequences since, in the case of the first referral, the draft law cannot be passed and, in the case of the second referral, the impugned provision is null and void.³⁶ In both cases, therefore, the censured provision is of no effect.
130. The Court therefore considers that the citizens of the Respondent State have an effective and efficient remedy for the protection of their human rights.

35 Article 105 of the Constitution "Laws shall be jointly initiated by the President of the Republic and the members of the National Assembly ..."

36 Article 44 "In the event that the Constitutional Court declares the law before it to contain a provision contrary to the Constitution without at the same time noting that it is inseparable from the law as a whole, the President of the Republic may either promulgate the law with the exception of this provision or ask the National Assembly for a new deliberation.
In the same way, when the Court is seized by a citizen declares that a law, a regulatory text or an administrative act is contrary to the provisions of the Constitution, these laws, texts or acts are null and void."

ii. Judges

131. The Court recalls that under Article 17 of the Organic Law on the HJC, the HJC has the status of a judges' disciplinary council and that the applicable sanctions and disciplinary procedure are spelt out in the Law pertaining to the status of the judiciary.
132. The Court also notes that it emerges from Article 20(3) of the HJC Act and Article 68 of Act No 2001-35 of 21 February 2003 pertaining to the status of judges that the decisions of the HJC are not subject to a remedy, except in cases of violation of human rights and public freedoms, in which case the remedy is pursued before the Constitutional Court.
133. The Court notes, however, that notwithstanding that judges have a remedy only in cases of violation of fundamental human rights and freedoms, it considers that a decision in this ambit by the Constitutional Court in favour of judges may ultimately have an impact on the decision taken by the HJC so much so that it amends the said decision.
134. The Court notes in this respect that the decisions of the Constitutional Court are enforceable and are binding on public authorities, on all civil, military and judicial authorities and on all natural or legal persons who must diligently comply.³⁷
135. The Court therefore considers that judges have an effective remedy as regards sanctions pronounced against them by the HJC.
136. In the light of all the foregoing, the Court finds that the Respondent State did not violate Article 7(1) of the Charter read together with Article 2(3)(a) of the ICCPR, Article 1(h) of the ECOWAS Protocol on Democracy and Article 8 of the UDHR.

F. On the alleged violations of the right to independent candidacy, and to the composition of the COS-LEPI

137. The Applicant argues that Article 153-1³⁸ of the amended Constitution, prohibits any citizen of the Respondent State who is not a member of a political party or who is not running on the ticket of a political party from participating in the conduct of public affairs, including legislative, municipal, village and city neighbourhood elections.

37 Article 20(2)(3) of Law No2022-09 of 27 June 2022.

38 Resulting from the constitutional amendment of 7 November 2019.

138. He further argues that this provision violates the right to freedom of association, the rights to equality and non-discrimination, and the right to freedom to participate in the public affairs of his country.
139. He submits that by compelling Beninese citizens to vote only for candidates chosen and nominated by political parties, Article 153-1, violates the right to freedom of expression enshrined in Article 19(2) of the ICCPR.
140. The Applicant further submits that Article 44 of the said amended Constitution requires aspiring candidates to obtain sponsorship in order to run in presidential elections. Under Article 138 of the Electoral Code, only deputies and mayors are empowered to sponsor candidates, whereas all the deputies as well as nearly all mayors are members of the ruling government.
141. To this effect, he submits that the mayors are illegitimate insofar as they were elected in the communal and municipal elections of 2020 which were held in violation of the decisions of this Court rendered on 17 April 2020 in Application No 062/2019 and 5 May 2020 in Application No 003/2020.
142. He further contends that as elections go, the mayor does not represent the entire population of the commune that elected him, since he is the political representative of a single political party. Therefore, according to him, the power to sponsor candidates can therefore not be vested in mayors in place of the population of the commune or of all local elected officials who represent the entire population.
143. He further argues that the mayor is only the executive agent of the municipality and therefore does not represent the political choice of the entire municipality. For the Applicant, therefore, vesting the power to sponsor a candidate violates the principle of democratic change of power in that it excludes all other representatives chosen by the people from participation in the conduct of public affairs.
144. He further states that there is no opposition in the parliament of the Respondent State, as all deputies are affiliated to the president's camp. He explains that these deputies not only illegally impede his candidacy and that of several other citizens of the Respondent State but also compel the citizens to pledge their allegiance to them in order to be sponsored. He therefore believes that the sponsorship system precludes any guarantee of democratic change of government in Benin protected by Article 23(5) of ACDEG.

145. Finally, the Applicant submits that Article 53³⁹ of the amended Constitution violates the right to freedom of religion protected by Article 8 of the Charter and Article 18 of the ICCPR insofar as it provides that: “Before taking office, the President of the Republic shall take the following oath: before God, the spirits of the ancestors, the Nation and the Beninese people, the sole repository of sovereignty”
146. According to the Applicant, by using the phrase “spirits of the ancestors” in the text of the presidential oath, the Respondent State expressed its view which considers as legitimate the belief in ancestral spirits. He contends that as a citizen, he cannot be compelled to take an oath based on such a belief, which is contrary to his own religious convictions and beliefs.
147. The Applicant finally submits that the election of Mr. Patrice Talon as President of the Respondent State in 2021 constitutes an unconstitutional change of government by virtue of the composition of the *Conseil d’orientation et supervision de la liste électorale permanente informatisée* (COS-LEPI), the body in charge of compiling the electoral register, given that this Court had ordered the reconstitution of the said body before the holding of any election.
148. Finally, the Applicant asserts that despite the decisions of the Court ordering the Respondent State to repeal the provisions resulting from the constitutional amendment and the Electoral Code, the Constitutional Court of the Respondent State, by Decision DCC 21-011, Decision DC 21-008, and Decision DCC 21-010 of 7 January 2021, rejected requests by citizens of the Respondent State to that effect.
149. He concludes that the Respondent State violated Articles 19(2) and 25(b) of the ICCPR, Article 13(1) of the Charter, Articles 3(10) (11) and 23(5) of the ACDEG and Article 1(i) of the ECOWAS Protocol.
150. The Respondent State did not submit on this allegation.

39 Resulting from the constitutional amendment of 7 November 2019.

151. The Court has already ruled⁴⁰ that the constitutional amendment of 7 November 2019 violates Articles 9(1), 22(1) and 23(1) of the Charter and Article 10(2) of the ACDEG and ordered its repeal as well as that of subsequent laws including the Electoral Code of 15 November 2019.
152. The Court also ruled that the COS-LEPI, by virtue of its composition, does not offer sufficient guarantees of independence and impartiality under Article 17(2) of the ACDEG and Article 3 of the ECOWAS Protocol on Democracy.⁴¹
153. The Court finds that there is nothing in the circumstances of the case that warrants a Ruling otherwise.
154. The Court therefore considers it unnecessary to rule on the violations that would result from composition of the COS-LEPI as well as the constitutional amendment and the Electoral Code, with regard to the criteria for candidacy, freedom of electoral expression and freedom of religion.
155. Accordingly, the Court finds that the Applicant's prayer that the Court find a violation of the said rights is moot.

VIII. Reparations

156. Article 27(1) of the Protocol provides that: "If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation".
157. The Court recalls its previous judgments on reparation⁴² and reaffirms that, in considering claims for reparation for damage resulting from human rights violations, it takes into account the principle according to which the State found guilty of an internationally wrongful act is required to make full reparation for the damage caused to the victim.
158. The Court also takes into account the principle that there must be a causal link between the violation alleged and the alleged injury and puts the burden of proof on the Applicant who must provide

40 *Houngue Éric Noudehouenou v Republic of Benin*, ACtHPR, Application No 003/2020, Judgment of 4 December 2020 (merits and reparations), §§ 66 and 77-79, 123(xii), *XYZ v Republic of Benin*, ACtHPR, Application No 059/2019, Judgment of 27 November 2020 (merits and reparations), §§ 124-125, 179(xii).

41 *Ibid*, *XYZ v Republic of Benin*, § 148.

42 *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema dit Ablassé, Ernest Zongo and Blaise Ilboudo and Mouvement Burkinabé des droits de l'homme et des peuples v Burkina Faso* (reparations) (5 June 2015) 1 AfCLR 265, § 22; *XYZ v Republic of Benin*, ACtHPR, Application No 010/2020, Judgment of 27 November 2020 (merits and reparations), § 139.

evidence to justify his request.⁴³

159. The Court recalls that it has also established that “reparation must, as far as possible, erase all the consequences of the wrongful act and restore the state which would presumably have existed if that act had not been committed”. Moreover, depending on the particular circumstances of each case, reparation measures must include restitution, compensation, rehabilitation of the victim and measures to ensure the non-repetition of violations, taking into account the circumstances of each case.⁴⁴
160. Furthermore, the Court reiterates that it has established already that reparation measures for damage resulting from human rights violations must take account of the circumstances of each case and the Court’s assessment is made on a case-by-case basis.⁴⁵
161. The Court will consider requests for reparations bearing in mind that it cannot order reparations measures based on allegations for which no human rights violations have been found.
162. In the instant case, the Court notes that it has found that the law on the HJC violates Article 26 of the Charter; that Article 413(3) of the criminal code violates Article 9(2) of the Charter and Article 19 of the ICCPR. It also found a violation of Article 30 of the Protocol by virtue of the Respondent’s failure to comply with the Court’s decisions.
163. The Court recalls that the Applicant seeks (A) pecuniary reparation and (B) non-pecuniary reparation.

A. On pecuniary reparations

164. The Applicant prays the Court to order the Respondent State to pay him the sum of One Billion (1,000,000,000) CFA francs as monthly flat-rate interest until full compliance with the present decision. He also claims a lump-sum interest of Five Hundred Million (500,000,000) CFA francs per month until full compliance with the Rulings of 5 May and 25 September 2020, and the judgment of 4 December 2020-Application No 003/2020 – *Houngue Eric Noudéhouenou v Benin*.
165. He further requests that the Respondent State be ordered to pay him Fifteen Million (15,000,000) CFA francs in respect of legal fees and procedural costs, Five Hundred Thousand (500,000) CFA francs in respect of mailing costs and Five Hundred Million

43 *Ibid*, XYZ v Republic of Benin, § 140.

44 *Ibid*, § 141.

45 *Ibid*, § 142.

(500,000,000) CFA francs for the moral damage he suffered as a result of the violations found.

166. The Respondent State did not submit on these requests.

i. Monthly lump sum interest.

167. The Court notes that the Applicant requests it to impose on the Respondent State the payment of monthly lump sums of One Billion (1,000,000,000) CFA francs and Five Hundred Million (500,000,000) CFA francs, respectively, to comply with the judgment to be rendered in the present case, and for not complying of the judgment of 4 December 2020 as well as the Rulings of provisional measures of 5 May and 25 September 2020 rendered in Application 003/2020 – *Houngué Eric Noudéhouenou v Republic of Benin*.

168. The Court considers that such requests are tantamount to requests for coercive measures compelling the Respondent State to enforce the decisions, which would make it an enforcement judge of its own decisions, contrary to Articles 29(2)⁴⁶ and 30⁴⁷ of the Protocol on the requirements for enforcing the Court's decisions.

169. The Court notes that under the latter provision the Respondent State must comply with the Court's decisions without the need for further coercive measures.

170. The Court therefore dismisses the requests for lump sum interest.

ii. Legal, mailing, communication and procedural costs

171. The Court notes that the Applicant does not produce evidence in support of the costs he incurred in respect of legal representation, nor those in respect of mailing and communication. Moreover, the Court recalls that proceedings before it are free of charge in line with Rule 32 of its Rules of Procedure.

172. Consequently, the Court dismisses the requests for restitution in the sums of Fifteen Million (15,000,000) CFA francs in respect of legal and procedural costs, and Five Hundred Thousand (500,000) CFA francs in respect of mailing and communications claimed by the Applicant.

⁴⁶ Article 29(2) of the Protocol provides: "The Council of Ministers shall also be notified of the judgment and shall monitor its execution on behalf of the Assembly"

⁴⁷ Article 30 of the Protocol provides: "The States parties to the [...] Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution".

iii. Moral prejudice

173. The Court recalls its jurisprudence that moral prejudice suffered by the Applicant is presumed once the Court has found a violation of his rights, such that it is no longer necessary to seek evidence to establish the link between the violation and the damage in cases of human rights violations. The Court has also held that the assessment of the amounts to be awarded for moral damage should be made on the basis of equity, taking into account the circumstances of each case.⁴⁸
174. In the instant case, the Court finds that the moral prejudice suffered by the Applicant emanates from the violation of his rights in connection with the Penal Code and the non-enforcement of the Court's decisions.
175. The Court observes that the quantum of reparation to be awarded to the Applicant in the present case must be assessed in the light of the degree of mental anguish he must have suffered as a result of the violation of his rights by the above-mentioned laws as well as the failure by the Respondent State to comply with the Court's decisions concerning him.
176. It notes that as result of the failure to comply with the judgment delivered on 4 December 2020, in Application No 003/2020 – *Houngué Eric Noudéhouenou v Benin*, the Applicant was unable to contest this country's parliamentary and presidential elections.⁴⁹ It considers that this situation was the cause of moral prejudice for the Applicant.
177. For all these considerations, the Court, using its discretionary appreciation, awards the Applicant reparation for the moral damage he personally suffered, in the amount of Five Million (5,000,000) CFA.

B. On non-pecuniary remedies

178. The Court recalls that the Applicant seeks measures to erase all effects and all consequences arising from the violations of which the Respondent State was found guilty, in particular in relation

⁴⁸ *Ibid*, § 146.

⁴⁹ *Houngue Éric Noudéhouenou v Republic of Benin*, ACTHPR, Application No 003/2020, judgment of 4 December 2020 (merits and reparations), §§ 123(xii): the court had ordered the Respondent State to take all measures to repeal Law No 2019-40 of 1 November 2019 amending Law No 90-032 of 11 December 1990 on the Constitution of the Republic of Benin and all subsequent laws in order to ensure that its citizens participate freely and directly, without any political, administrative or judicial impediments, prior to any election.

to the composition of the HJC, Article 20 of Law No 2018-01 on the status of the judiciary, Article 410(3) of the Penal Code, the annulment of the decisions of the Constitutional Court, the failure to execute the decisions of the Court, and the reconstitution of the National Assembly.

179. The Respondent State did not submit on these requests.

180. The Court will proceed to consider the orders for reparations bearing in mind that it cannot order reparations measures based on allegations for which no human rights violation has been established.

i. The composition of the HJC

181. The Court recalls that the Applicant seeks measures to remove all members of the executive branch from the HJC, by instituting the election by an absolute majority of its members, with the Chair of the HJC being a democratically elected magistrate.

182. The Court notes that it has found a violation of Article 26 of the Charter by virtue of the executive's massive control over the HJC.

183. Consequently, it orders the Respondent State to take all necessary measures to redress this situation and to make the structure of HJC statutorily and functionally consistent with Article 26 of the Charter, on the one hand, by repealing the following provisions of the HJC organic law: those that make the President of the Republic a member of the HJC and Chair of the HJC, those that entitle the President of the Republic to appoint members of the HJC, and those that make other members of the executive members of the HJC and, on the other hand, by making the President of the Supreme Court Chair of the HJC.

ii. Article 410(3) of the Penal Code

184. The Court found that the Respondent State violated the right to freedom of opinion and expression protected by Article 9(2) of the Charter and Article 19 of the ICCPR, by virtue of Article 410(3) of its Criminal Code.

185. The Court therefore orders the Respondent State to take all measures to bring Article 410(3) of the Penal Code in line with

Article 9(2) of the Charter and Article 19 of the ICCPR which guarantee freedom of opinion and expression with regard to technical comments on judicial decisions.

iii. Annulment of the decisions of the Constitutional Court

- 186.** The Applicant states that despite this Court's decisions ordering the repeal of the constitutional amendment and the Electoral Code, the Constitutional Court of the Respondent State, by Decisions DCC 21-011, DC 21-008, DCC 21-010 of 7 January 2021, rejected the requests of Beninese citizens to declare the impugned provisions of these laws unconstitutional. The Applicant requests the Court to annul these decisions of the Constitutional Court.
- 187.** The Court recalls its jurisprudence that it is not an appellate court with the power to reverse or vacate the decisions of domestic courts.⁵⁰
- 188.** Accordingly, the Court dismisses the request.

iv. Enforcement of the Court's decisions

- 189.** The Court orders the Respondent State to take all measures to comply with Article 30 of the Protocol by implementing the Ruling on provisional measures of 5 May and 25 September 2020, and the Judgment of 4 December 2020 in Application No 003/2020 – *Houngue Eric Noudéhouenou v Republic of Benin*.

v Reconstitution of the National Assembly

- 190.** The Court recalls that the Applicant prays it to reconstitute the National Assembly since the deputies of the legislative body were elected in elections organised by partial and non-independent electoral bodies, notably the COS-LEPI and under the amended provisions of the Constitution and the Electoral Code of 7 and 15 November 2019, which had to be repealed before any election per the decisions of this Court.
- 191.** The Court however notes that the request for the reconstitution of the National Assembly implies that it must first be dissolved.
- 192.** The Court notes that it has found in the present case that the alleged violations relating to the constitutional amendment,

⁵⁰ *Kijiji isiaga v United Republic of Tanzania* (21 March 2018) (merits and reparations) 2 AfCLR 218 § 94; *Ramadhani v United Republic of Tanzania* (11 May 2018) (merits and reparations) 2 AfCLR 344 § 84.

the Electoral Code and COS-LEPI are moot. The Court further observes that it has not ruled on the legitimacy of the National Assembly, or established its illegitimacy.

193. The Court observes that Article 27(1) of the Protocol adequately empowers it to order a Respondent State to take measures to annul an election if it so deems fit in order to remedy the situation. In doing so, it takes into account the gravity of the violations found, their implication on the credibility of the entire electoral process and the impact of such a measure on the security and stability of the country.
194. The Court notes that in the present case, the Applicant does not demonstrate the substantial impact of the violations found on the credibility of the entire electoral process. There is nothing on record to indicate that the parliamentary elections were impacted by the violations found to such an extent that the dissolution of the National Assembly is the most appropriate remedy.
195. Accordingly, the Court dismisses this request.

IX. On the request for provisional measures

196. The Court recalls that on 14 July and 15 September 2022, the Applicant filed two requests for provisional measures, which the court has joined to the Application on the merits.
197. The Court however notes that the present decision on the merits renders the said requests moot.

X. Costs

198. The Applicant requests that the Respondent State bear the costs of the proceedings.
199. The Respondent State did not submit on this request.

200. Under Article 32(2) of the Rules,⁵¹ “[u]nless otherwise decided by the Court, each party shall bear its own costs, if any.”

51 Rule 30(2) of the Rules of 2 June 2010.

201. The Court finds that there is nothing in the circumstances of the present case to warrant a departure from that principle.

202. The Court therefore orders that that each Party bear its own costs.

XI. Operative part

203. For these reasons,

The Court

Unanimously,

On jurisdiction

i. *Declares* that it has jurisdiction.

On admissibility

ii. *Declares* the Application admissible.

On merits

iii. *Finds* that the alleged violation of judges' right to strike, their right to information, freedom of opinion and expression, their right to form associations freely, and their right to freedom to assemble, protected respectively by Articles 8, 9, 10 and 11 of the Charter, is moot;

iv. *Finds* that the Respondent State did not violate the right of citizens and judges to an effective remedy for the protection of their rights, protected by Article 7(1) of the Charter read together with Article 2(3)(a) of the ACDEG, Article 1(h) of the ECOWAS Protocol on Democracy and Article 8 of the UDHR;

v. *Finds* that the alleged violations in connection with the constitutional amendment and with the Electoral Code are moot;

vi. *Finds* that the alleged violations in connection with the COS-LEPI are moot.

vii. *Finds* that the Respondent State violated Article 26 of the Charter in relation to the composition and functioning of the HJC;

By a majority of Ten (10) for, and One (1) against, Justice Dennis D. ADJEI Dissenting,

viii. *Finds* that the Respondent State violated Article 30 of the Protocol by failing to comply with the Court's decisions;

Unanimously,

- ix. *Finds* that the Respondent State violated the right to freedom of opinion and expression in relation to Article 410(3) of the Criminal Code;

On reparations

Pecuniary reparations

By a majority of Ten (10) for, and One (1) against, Justice Chafika BENSALOULA Dissenting,

- x. *Dismisses* the request for the payment of Five Hundred Million (500,000,000) CFA francs as monthly lump sum interest for the enforcement of the Ruling on provisional measures of the 5 May and 25 September 2020, and the judgment on 4 December 2020 rendered in Application No 003/2020 – *Houngue Eric Noudehouenou v Republic of Benin*.

Unanimously,

- xi. *Dismisses* the request for the payment of One Billion (1,000, 000, 000) CFA francs as monthly lump sum interest for non-enforcement of the judgment delivered in the instant case;
- xii. *Dismisses* the requests for reimbursement of the sums of Fifteen Million (15,000,000) CFA francs in respect of legal and procedural costs, and Five Hundred Thousand (500,000) CFA francs in respect of mailing and communication costs;
- xiii. *Orders* the Respondent State to pay the Applicant the sum of Five Million (5,000,000) CFA francs as reparation for moral damage within six (6) months of notification of this judgment, failing which it will have to pay default interest calculated on the basis of the applicable rate of Banque centrale des Etats de l'Afrique de l'Ouest (BCEAO) for the entire period of delay until full payment of the amount due.

Non-pecuniary reparations

- xiv. *Dismisses* the request for the reconstitution of Parliament;
- xv. *Dismisses* the request for annulment of the decisions of the Constitutional Court;
- xvi. *Orders* the Respondent State to take, within six (6) months of the notification of this judgment, all measures to make the structure of the HJC statutorily and functionally consistent with Article 26 of the Charter, on the one hand, by repealing the following provisions of the HJC organic law: those that make the President of the Republic a member of the HJC and Chair of the HJC, those that entitle the President of the Republic to appoint members of the HJC, and those that make other members of the executive

members of the HJC and, on the other hand, by making the President of the Supreme Court Chair of the HJC.

- xvii. *Orders* the Respondent State to take, within six (6) months of the date of notification of this judgment, all measures to make Article 410(3) of the Criminal Code consistent with Article 9(2) of the Charter and Article 19 of the ICCPR, by guaranteeing freedom of opinion and expression in relation to criticism of judicial decisions;
- xviii. *Orders* the Respondent State to take all measures to comply with Article 30 of the Protocol by implementing the decisions rendered in Application No 003/2020 – *Houngue Eric Noudéhouenou v Benin*.
- xix. *Orders* the Respondent State to publish the operative part of this judgment within one (1) month of the date of its notification on the websites of the Government, the Ministry of Foreign Affairs, the Ministry of Justice, and in the official gazette of the Respondent State for a period of twelve (12) months.

On implementation and reporting

- xx. *Orders* the Respondent State to submit to the Court, within six (6) months a report on the implementation of paragraphs (xiii), (xvi), (xvii), (xviii) and (xix) of this operative part. These timelines shall run from the date of notification of this judgment.

On the request for provisional measures

- xxi. *Finds* that the requests for provisional measures are moot.

On costs

- xxii. *Orders* that each Party shall bear its own costs.

Dissenting Opinion: BENSAOULA

- [1] I concur with the decisions arrived at by the Court in its operative part in regard to the different violations it deemed founded. Conversely, I disagree with the opinion of the majority regarding the dismissal of the Applicant's prayer for the payment of five hundred million CFA francs as lump sum interest for failure to implement the Court's Rulings rendered on 5 May and 25 September 2020 and the Judgment of 4 December 2020 in his

favour.

- [2] In paragraphs 168 and 169 of its judgment, the Court responded clearly to this prayer by stating as follows: « The Court notes that the Applicant requests it to impose on the Respondent State the payment of monthly lump sums of one billion (1000 000 000) CFA francs and five hundred million (500 000 000) CFA francs respectively. Such requests are tantamount to coercive measures compelling the Respondent State to enforce decisions, which would make it an enforcement judge of its own decisions, contrary to Articles 29(2) and 30 – of the Protocol – on the requirements on the enforcing of the Court's decisions » and « The Court notes that pursuant to the last provision, the Respondent State has to comply with the decisions of the Court without necessarily resolving to any other measures. »
- [3] In my opinion, this argument is inconsistent with Article 27 of the Protocol, the jurisprudence of the Court and Rules 80 and 81 of the Rules of Court.

1. Article 27 of the Protocol

- [4] This article clearly provides that « If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation ».
- [5] It emerges clearly from paragraphs 99 and 100 of the judgment that the Court has no doubt as to the failure of the Respondent State to implement the decisions rendered in favor of the Applicant prior to the application which is the subject of this opinion. It did not receive any report from the state in question on the implementation of these decisions. The latter does not contend the fact that it has not implemented the decisions and on the contrary, the Court finds that the Respondent State violated Article 30 of the Protocol.
- [6] Based on the foregoing, having found the violation of Article 30, the Court, pursuant to Article 27 herein above had to order the Respondent State to pay fair compensation or reparations.
- [7] By failing to do so, the Court failed to apply the above-mentioned article on the one hand and on the other, because without doubt, it involved the responsibility of the Respondent State!

2. Its jurisprudence

- [8] As regards the lump sum interest requested by the Applicant for failure to enforce the rulings rendered in his favour on 5 May and

25 September 2020 as well as the judgment of 4 December 2020 considered by the Court as « coercive measures to compel the Respondent State to enforce decisions, which would make it an enforcement judge of its own decisions and that this is contrary to Articles 29(2) et 30 of the Protocol on the requirements for enforcing the Court's decisions », It should be recalled that in many of the operative parts of its judgments and just to name a few, – *Ibrahim ben Mohamed ben Ibrahim Belghit v The Republic of Tunisia* Application 017/2021, *Kouassi Kouamé Patrice and Baba Sylla v The Republic of Côte d'Ivoire* Application 015/2021, *Joseph John v The United Republic of Tanzania* – Application 005/2018, *Sébastien Germain N. Ajavon v The Republic of Benin* – Application 013/2017. The Court explicitly ordered the Respondent State to implement some of its decisions failing which it would pay lump sum interests, though the Applicants did not make any prayers in this regard, and this was long before making the finding of failure to enforce the decisions!

- [9] Doing so in the present application therefore would have been just a matter of consistency with its jurisprudence, especially with this very important detail that the Applicant made a clear prayer after finding that decisions rendered in his favour had not been implemented and holding the Respondent State liable to enforce these final decisions would have been subject to lump sum interest. This would have only been a proper application of Article 27 of the Protocol.

3. Considering the Court as an enforcement judge of its own decisions, contrary to Articles 29(2) and 30 of the Protocol

- [10] It should be noted that the new Rules of Court enshrined and enhanced the jurisdiction of the Court on the enforcement of its decisions and chapter 6 of the Rules is a legal base and accordingly, the basis for cases on the enforcement of its decisions.
- [11] The title of this chapter « Enforcement of the decisions of the Court » followed by its Rules 80 and Rule 81 provide for and confirm the jurisdiction of the Court over control of the enforcement of its decisions.
- [12] Though Rule 80 provides that « State parties shall fully comply with the decisions of the Court and guarantee their execution within the time limits set by the Court » Rule 81 also provides that « State parties concerned shall submit reports on compliance with the decisions of the Court and these reports shall, unless otherwise stated by the Court, be transmitted to the Applicants for

their observation. ».

- [13]** Furthermore, in case of any dispute relating to the implementation of its decisions, the Court may organise a hearing to assess the level of implementation. At the end of the hearing the Court shall decide and if necessary, issue a ruling to guarantee the enforcement of its decisions, pursuant to Article 31 of the Protocol. In case of non-compliance with its decisions by a State party, the Court shall submit a report to the Assembly of Heads of State and Government of the African Union.
- [14]** In terms of the combined provisions of the Protocol on the implementation of the judgments of the Court, The Executive Council (Ministers of foreign Affairs) of the African Union is charged with ensuring the enforcement of these judgments. In its daily practice, it is required to inquire about the execution of the judgments of the Court contained in its annual report and to decide whether or not to discuss with the States concerned. In its 2017 report, it is stated that the Executive Council ensures compliance as follows:
- [...] The Executive Council expresses satisfaction with measures taken by Burkina Faso and Tanzania to comply with the judgments of the Court [...] and calls on both States to continue in their efforts to implement the decisions of the Court and to report on the same.¹
- [15]** On a closer look, it is not a dispute over the enforcement of the Court's judgments but rather a political stop gap measure of a diplomatic nature which falls within the monitoring mechanism of the commitments of states towards the African Union. Respect for judgments of the Court is part of the commitment of states, it is appropriate for the Executive Council to ensure enforcement through diplomacy: A measure of satisfaction or through a diplomatic call to order. The report to the Executive Council of the African Union is therefore a further means of calling on State parties to fulfil their international obligations comprising the enforcement of the decisions of the African Court. Decisions rendered by the African Court fall within the framework of decisions of the African Union and are subject to monitoring through reports submitted to the Executive Council.
- [16]** With the entry into force of the Rules of Court, there has been a remarkable change in the implementation of the decisions of the African Court. There is no further debate on the jurisdiction of the African Court on the enforcement of its decisions. The dispute

1 Executive Council of the African Union, *Decisions*, 31st Ordinary session, 27 June -1 July 2017.

over the implementation of the decisions of the African Court stemmed from the jurisdiction of the African Court in the new Rules of Court. Compliance hearings are purely judicial and the call from the executive Council is quite different from the terms of an executive Ruling or non-enforcement from a compliance hearing.

- [17] The political control by the Executive Council does not replace the Court's judicial control over its decisions.
- [18] To conclude, the African Court on Human and Peoples' Rights, is the presiding judge on cases and enforcement judge of its decisions and cannot decide *infra petita* when it is requested to decide on the non-enforcement of its decisions. The jurisdiction of the Court on the enforcement of its decisions is clearly enshrined and affirmed. It is the main jurisdiction which has as a complementary and support jurisdiction, that of the Executive Council of the African Union. The accessory jurisdiction comes after the main jurisdiction.».

Dissenting Opinion: ADJEI

- 1. I agree with almost every part of the judgment except the request by the Applicant for lump sum interest for the enforcement of decisions, in which the majority found violation and awarded reparation. The violations alleged by the Applicant against the State includes articles 27 and 30 of the Protocol which I find to be procedural protocol and does not provide for violation of human and peoples' rights but rather a vehicle within which to enforce human rights provided in human rights instruments including the African Charter on Human and Peoples' Rights, and the International Covenant on Civil and Political Rights (ICCPR) whose violations require the Court to make appropriate orders.
- 2. I note that the Protocol provides for procedural rules to regulate the Court, and non-compliance with any of its provisions does not amount to a violation of human or peoples' rights but rather a non-compliance with procedural rules, which attracts sanctions of different forms but cannot be construed as a violation of human rights provisions, which attracts appropriate orders to remedy

- same, including payment of reparation.
3. Article 27 of the Protocol requires the Court to make appropriate orders to remedy a violation of a human or people's rights whenever it finds same. Article 30 of the Protocol enjoins State Parties to comply with the judgment given against them by the Court within the time specified by the Court and to guarantee its execution.
 4. The Applicant contends that the Court granted him decisions in his favour in the Application No 003/2020 Houngue Eric Noudehouenou v Benin, including two rulings for provisional measures and one judgment on merits and reparations, on 5 May 2020, on 25 September 2020 and on 4 December 2020, respectively. The Court notes that the decisions were delivered against the Respondent State and which was ordered to comply with the orders made therein within the time specified in the decisions, but the Respondent has refused to comply with the decisions despite its obligation under Article 30 of the Protocol to comply with the decisions delivered against him by the Court.
 5. It is clear from the pleadings that the Respondent State has refused to comply with its obligations under the Protocol, and the majority is of the opinion that the failure of the Respondent State to comply with the decisions amount to a violation of a human or peoples' rights, and reparation is an appropriate remedy to grant to compensate the Applicant.
 6. Article 27(1) of the Protocol which the Respondent has been found by the majority to have violated states:
 - If the Court finds that there has been violation of a human or peoples' rights,
 - it shall make appropriate orders to remedy the violation, including the payment
 - of fair compensation or reparation.
 7. I am of the considered opinion that the Court decides on human or peoples' rights and gives judgment to remedy a violation where the Court so finds against a State. Whenever the Court finds a violation, it is required to make appropriate orders to remedy same, including the payment of fair compensation or reparation. There is no jurisprudence to support the proposition that a State which fails to comply with a judgment delivered against it shall be deemed to have violated the human rights of the applicant in whose favour the judgment was delivered.
 8. I note that Article 30 of the Protocol which the Respondent State is alleged to have violated states:
 - The States parties to the present Protocol undertake to comply with

- the judgment in any case to which they are parties within the time stipulated
 - by the Court and to guarantee its execution.
9. The Court determines or finds human or people's rights violations and delivers judgment; immediately after judgment is rendered, the Court is mandated to notify the Council of Ministers of the judgment, and the latter is required to monitor its execution on behalf of the Assembly. The trite position of law is that where a law prescribes a particular procedure, it is that procedure alone which shall be used. The procedure prescribed by Protocol is to request the Council of Ministers monitor the execution, and there is no provision to the contrary that it shall amount to a violation of human or people's rights, which entitles the Court to award reparations against the State for failing to comply with the judgment.
 10. Rule 80 of the Rules of Court reiterates the provision in Article 30 of the Protocol, and it requires State Parties to the Protocol to fully comply with the decisions rendered by the Court and guarantee their execution within the time specified by the Court. Furthermore, Rule 81 of the Rules of the Court provides the procedure to monitor compliance with the decisions of the Court and does not give such power to the Court to enforce its own judgments by treating the compliance of its decisions as human rights violations.
 11. I note that execution of the Court's decision is the sole prerogative of the Council of Ministers, and the Court cannot usurp the powers conferred on them where decisions rendered by the Court are not being complied with by the State concerned. Where a State Party fails to comply with a decision of the Court, the only duty imposed on the Court is to report the non-compliance to the Assembly.²
 12. I state unambiguously that the Protocol, which is procedural law, does not create human rights provisions whose violations attract sanctions, including the award of fair compensation or reparations. The non-compliance with any provisions of the Protocol, from articles 1 to 35, cannot be said to amount to a violation of human rights provisions, as they are meant to regulate the hearings of the Court, and I am of the considered opinion that the Respondent State's refusal to comply with the decisions of the Court is not a violation of human rights or people's rights but a non-compliance with a procedural protocol.

2 Article 31 of the Protocol and Rule 81(4) of the Rules.

13. I note that Articles 1-35 deal principally with the establishment of the Court, relationship between the Court and the Commission, jurisdiction of the Court, request opinions by the Court at the request of African Union or any of its organs, access to the Court, admissibility of cases instituted before the Court, sources of law for the Court, consideration of cases filed before the Court and the requirement for detailed rules to govern the practice of the Court, amicable settlement, hearings before the Court and representations, composition of the Court, nominations of judges for the Court, list of candidates to be presented by member States to be considered as judges, elections of judges, term of office of judges, oath of office by judges, independence of the judges, incompatibility of the work judges do elsewhere, cessation of office of judges, vacancies occurring as a result of death or resignation of judges, presidency of the Court, exclusion of a judge in a matter involving his or her State, quorum for the Court, Registry of the Court, seal of the Court, evidence by the Court, findings by the Court that a violation has been made, judgment of the Court, notification of judgment, execution of judgment, the Court to submit report to the Assembly, budget of the Court, Rules of practice to be determined by the Court, ratification or accession of the Charter, and amendments to the Protocol. I hold that none of the provisions in the Protocol by itself constitutes a human right and whose non-compliance would amount to human rights violations.
14. An example is where the Court fails to submit a report to each regular session of the Assembly as required by Article 31 of the Protocol or fails to notify the appropriate bodies of a judgment it has delivered. This would amount to non-compliance with the Protocol and not a violation of human or people's rights.
15. I find that the Respondent State has not violated Article 30 of the Protocol within the context of human or people's rights, and the Applicant is not entitled to the payment of the sum of one billion (1,000,000,000) CFA francs as flat-rate monthly interest until it complies with the present decision. Furthermore, the Applicant is not entitled to a lump-sum interest of Five Hundred Million (500,000,000) CFA francs per month until full compliance of the judgment rendered in favour of the Applicant against the Respondent State. I accordingly dismiss relief (§ 167) of the Applicant's prayer as without merits. Subject to the above, I am in agreement with all the findings made on merits by the Court.

Noudehouenou v Benin & Ors (provisional measures) (2022) 6 AfCLR 1047

Application 010/2021, *Houngue Éric Noudehouenou v Republic of Benin, Burkina Faso, Republic of Côte d'Ivoire, Republic of the Gambia, Republic of Ghana, Republic of Malawi, Republic of Mali and Republic of Tunisia*

Ruling, 21 December 2022. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, MENGUE, BENSAOULA, ANUKAM, NTSEBEZA

Recused under Article 22: BEN ACHOUR, MUKAMULISA, CHIZUMILA and SACKO

The Applicant, a politician and citizen of the first Respondent State, claimed that the first Respondent State was responsible for continuous human rights violations against him despite decisions of the Court in his favour. He brought this Application alleging *inter alia*, that all the Respondent States had violated his rights by failing in their responsibilities to enforce the decisions of this Court in his favour. Along with the Application, the Applicant filed a request for provisional measures to avoid irreparable harm arising from the Presidential elections in the first Respondent State. The Court considered and dismissed all the provisional measures sought by the Applicant.

Jurisdiction (*prima facie* jurisdiction, 19, 23-26)

Provisional measures (urgency, 36, 38; irreparable harm, 37; cumulative conditions, 38; mootness, 42-43; non-parties, 45-46)

I. The Parties

1. Mr. Éric Noudehouenou (hereinafter referred to as “the Applicant”) is a politician and Benin national. He avers that the Republic of Benin is responsible for continuous human rights violations, despite the decisions of this Court. He adds that the Respondent States should be held responsible for the non-enforcement of the said decisions since they are members of the Executive Council of the African Union (hereinafter referred to as “Executive Council”) which has oversight responsibility for the enforcement of the Court’s decisions.
2. The Application is filed against:
 - i. The Republic of Benin, which became a Party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986, and to the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (hereinafter referred to as “the Protocol”) on 22 August 2014. On 8 February 2016 it

deposited the Declaration provided for in Article 34(6) of the said Protocol (hereinafter referred to as “the Declaration”) by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and non-governmental organizations. On 25 March 2020, the Republic of Benin deposited with the African Union Commission the instrument of withdrawal of its Declaration. The Court has ruled that this withdrawal has no bearing on pending cases or on new cases filed before the withdrawal takes effect one year after its filing, that is, on 26 March 2021.¹

- ii. Burkina Faso became a Party to the Charter on 21 October 1986 and to the Protocol on 25 January 2004. Burkina Faso also deposited the Declaration on 28 July 1998. The Declaration took effect on the date of entry into force of the Protocol, that is, 25 January 2004.
 - iii. The Republic of Côte d'Ivoire became Party to the Charter on 31 March 1992 and to the Protocol on 25 January 2004. It also deposited the Declaration on 23 July 2013. On 29 April 2020, the Republic of Côte d'Ivoire deposited with the African Union Commission the instrument of withdrawal of its Declaration. The Court has ruled that this withdrawal has no bearing on pending cases and on new cases filed before the withdrawal takes effect one year after its deposit, that is, on 30 April 2021.²
 - iv. The Republic of the Gambia became a Party to the Charter on 21 October 1986 and to the Protocol on 25 January 2004. It also deposited the Declaration on 3 February 2020.
 - v. The Republic of Ghana became a Party to the Charter on 1 March 1989 and to the Protocol on 16 August 2005. It further deposited the Declaration on 10 March 2011.
 - vi. The Republic of Malawi became a Party to the Charter on 23 February. It became a Party to the Protocol and deposited the Declaration on 9 October 2008.
 - vii. The Republic of Mali became a Party to the Charter on 21 October 1986 and to the Protocol 20 June 2000. It deposited the Declaration on 19 February 2010.
 - viii. The Republic of Tunisia became a Party to the Charter on 21 October 1986 and to the Protocol on 5 October 2007. It also deposited the Declaration on 2 June 2017.
3. These States are referred to individually by their respective official names and collectively as “Respondent States”.

1 *Houngue Éric Noudehouenou v Republic of Benin*, ACtHPR, Application No 003/2020, Ruling ((5 May 2020) (Provisional Measures), § 4-5 and Corrigendum of 29 July 2020.

2 *Suy Bi Gohoré Émile and Others v Republic of Côte d'Ivoire*, ACtHPR, Application No 044/2019, Judgment of 15 July 2020 (merits and reparations), §67;

II. Subject of the Application

4. In his Application, the Applicant states that, following multiple violations suffered, Beninese citizens, including himself, decided to bring before the Court several Applications against the Republic of Benin, which has been found responsible for the said violations in previous judgments delivered by this Court.³
5. He maintains that the Respondent States, which are members of the Executive Council, failed to ensure the enforcement of the said judgments by the Republic of Benin and, by their failure to do so, “endorsed the dispossession of the Beninese people of their sovereignty and their right to self-determination, by having given effect to the systematic and continuous violations of fundamental rights and of the decisions of this Court by the Republic of Benin”.
6. The Applicant contends that on 5 March 2021, Ms Reckya MADOUGOU, was arrested while protesting against the holding of the 2021 presidential election in violation of the decisions of this Court. He further avers that he was given power of attorney by Ms. MADOUGOU to represent her in this matter. The Applicant further submits that the detention of Reckya MADOUGOU is arbitrary, especially since there was no plausible suspicion against her warranting her arrest.

III. Alleged violations

7. With regard to the Republic of Benin, the Applicant alleges violation of the following rights or obligations:
 - i. The right not to be discriminated against, protected by Article 2 of the Charter;
 - ii. The rights to full equality before the law and equal protection of the law, protected by Article 3 of the Charter and Article 7 of the Universal Declaration of Human Rights (UDHR);
 - iii. The right to respect for life and physical and moral integrity, protected by Article 4 of the Charter;
 - iv. The right to respect for the inherent dignity of the human person, protected by Article 5 of the Charter;

3 Application 013/2017, *Sébastien Ajavon v Republic of Benin*, Judgment of 29 March 2019; Application No 059/2020 – *XYZ v Republic of Benin*, Judgment of 27 November 2020; Application No 010/2020 – *XYZ v Republic of Benin*, Judgment of 27 November 2020; Application No 62/2020 – *Sébastien Germain Marie Aikoué Ajavon v Republic of Benin*, Judgment of 4 December 2020; Application No 003/2020 – *Houngue Eric Noudehouenou v Republic of Benin*, Judgment of 4 December 2020.

- v. The right to a fair trial, in particular, the right to a defence, protected by Article 7(1)(c) of the Charter, the right to be tried within a reasonable time by an impartial court, protected by Article 7(1)(d);
- vi. The right to information, protected by Article 9(1) of the Charter;
- vii. The right to freedom of opinion and expression, protected by Article 9(2) of the Charter and Article 19 of the ICCPR;
- viii. The right to freely associate with others, protected by Article 10 of the Charter, due to arbitrary interference in the affairs of an association;
- ix. The right to participate freely in the conduct of the public affairs of one's country, protected by Article 13 of the Charter;
- x. The right to property, protected by Article 14 of the Charter and Article 17 of the UDHR;
- xi. The right to work, protected by Article 15 of the Charter and Article 23 of the UDHR;
- xii. The right of all peoples to the free disposal of their natural wealth and resources, protected by Article 21 of the Charter;
- xiii. The right of all peoples to peace and security, protected by Article 23(1) of the Charter;
- xiv. The right to liberty and security, protected by Article 9(1) of the ICCPR;
- xv. The right to respect for the principle of legality of criminal law, protected by Article 15 of the International Covenant on Civil and Political Rights (ICCPR);
- xvi. The right to privacy, protected by Article 17 of the ICCPR;
- xvii. The right to an adequate standard of living, protected by Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- xviii. The rights to take part in cultural life, to enjoy the benefits of scientific progress and its applications, as well as the right of every author to benefit from the protection of the moral and material interests resulting from their scientific, literary or artistic production, protected by Article 15(1) of the ICESCR
- xix. The right to an effective remedy, guaranteed by Article 8 of the Universal Declaration of Human Rights (UDHR);
- xx. The right to the presumption of innocence, guaranteed by Article 11 of the UDHR;
- xxi. The obligation to adopt legislative or other measures to give effect to and secure the rights, freedoms and duties guaranteed in the Charter, provided for in Article 1 of the Charter;
- xxii. The obligation to take the necessary measures to protect the health of the population and to provide medical assistance in the event of illness, provided for in Article 16(2) of the Charter;
- xxiii. The obligation to guarantee the independence of the courts, provided for in Article 26 of the Charter;

- xxiv. The obligation to comply with the decisions of the African Court under Article 30 of the Protocol;
 - xxv. The obligation to provide an effective remedy to any person whose rights and freedoms have been violated, as provided for in Article 2(3) of the ICCPR;
 - xxvi. The obligation to ensure that any remedy that has been granted and justified is properly pursued by the competent authorities, as provided for in Article 2(3)(c) of the ICCPR;
 - xxvii. The obligation to comply with the principle of non-regression, provided for in Article 5 of the ICCPR;
8. The Applicant further alleges violation of Article 1 of the UN Charter, Article 3(b)(e) and Article 4(g)(m) of the Constitutive Act of the African Union (Constitutive Act).
9. With respect to the other Respondent States, the Applicant alleges violation of the following rights and obligations:
- i. The right to respect for the inherent dignity of the human person, protected by Article 5 of the Charter;
 - ii. The right of every people to exist, protected by Article 20(1) of the Charter;
 - iii. The obligation to adopt legislative or other measures to give effect to the rights protected by the Charter, provided for by Article 1 of the Charter;
 - iv. The obligation to ensure the holding of regular, transparent, free and fair elections in order to institutionalise legitimate authority and government as well as democratic change of government, protected by Article 2(3) of the ACDEG;
 - v. The obligation to prohibit, reject and condemn any unconstitutional change of government in any Member State as a serious threat to stability, peace, security and development, protected by Article 2(4) of the ACDEG;
 - vi. The obligation to promote democratic rule, the principle of the rule of law and human rights, as provided for in Article 4(1) of the African Charter on Democracy, Elections and Governance (ACDEG);
 - vii. The obligation not to engage in any activity or perform any act aimed at the destruction of the rights and freedoms set forth in the UDHR, provided for in Article 30 of the UDHR;
10. The Applicant further alleges violation of Articles 1 of the UN Charter,⁴ 3(b)(e)(h) and 4(g) of the Constitutive Act.

4 The purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of

IV. Summary of the Procedure before the Court

11. The Application and a request for provisional measures were filed with the Registry on 25 March 2021.
12. On 16 August 2022, the Registry notified these various requests to the Respondent States, requesting them to submit the list of their representatives within thirty (30) days and to file their response to the request for provisional measures and the main Application within forty-five (45) and ninety (90) days of receipt, respectively, that is, on 22 August 2022 for the request for provisional measures in the case of Burkina Faso, the Republic of Benin, the Republic of Côte d'Ivoire, the Republic of Ghana, the Republic of Malawi and the Republic of Mali, and on 23 August 2022 in the case of the Republic of the Gambia and the Republic of Tunisia.
13. On 19 September and 5 October 2022, Burkina Faso and the Republic of Ghana submitted the list of their representatives, respectively. At the end of the forty-five (45) day period, none of the Respondent States had filed its submissions on the request for provisional measures.

V. *Prima facie* jurisdiction

14. The Applicant asserts, based on Article 27(2) of the Protocol and Rule 51 of the Rules of Court (hereinafter “the Rules”),⁵ that in matters of provisional measures the Court need not be satisfied that it has jurisdiction over the merits of the case, but merely that it has *prima facie* jurisdiction.
15. Referring further to Article 3(1) of the Protocol, the Applicant submits that the Court has jurisdiction insofar as he alleges violations of human rights protected by human rights instruments, and insofar as some of the provisional measures sought relate to the Republic of Benin, which deposited the Declaration on 8 February 2016. He further submits that the withdrawal of the said

justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion and
4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

5 Rule 59 of the Rules of 25 September 2020.

Declaration, which took effect on 25 March 2020, has no bearing on pending cases, or on cases filed before it took effect.

16. He further contends that the Court has *prima facie* jurisdiction as regards all the five (5) provisional measures requested against the Republic of Benin, even if two of the measures seek to secure the intervention of the Executive Council in order to obtain from it the execution of the Court's decisions, in order to avoid irreparable damage.
17. None of the Respondent States submitted on *prima facie* jurisdiction.

18. Article 3(1) of the Protocol provides:
The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
19. Furthermore, Rule 49(1) of the Rules provides: "The Court shall ascertain its jurisdiction and the admissibility of an Application in accordance with the Charter, the Protocol and these Rules". However, with regard to provisional measures, the Court does not have to ensure that it has jurisdiction on the merits, but merely that it has *prima facie* jurisdiction.⁶
20. In the present case, the rights whose violation the Applicant alleges are protected by the Charter, the ICCPR and the ICESCR, instruments to which the Respondent State is a party.
21. The Court further notes, as mentioned in paragraph 2 of this Ruling, that the Respondent States have ratified the Protocol and also deposited the Declaration.
22. The Court observes, as mentioned in paragraph 2(i) of this Ruling, that on 25 March 2020 the Republic of Benin deposited the instrument of withdrawal of its Declaration deposited under Article 34(6) of the Protocol.
23. The Court recalls that it has held that the withdrawal of the Declaration has no bearing on pending cases at the time of its deposition, or on cases instituted before the withdrawal took

6 *Ghati Mwita v United Republic of Tanzania*, ACtHPR, Application No 012/2019, Order of 9 April 2020 (provisional measures), § 13.

effect,⁷ as in the instant case. The Court reiterates its position in its Ruling of 5 May 2020 *Houngue Éric Noudehouenou v Republic of Benin*⁸ that the withdrawal of the Declaration by the Respondent State takes effect on 26 March 2021. Consequently, the said withdrawal has no bearing on the jurisdiction of the Court insofar as the initial Application was filed before the withdrawal took effect.

24. The Court further notes, as mentioned in paragraph 2(iii), that on 29 April 2020, the Republic of Côte d'Ivoire deposited the instrument of withdrawal of its Declaration under Article 34(6).
25. The Court recalls that it has held that the withdrawal of the Declaration has no effect on pending cases at the time of its deposition, or on cases instituted before the withdrawal takes effect,⁹ as is the case in the present instance. The Court reiterated this position in its judgment of 15 July 2020 in *Suy Bi Gohoré and Others v Republic of Côte d'Ivoire*¹⁰ that the withdrawal of the Respondent State's Declaration takes effect on 30 April 2021. Accordingly, the said withdrawal has no bearing on the jurisdiction of the Court insofar as the initial Application was filed before the withdrawal took effect.
26. Accordingly, the Court finds that it has *prima facie* jurisdiction to hear the present request for provisional measures.

VI. Provisional measures requested

27. The Applicant requests provisional measures, which, he avers, seek to avoid irreparable harm emanating from the holding of the 2021 presidential election in violation of the right to the enforcement of decisions rendered by this Court. He also requests the suspension of the detention warrant issued against Reckya MADOUGOU as well as measures relating to the exercise of the right to an effective remedy.
28. With regard to measures to avoid irreparable harm as a result of the holding of the 2021 Presidential election in violation of

7 *Ingabire Victoire Umuhoza v Republic of Rwanda*, ACTHPR (Judgment of 3 June 2016) (Jurisdiction) 1AfCLR 540 § 67.

8 *Houngue Éric Noudehouenou v Republic of Benin*, ACTHPR, Application No 003/2020, Order (Provisional Measures) (5 May 2020), § 4-5 and Corrigendum of 29 July 2020.

9 *Ingabire Victoire Umuhoza v Republic of Rwanda*, ACTHPR (Judgment of 3 June 2016) (Jurisdiction) 1AfCLR 540 § 67.

10 *Suy Bi Gohoré Émile and Others v Republic of Côte d'Ivoire*, ACTHPR, Application No 044/2019, Judgment of 15 July 2020 (merits and reparations), § 67.

the right to the enforcement of the decisions of this Court, the Applicant prays the Court to order the Republic of Benin to take all necessary measures to ensure the enforcement of its judgments of 27 November 2020 in Application No 059/2019 and Application No 010/2020, and on 4 December 2020, in Application No 003/2020 and Application No 062/2019.

29. In the same vein, the Applicant prays the Court to order the Executive Council to take all appropriate measures, within the meaning of Articles 29(2) and 30 of the Protocol, first, to ensure the enforcement of the said judgments, secondly, to erase all the effects of the holding of the 2021 Presidential election in violation of the aforementioned judgments, until full enforcement of the decisions of this Court and, thirdly, to notify the measures taken to this Court, and to the Government and people of Benin.
30. The Applicant submits, in this regard, that there is urgency simply because the Court's decisions are enforceable. He further contends that the current leadership of the Republic of Benin persisted in holding the 2021 presidential election. Furthermore, he emphasises that the situations that gave rise to the unenforced decisions could cause irreparable harm.
31. As regards the measure relating to the suspension of the detention warrant against Reckya MADOUGOU for acts of terrorism, while protesting against the holding of the presidential election of 2021, the Applicant insists that the said detention warrant is prejudicial to the rights protected by Articles 2, 19 and 25 of the ICCPR "in respect of the presidential elections of 2021". He further contends that she is held under appalling detention conditions and does not have the right to see her children, who are still minors, not to mention the fact that she cannot communicate with her lawyers in private.
32. With regard to the measures relating to the exercise of the right to an effective remedy, the Applicant submits that since, in line with the jurisprudence of this Court, cases cannot be instituted before it against the organs of the African Union, he can only bring a case against all the Member States of the Executive Council.
33. In this regard, the Applicant maintains that there is an urgent need to pursue all the remedies legally available to him in order to avoid a situation of systematic violations of the decisions of this Court. The Applicant underscores, in relation to the irreparable harm, that there is "imminent arbitrary deprivation of the effectiveness and the satisfactory nature of the right to a remedy". He maintains, to this effect, that if the other Member States of the Executive Council were to be excluded from the case, his right to a remedy

would be rendered unsatisfactory.

34. The Applicant thus prays the Court to “rule on the composition of the organ provided for in Article 29(2) of the Protocol by indicating the African States that compose it” and to authorize it to “modify and/or re-state the identities of the Respondent States, other than the Republic of Benin, upon notification of the composition of the organ provided for in Article 29(2) of the Protocol by the Court”.

35. The Court notes that Article 27(2) of the Protocol provides:
In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.
36. The Court recalls that urgency, which is consubstantial with extreme gravity, means that there is an “irreparable and imminent risk of irreparable harm being caused before the Court renders its final decision”.¹¹ The risk in question must be real, which excludes the purely hypothetical risk and explains the need to remedy it immediately.¹²
37. With regard to irreparable harm, the Court considers that there must be a “reasonable likelihood of occurrence” having regard to the context and personal circumstances of the applicant.¹³
38. The Court emphasises that the two conditions required by the above-mentioned article, namely, urgency or extreme gravity and irreparable harm, are cumulative, so that if one of them is not met, the measure sought cannot be ordered.
39. The Court notes, however, that before determining if the said requirements are met, it must satisfy itself, if necessary, that the measures sought are meritorious or that a Respondent State is liable to enforce them.
40. The Court recalls that the Applicant requests measures in respect of (i) irreparable harm resulting from the holding of the 2021 presidential election (ii) the detention order issued against Reckya Madougou and (iii) the right to an effective remedy.

11 Sébastien *Ajavan v Republic of Benin*, ACTHPR, Application No 062/2019, Order 17 April 2020 (Provisional Measures) § 61.

12 *Ibid*, § 62.

13 *Ibid*, § 63.

A. On the measures relating to the 2021 presidential election

41. The Court recalls that as regards the 2021 presidential election, the Applicant requested four (4) measures, one against the Republic of Benin and three against the Executive Council.

B. Measures against the Republic of Benin

42. The Court emphasises that the measures sought relate to the enforcement of the Court's decisions by the Republic of Benin before the presidential election of 2021. The Court notes that the said election took place on 11 April 2021. It follows that the measures sought have become moot.
43. Accordingly, without the need to examine the requirements of Article 27(2) of the Protocol, the Court declares this request moot.

C. On the measures against the Executive Council

44. The Court recalls that the Applicant prays the Court to order the Executive Council to take appropriate measures under Articles 29(2) and 30 of the Protocol to ensure the enforcement of four (4) judgments against the Republic of Benin, to erase and hold in abeyance all the effects of the holding of the 2021 Presidential election in violation of the said judgments and to inform the Court of all measures taken in this regard.
45. The Court emphasises that it can only order provisional measures against the parties to a proceeding. In the present case, however, the Executive Council is neither a Party to the proceedings nor a State Party to the Protocol.
46. Accordingly, without the need to examine the requirements of Article 27(2) of the Protocol, the Court rejects this request.

D. On the provisional measure relating to the suspension of the detention warrant issued against Reckya Madougou

47. The Court recalls that the Applicant requests the "suspension" of the detention warrant issued against Reckya Madougou by the CRIET Investigating Committee.
48. The Court notes that it emerges from the record that on 11 December 2021, Reckya Madougou was tried and sentenced by the Court of Repression of Economic Offences and Terrorism to twenty (20) years' imprisonment. The Court underscores that,

consequently, the detention of Reckya Madougou is based on this conviction and no longer on the detention warrant issued by the CRIET Investigation Commission, whose effects have thus come to an end.

49. The Court considers that the request for suspension of the detention warrant, cannot be justified.
50. Accordingly, this request is rejected.

E. On provisional measures relating to the right to the exercise of an effective remedy

51. The Court recalls that the Applicant requests the Court to “decide on the composition of the organ provided for in Article 29(2) of the Protocol by indicating the African States which compose it” and to authorize it to “modify and/or re-specify the identities of the Respondents, other than the Republic of Benin, upon notification of the composition of the organ provided for in Article 29(2) of the Protocol by the Court”.
52. The Court notes that it is not for it to pronounce on the composition of the Executive Council, whose composition and powers are laid down in the Constitutive Act of the African Union.
53. Furthermore, it is not for the Court, under provisional measures, to rule on the procedural position of the parties by amending or clarifying the identity of the Respondent States.
54. Accordingly, the Court dismisses these prayers.
55. For the avoidance of doubt, the Court recalls that this Ruling is provisional and in no way prejudices the Court’s findings on its jurisdiction, on the admissibility of the application and on the merits thereof.

VII. Operative part

56. For these reasons,

The Court

Unanimously,

- i. *Finds* that the requests relating to the 2021 presidential elections are moot;
- ii. *Dismisses* all other requests for provisional measures.

Kchouk v Tunisia (provisional measures) (2022) 6 AfCLR 1059

Application 006/2022, *Salaheddine Kchouk v Republic of Tunisia*

Ruling, 16 December 2022. Done in Arabic, English and French, the Arabic text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, MENGUE, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA, SACKO and ADJEI

Recused under Article 22: BEN ACHOUR

The Applicant, a citizen the Respondent State, brought this Application alleging that two decrees promulgated by the Respondent State were in violation of certain human rights guaranteed in the African Charter and other human rights instruments. The Application was filed along with a request for provisional measures to stop the Respondent State from holding certain elections. In this ruling, the Court dismissed the Applicant's request for provisional measures.

Jurisdiction (*prima facie* jurisdiction, 15-17)

Provisional measures (urgency, 22 extreme gravity 22; irreparable and imminent risk, 22-23; irreparable harm, 24; connection between measures requested and merits, 30-31)

Dissenting Opinion: BENSAOULA

Provisional measures (conditions for grant, 5; urgency, 15)

I. The Parties

1. Salaheddine Kchouk is a national of the Republic of Tunisia (hereinafter referred to as the "Applicant"). He alleges that the Respondent State, in issuing Decrees 54 and 55-2022, violated the rights of equality between men and women, equality of opportunity, freedom of expression, inviolability of the home and confidentiality of correspondence.
2. The Application is filed against the Republic of Tunisia (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 5 October 2007. Furthermore, the Respondent State, on 2 June 2017, deposited the Declaration provided for under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration"), by virtue of which it accepted the jurisdiction

of the Court to receive applications from individuals and non-governmental organisations

II. Subject of the Application

3. The Applicant alleges that Presidential Decrees No 54 and 55 of 2022 violate the rights guaranteed by the Charter, the International Covenant on Civil and Political Rights, the International Covenant on Economic and Social Rights, the Universal Declaration of Human Rights, and the Constitution of the Respondent State.

III. Alleged violations

4. The Applicant alleges violation of the rights to non-discrimination, equality, fair trial, participation in the conduct of public affairs, rights guaranteed by Articles 2, 3, 7, 13 and 20 of the Charter, Article 14 of the International Covenant on Political and Civil Rights.
5. The Applicant further alleges that the said decrees violate Articles 22, 23, 26, 30, 37, 38, 39, 51 and 123 of the Respondent State Constitution of 25 July 2022.

IV. Summary of the Procedure before the Court

6. On 25 October 2022, the Registry received the Application together with a request for provisional measures.
7. On 16 November 2022, the Application was served on the Respondent State with a request to it to file its response to the Application on the merits and the provisional measures within ninety (90) days and seven (7) days, respectively. The Respondent State was also requested to submit the names of its Representatives within thirty (30) days.
8. The Respondent State has not responded to the request for provisional measures.

V. Prayers of the Parties

9. The Applicant request the Court to:
 - i. Declare that it has jurisdiction
 - ii. Declare the application admissible;
 - iii. Take the necessary measures to put on hold the implementation of Presidential Decrees No 54 and 55 of 2022;
 - iv. Rule that Decrees Nos 54 and 55 of 2022 are null and void;

- v. Compel the Respondent State to issue a decree establishing the Constitutional Court within three (3) months;
- vi. Order the Respondent State, through the Independent Elections Authority, to refrain from holding the legislative elections scheduled for 17 December 2022, the said legislative elections being based on Decree No 55 which is unconstitutional and contrary to the international instruments ratified by the Respondent State, and to order the Respondent State not to hold the said elections until the Constitutional Court has been established.

VI. *Prima facie* jurisdiction

- 10. Both parties did not submit observations on the *prima facie* jurisdiction of the Court.

- 11. When it is seized of an application, the Court shall make a preliminary examination of its jurisdiction on the basis of Articles 3, 5(3) and 34(6) of the Protocol.
- 12. Article 3(1) of the Protocol provides that:

The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
- 13. Rule 49(1) of the Rules provides “the Court shall preliminary ascertain its jurisdiction...in accordance with the Charter, the Protocol and these Rules.” However, in ordering provisional measures, the Court need not ascertain that it has jurisdiction on the merits of the Case, but it simply needs to satisfy itself that it has *prima facie* jurisdiction.¹
- 14. In terms of Article 5(3) of the Protocol, “The Court lay entitle relevant non-Governmental organizations (NGOs) with observer Status before the Commission and individuals to institute cases

¹ See *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya* (provisional measures (15 March 2013) 1 AfCLR 145, 21 10; *Komi Koutché v Republic of Benin* (provisional measures) (2 December 2019) 3 AfCLR 725, § 14; *Ghati Mwita v United Republic of Tanzania*, ACTHPR, Application n° 012/2019 (provisional measures) 9 April 2020, § 14; *Symon Vuwa Kaunda and 5 others v Republic of Malawi*, ACTHPR, Application n° 013/2021 (provisional measures), 11 June 2021, § 11.

directly before it, in accordance with Article 34(6) of this Protocol.”

15. As mentioned in paragraph 2 of this Ruling, the Respondent State is a party to the Charter and the Protocol and has also made and deposited the Declaration accepting the jurisdiction of the Court to receive application from individuals and non-governmental organizations in accordance with Article 34(6) of the Protocol read together with Article 5(3) thereof.
16. In the instant case, the rights claimed by the Applicant to have been violated are protected by the Charter, instrument that the Court is empowered to interpret and apply pursuant to Article 3(1) of the Protocol.
17. In light of the foregoing, the Court, notes that it has *prima facie* jurisdiction to hear the requests for provisional measures.

VII. Provisional measures requested

18. Under provisional measures, the Applicant prays the Court to:
Order the Respondent State, through the Independent Elections Authority, to refrain from holding the legislative elections scheduled for 17 December 2022, the said legislative elections being based on Decree No 55 which is unconstitutional and contrary to the international instruments ratified by the Respondent State, and to order the Respondent State not to hold the said elections until the Constitutional Court has been established.

19. The Court recalls that Article 27(2) of the Protocol provides:
In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.
20. The Court notes that Rule 59(1) of the Rules provide:
Pursuant to Article 27(2) of the Protocol, the Court may, at the request of a party, or on its own accord, in case of extreme gravity and urgency and where necessary to avoid irreparable harm to persons, adopt such provisional measures as it deems necessary, pending determination of the main Application.
21. It follows from the foregoing that the Court has the discretion to decide in each case whether to exercise the power vested in it by virtue of the aforementioned provisions in light of the particular circumstances.

22. The court recalls that urgency, which is consubstantial with extreme gravity, means that an “irreparable and imminent risk will be caused before it renders its final judgment”.²
23. The Court notes that the risk in question must be real, should excludes the purely hypothetical risk, and should explain the need to remedy it in the immediate future.³
24. With respect to irreparable harm, the Court considers that there must be a “reasonable probability of its occurrence” having regard to the context and the Applicant’s personal situation.⁴
25. In view of the above-mentioned provisions, the Court takes into account the nature of the standard practices as regards the procedures for examining and deciding on requests for provisional measures, which rules are of a preventive nature and do not preclude a decision on the merits of the Application.⁵
26. The Court will now consider the Applicant’s request to postpone the parliamentary elections scheduled for December 2022.

A. Injunction on the legislative elections scheduled for December 2022

27. The Applicant requests the Court to order the Respondent State, through the Independent Superior Electoral Authority (ISIE), to suspend the legislative elections scheduled for 17 December 2022, in accordance with Decree No 55 of 2022. The Applicant argues that since the said Decree is unconstitutional and contrary to the international instruments ratified by the Respondent State, the ISIE is enjoined to refuse to supervise any elections prior to the establishment of the Constitutional Court.

2 *Houngue Éric Noudehouenou v Republic of Benin*, ACtHPR, Application No 00004/2020, Order for Provisional Measures of 15 August 2022; *Ajavon Sébastien v Republic of Benin*, ACtHPR, Application No 062/2019, Order for Provisional Measures of 17 April 2020, § 61;

3 *Sébastien Germain Ajavon v Republic of Benin*, *op. cit.* 62.

4 *Houngue Éric Noudehouenou v Republic of Benin*, 28, *Sébastien Germain Ajavon v Republic of Benin*, *op. cit.* 63.

5 *Sébastien Germain Ajavon v Republic of Benin*, *op. cit.*, § 60.

28. The Court notes that this application seeks the Court to order the respondent State to postpone the parliamentary elections scheduled for 17 December 2022, to elect the members of the Assembly of People's Representatives.
29. The Court notes that the Applicant filed his application with the Registry on 21 October 2022. He refers to the two decree-laws No 44 and No 55 of 2022 of 13 and 15 September 2022 relating respectively to the fight against offences relating to information and communication systems and the amendment of the organic law No 2014-16 of 26 May 2014 on elections and referendum.
30. The Court notes that the Applicant has not shown any direct link between the date of the calling of the parliamentary elections and the decree which is the subject of his application. Furthermore, the prayers for provisional measures are the same as those in the main application.
31. The Court observes that, in order to establish the existence of harm which the request for provisional measures seeks to avoid, it is necessary to determine a connection between the measures requested and the merits of the case. The Court notes in this respect that there is no connection between the request for a stay of the election concerned and the rights alleged by the Applicant in the Application instituting proceedings. Indeed, the alleged violations are not alleged in the context of the election whose suspension is sought.
32. Therefore, the Court rejects the Applicant's request for an order to suspend the organisation of the concerned election.
33. For the avoidance of doubt, the Court recalls that this Ruling is provisional and in no way prejudices the Court's findings on its jurisdiction, on the admissibility of the application and on the merits thereof.

VIII. Operative part

34. For these reasons,
The Court

By a vote of nine (9) for, and one (1) against, Judge Chafika BENSOUALA dissenting,

Dismisses the request to order the respondent State to postpone the holding of the parliamentary elections scheduled for 17 December 2022 until the Court can examine the merits of the case.

Dissenting Opinion: BENSAOULA

1. I do not share the Court's findings in its above-mentioned Ruling and the reasons proffered with regard to the dismissal of the Application seeking an Order for the Respondent State to postpone the legislative elections slated for 17 December 2022 until examination of the case on the merits.
2. It is therefore my wish to write this dissenting opinion because I am convinced that the Court should have declared the request well-founded for the simple reason that it meets the requirements of urgency warranting provisional measures.
3. In this regard, Article 27(2) of the Protocol clearly provides that "In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary".
4. Rule 59(1) of the Rules of Court also clearly provides that "Pursuant to Article 27(2) of the Protocol, the Court may, at the request of a party, or on its own accord, in case of extreme gravity and urgency and where necessary to avoid irreparable harm to persons, adopt such provisional measures as it deems necessary, pending determination of the main Application".
5. Hence, it emerges from a reading of the above two Rules that the conditions governing provisional measures remain the urgency or the gravity of cases and the need to avoid irreparable harm.
6. In paragraph 22 of its Ruling, the Court declares that urgency, which is consubstantial with extreme gravity, means that an irreparable and imminent risk will be caused before it renders its final judgment.
7. It further provides in its paragraph 23 that the risk in question must be real, which excludes a purely hypothetical risk...
8. With respect to irreparable harm, in paragraph 24 of the Ruling, the Court considers that there must be a "reasonable probability of occurrence" having regard to the context and the Applicant's personal situation.
9. It is noteworthy that the Application seeking the suspension of the legislative elections of 17 December 2022 was filed before the Court on 25 October 2022 with the prayer on the merits, that is, over one (1) month before the elections.
10. It emerges from the Applicant's prayers on the merits (paragraph 4 of the Ruling) that he, *inter alia*, alleges the violation of Articles 13 and 20 of the Charter and Article 14 of the International Covenant on Civil and Political Rights.
11. It is clear from the request for provisional measures that the Applicant seeks the suspension of the elections because they are

- based on Decree 55/22 which he considers to be unconstitutional.
12. The case file on the merits shows that the decree in question is a decree-law numbered 2022/55 and dated 15 September 2022 amending Organic Law No 2014/16 of 26 May 2014 on elections and referenda.
 13. As indicated in paragraph 9 (iv) of the Ruling, the Applicant did indeed, among his claims on the merits, request the suspension and annulment of this decree!
 14. It emerges, however, that in paragraph 30 of the Ruling the Court found that the Applicant did not establish any direct link between holding the legislative elections and the decree-law, so that the prayer for provisional measures is indistinguishable from the claims on the merits, especially as in paragraph 31 the alleged violations are not in the context of the election, the suspension of which is sought. Consequently, it is my opinion that the Court has not only misrepresented the Applicant's claims but has also prejudged the merits.
 15. It is clear that there is a situation of urgency... because holding elections while substantive claims are pending before the Court would completely destroy the meaning of the said claims and prejudice the decision of the Court on the merits!
 16. As for real harm, it is apparent that the Applicant is a Tunisian citizen who aspires to the stability of his country's institutions, and therefore, that organizing premature elections according to his allegations whereas the mandate of the dissolved parliament would expire only in November 2024 cannot but constitute real harm that cannot be restored to the original state if the Court were to declare the measures taken by the Respondent State as being in breach of the principles enshrined in the Charter.
 17. In my opinion, prayers for provisional measures must be considered against the backdrop of the nature of the request itself!
 18. A request for the suspension of an act can only be a request with provisional and momentary effects which abates once the Court renders its decision on the merits.
 19. Therefore, in my opinion, the Court should have declared the request for suspension well-founded, insofar as it was not only provisional but also temporary and urgent, given that the event was imminent and unequivocally prejudicial to the Applicant.

Zayd v Tunisia (provisional measures) (2022) 6 AfCLR 1067

Application 005/2022, *Maher Ben Mohamed Taher Zayd v United Republic of Tunisia*

Ruling, 16 December 2022. Done in Arabic, English and French, the Arabic text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, MENGUE, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA, SACKO and ADJEI

Recused under Article 22: BEN ACHOUR

The Applicant is a citizen of the Respondent State and a former member of its parliament. He brought this Application alleging that the dissolution of the parliament by the Respondent State before the expiry of its term was a violation of certain human rights guaranteed in the African Charter and other human rights instruments. The Applicant alleged further that the conduct of the Respondent State, in the course of subsequent political events, including his arrest, trial and sentencing by a military tribunal was also in violation of his rights. The Application was filed along with a request for provisional measures to order the Respondent State to refrain from holding parliamentary elections. In this ruling, the Court dismissed the Applicant's request for provisional measures.

Jurisdiction (*prima facie* jurisdiction, 19-21)

Provisional measures (urgency, 26; extreme gravity 26; irreparable and imminent risk, 26-27; irreparable harm, 28; preventive nature, 29; connection between measures requested and merits, 34; similarity with merits, 39)

Dissenting Opinion: BENSAOULA

Provisional measures (conditions for grant, 5; urgency, 14; real harm, 15)

I. The Parties

1. Maher Ben Mohamed Taher Zayd (hereinafter referred to as "the Applicant"), is a national of the Republic of Tunisia and member of the dissolved Assembly of the People's Representatives. He alleges human rights violations. He alleges violation of his human rights in connection with the dissolution of the Assembly of People's Representatives and the political events that followed.
2. The Application is filed against the Republic of Tunisia (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 5 October 2007. Furthermore, the Respondent State, on 2 June 2017, deposited the Declaration provided for

under Article 34(6) of the Protocol (hereinafter referred to as “the Declaration”), by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and non-governmental organisations.

II. Subject of the Application

3. It emerges from the record that the Applicant was elected for a parliamentary term that runs until November 2024. He alleges that the authorities of the respondent State are planning to hold parliamentary elections while the term of office of Parliament has not yet expired.
4. The Applicant alleges the violation of the country’s Constitution by the President of the Republic. He contends that the President took measures that are not within his powers, in particular, by suspending the Assembly of the People’s Representatives and dissolving the government. Subsequently, the President dissolved the Assembly of the Representatives of the People and withheld the entitlements of its members, including salaries, health insurance and travel allowances.
5. The Applicant alleges that the President of the Republic described the Representatives as “rats, criminals and trash”. He further accused them of taking bribes to pass certain laws. The Applicant further alleges that he was arrested on 30 July 2021 and arraigned before a military court on the charge of conspiracy against State security. He avers that the same military court also sentenced him in another case to three (3) years in prison.
6. The Applicant further alleges that armed men in civilian clothes raided his house on two occasions, on 2 November 2021 and 2 August 2022. The authorities also prevented the Applicant and his young son, who holds an American passport, from traveling abroad.
7. The Applicant alleges that the President of the Republic has failed to disclose the state of his physical and psychological health, which exacerbates fear and anxiety over the fate of the country in the light of the chaotic decisions and orders he issues based on his whims and caprices.

A. Alleged violations

8. The Applicant alleges violation of the rights to non-discrimination, equality, life, dignity, security and liberty, fair trial, freedom of movement, the right of the people to self-determination, and the independence of the courts guaranteed by Articles 2, 3, 4, 5, 6, 7,

12, 20 and 26 of the Charter respectively.

III. Summary of the Procedure before the Court

9. On 7 November 2022, the Registry of the Court received the Application together with a request for provisional measures.
10. On 16 November 2022, the Application was served on the Respondent State with a request to file its response to the Application on the merits and the provisional measures within ninety (90) days and seven (7) days, respectively. The Respondent State was also requested to submit the names of its Representatives within thirty (30) days.
11. The Respondent State has not responded to the request for provisional measures.

IV. Prayers of the Parties

12. The Applicant requests the Court to:
 - i. Declare that it has jurisdiction;
 - ii. Declare the Application admissible;
 - iii. Rule, on the merits of the Application, that the Respondent State violated Articles 2, 3, 4, 5, 6, 7 of the Charter by putting the Applicant on trial before military courts and sentencing him for his anti-corruption writings in his capacity as an elected Member of Parliament. Furthermore, the Applicant's family also suffered unlawful kidnapping of its children and deprived the latter of the service of a lawyer to defend them until they were released after a full day of intimidation and deprivation of water and medicine, especially his daughter, who is diabetic.
 - iv. Rule that the Respondent State violated Article 12 of the Charter by placing some members of the Assembly of the People's Representatives under house arrest and unlawfully preventing the rest of the members of the Assembly from leaving the country.
 - v. Find that the Respondent State violated Article 20 of the Charter for flagrant assault on the people's choices by suspending the democratically elected Assembly of the People's Representatives and subsequently dissolving it completely, with military force being used to deter any resistance. The Respondent State also violated the people's right to self-determination by calling parliamentary elections although the term of the legally elected parliament runs until October 2024.
 - vi. Find that the Respondent State violated Article 26 of the Charter for failing to guarantee the independence of the judiciary, by arraigning the elected Representatives of the people before military and anti-terrorism courts for attending a parliamentary session that called

upon the President of the Republic to end his exceptional measures and return the country to constitutional rule.

13. The Applicant prays the Court to:
 - i. Declare that the lifting of the Applicant's immunity as a member of the Assembly of the People's Representatives is illegal;
 - ii. Vacate the delivered against him by the military courts after the lifting of his immunity, as military courts lack jurisdiction to try civilians.
 - iii. Uphold his right to receive his parliamentary salary and health coverage for himself and his family, according to norms and practices existing since he assumed his parliamentary duties that were truncated by the July 2021 coup.
 - iv. Declare that the Applicant has the right to enter the premises of Parliament to serve the voters who elected him;
 - v. Uphold his right to pecuniary and non-pecuniary reparation for the harm suffered since 25 July 2021 as a result of the presidential measures, including imprisonment, defamation, and fleeing his country to seek safety in exile, away from his family whose members were kidnapped and banned from travel.

V. *Prima facie* jurisdiction

14. Both parties did not submit observations on the *prima facie* jurisdiction of the Court.

15. When it is seized of an application, the Court shall make a preliminary examination of its jurisdiction on the basis of Articles 3, 5(3) and 34(6) of the Protocol.
16. Article 3(1) of the Protocol provides:

The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
17. Rule 49(1) of the Rules provides "the Court shall preliminary ascertain its jurisdiction...in accordance with the Charter, the Protocol and these Rules." However, in ordering provisional measures, the Court need not ascertain that it has jurisdiction on the merits of the Case, but it simply needs to satisfy itself that it

has *prima facie* jurisdiction.¹

18. In terms of Article 5(3) of the Protocol, “The Court may entitle relevant non-Governmental organizations (NGOs) with observer Status before the Commission and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol.”
19. As mentioned in paragraph 2 of this Ruling, the Respondent State is a party to the Charter and the Protocol and has also made and deposited the Declaration accepting the jurisdiction of the Court to receive application from individuals and non-governmental organizations in accordance with Article 34(6) of the Protocol read together with Article 5(3) thereof.
20. In the instant case, the rights claimed by the Applicant to have been violated are protected by the Charter, instrument that the Court is empowered to interpret and apply pursuant to Article 3(1) of the Protocol.
21. In light of the foregoing, the Court, notes that it has *prima facie* jurisdiction to hear to hear the requests for provisional measures.

VI. Provisional measures requested

22. Under provisional measures, the Applicant prays the Court to:
 - i. Issue an urgent decision restraining the Respondent State from holding the parliamentary elections scheduled for 17 December 2022, in the light of the existence of a legitimate parliament democratically elected by the Tunisian people, whose term ends in two years, that is, in November 2024.
 - ii. Rule that the elections called, any decision or action issued by the illegitimate parliament resulting thereof, are null, void and of no legal effect, in the light of a previous decision issued by this honourable Court that nullified the presidential orders and decrees issued after the 25 July 2021 elections, insofar as the elections will prevent him from performing his duties as a member of the current Assembly of the People’s Representatives, and in the absence of a national Constitutional Court with jurisdiction in the matter.
 - iii. Compel the President of the Republic to undergo physical and psychological medical examination to ensure that he is of a sound mind and body to perform his duties, insofar as it is clear that there is a direct threat to the security and stability of the country, in the

¹ See *African Commission on Human and Peoples’ Rights v Great Socialist People’s Libyan Arab Jamahiriya* (provisional measures (15 March 2013) 1 AfCLR 145, 21 10; *Komi Koutché v Republic of Benin* (provisional measures) (2 December 2019) 3 AfCLR 725, § 14; *Ghati Mwita v United Republic of Tanzania*, ACTHPR, Application n° 012/2019 (provisional measures) 9 April 2020, § 14; *Symon Vuwa Kaunda and 5 others v Republic of Malawi*, ACTHPR, Application n° 013/2021 (provisional measures), 11 June 2021, § 11.

absence of a competent constitutional court in Tunisia to compel the President of the Republic to comply with this request.

23. The Court recalls that Article 27(2) of the Protocol provides:
In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.
24. The Court notes that Rule 59(1) of the Rules provides:
Pursuant to Article 27(2) of the Protocol, the Court may, at the request of a party, or on its own accord, in case of extreme gravity and urgency and where necessary to avoid irreparable harm to persons, adopt such provisional measures as it deems necessary, pending determination of the main Application.
25. It follows from the foregoing that the Court has the discretion to decide in each case whether, in the light of the particular circumstances, to exercise the power vested in it by virtue of the aforementioned provisions.
26. The court recalls that urgency, which is consubstantial with extreme gravity, means that an “irreparable and imminent risk will be caused before it renders its final judgment”.²
27. The Court notes that the risk in question must be real, which excludes the purely hypothetical risk and explains the need to remedy it in the immediate future³
28. With respect to irreparable harm, the Court considers that there must be a “reasonable probability of occurrence” having regard to the context and the Applicant’s personal situation.⁴
29. In view of the above-mentioned provisions, the Court takes into account the nature of the standard practices as regards the procedures for examining and deciding on requests for provisional measures, which rules are of a preventive nature and do not

2 *Houngue Éric Noudehouenou v Republic of Benin*, ACtHPR, Application No 00004/2020, Order for Provisional Measures of 15 August 2022; *Ajavan Sebastien v Republic of Benin*, ACtHPR, Application No 062/2019, Order for Provisional Measures of 17 April 2020, § 61;

3 *Sebastien v Republic of Benin*, § 27, *Ibid* 62.

4 *Sebastien v Republic of Benin*, 28, *Ibid* 63.

preclude a decision on the merits of the Application.⁵

30. In this Application for Provisional Measures, the Applicant requests the Court to i) stay the organisation of the parliamentary elections; ii) invalidate the calling of the parliamentary elections and the decisions of the Parliament elected as a result; and, iii) order that the President of the Republic be subjected to a physical and psychological examination.

A. Injunction on the legislative elections scheduled for December 2022

31. The Applicant request the court to issue an urgent decision placing an injunction on the holding of the parliamentary elections scheduled for 17 December 2022, in the light of the existence of a legitimate parliament democratically elected by the Tunisian people, whose term ends in two years, that is, in November 2024.

32. The Court notes that the Applicant seeks an order vacating Article 1 of the Presidential Order No 710 of 15 September 2022 by which the President called parliamentary elections on Saturday, 17 December 2022 to elect members of parliament. Voters residing abroad will vote on Thursday 15, Friday 16 and Saturday 17 December 2022.
33. The Court notes that the Applicant filed his application with the Registry on 7 November 2022.
34. The Court observes that, in order to establish the existence of harm which the request for provisional measures seeks to avoid, it is necessary to determine a connection between the measures requested and the merits of the case. The Court notes in this respect that there is no connection between the request for a stay of the election concerned and the rights alleged by the Applicant in the Application instituting proceedings. Indeed, the alleged violations are not alleged in the context of the election whose suspension is sought.

5 *Sébastien Germain Ajavon v Republic of Benin, op. cit.*, § 60.

35. The Court further notes that while the claims relating to the legitimacy of the dissolved Parliament and the Parliament that would emerge from the election scheduled for December 2022 are relevant to the merits of the case, it is clear that the Court would risk going into the merits if it were to grant the application for a stay in this case.
36. Therefore, the Court rejects the Applicant's request for an order to suspend the organisation of the concerned election.

B. Vacation of the elections called, the results thereof and the decisions of the parliament to be elected

37. The Applicant prays the Court to vacate the call for election of a new parliament on 17 December and the result thereof in light of the existence of a legitimate parliament whose term runs until November 2024, *insofar as the elections will prevent him from performing his duties as a member of the current Assembly of the People's Representatives, and in the absence of a national Constitutional Court with jurisdiction in the matter.*

38. The Court notes that the Applicant seeks a measure vacating the aforementioned call for elections and all actions undertaken by the parliament resulting thereof, in line with a previous ruling of this Court on the Presidential Orders and Decrees issued and the non-establishment of the Constitutional Court in the Respondent State.
39. The Court considers that this request relates to the merits of the Application and therefore cannot be considered at the stage of provisional measures. The convening of the electoral college is a measure which is similar in nature to the application already examined. The Court considers that the same answer applies to the application under consideration. The annulment of future decisions of the parliament to be elected is obviously a potential claim and the damage associated with it is not at all realized.
40. Furthermore, it would not be possible to grant the present Claim without affecting the merits of the Application.
41. Consequently, the Court rejects the request for interim measures to annul the convocation of the electorate and the decisions of the Parliament that will result from the December 2022 election.

C. Measure compelling the President of the Republic to undergo physical and psychological examination

42. Finally, the Applicant requests the Court to order that the President of the Republic of the Respondent State to undergo physical and psychological medical examination to ensure that he is of a sound mind and body to perform his duties, *insofar as it is clear that there is a direct threat to the security and stability of the country, in the absence of a competent constitutional court in Tunisia to compel the President of the Republic to comply with this request.*

43. The Court notes that there is nothing on record to warrant granting this request. Consequently, the Court dismisses it.
44. For the avoidance of doubt, the Court recalls that this Ruling is provisional and in no way prejudices the Court's findings on its jurisdiction, on the admissibility of the application and on the merits thereof.

VII. Operative part

45. For these reasons,
The Court

By a vote of nine (9) for, and one (1) against, Judge Chafika BENSAOULA dissenting,

- i. *Dismisses* the request to order the respondent State to postpone the holding of the parliamentary elections scheduled for 17 December 2022 until the Court can examine the merits of the case.
- ii. *Dismisses* the request for an order invalidating the convening of the electoral college, the results of the elections and any action taken by the parliament to be elected until it can consider the merits of the case.
- iii. *Dismisses* the request for an order requiring the President of the Republic to undergo a medical, psychological and physical examination to ascertain his state of health.

Dissenting Opinion: BENSAOULA

1. I do not share the Court's finding in its above-mentioned Ruling and the reasons proffered, with regard to the dismissal of the Application seeking an Order for the Respondent State to postpone the organization of the legislative elections slated for 17 December 2022 until examination of the case on the merits.
2. It is therefore my wish to write this dissenting opinion because I am convinced that the Court should have declared the request well-founded for the simple reason that it meets the requirements of urgency, warranting provisional measures.
3. In this regard, Article 27 of the Protocol in its paragraph 2 clearly provides that "In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary".
4. Rule 59 paragraph 1 of the Rules of Court also clearly provides that "Pursuant to Article 27(2) of the Protocol, the Court may, at the request of a party, or on its own accord, in case of extreme gravity and urgency and where necessary to avoid irreparable harm to persons, adopt such provisional measures as it deems necessary, pending determination of the main Application".
5. Hence, it emerges from a reading of the above two Rules that the requirements governing provisional measures remain the urgency or the gravity of cases and the need to avoid irreparable harm.
6. In paragraph 26 of its Ruling, the Court declares that urgency, which is consubstantial with extreme gravity, means that an irreparable and imminent risk will be caused if it does not grant the request, before it renders its final judgment.
7. It further provides in paragraph 27 of the Ruling that the risk in question must be real, which excludes a purely hypothetical risk.
8. With respect to irreparable harm, the Court considers, in paragraph 28 of the Ruling, that there must be a reasonable probability of occurrence having regard to the context and the Applicant's personal situation.
9. It is noteworthy that the Application seeking the suspension of the legislative elections of 17 December 2022 was filed before the Court on 7 November 2022 with the prayer on the merits, over one (1) month before the elections.

10. The Applicant is an elected Member of Parliament, a fact not denied by the Respondent State, and the term of the current parliament will expire in 2024.
11. It is apparent from the same alleged facts which the Respondent State does not contest, because although notified, it did not respond to the Applicant's claims, that the suspension of Parliament resulted in the suspension of the allowances of its members and all that arises from the loss of the status of Member of Parliament.
12. It emerges from the Applicant's claims on the merits that he alleges the violation of Article 20 of the Charter for flagrant attack on the will of the people by suspending the assembly of its democratically elected representatives and dissolving it completely, and the right of the people to self-determination by calling legislative elections whereas the term of the legally elected parliament runs until October 2024.
13. It is clear from the request for provisional measures that the Applicant at no time requested, as provisional measure, the annulment of Presidential Decree No 2022/710 of 15 September 2022 by which the President called legislative elections, contrary to what is stated in paragraph 32 of the Ruling. In fact, the Applicant only sought the suspension of the elections. This request in itself remains a provisional and, therefore, temporary measure which should not have brought the Court to consider the merits of the case pending the emergence of a new fact which could be the judgment on the merits rendered by the Court or another measure taken by the Respondent State to vacate the measure.
14. It is clear that there is a situation of urgency... insofar as holding elections while substantive claims are pending before the Court would completely destroy the meaning of the said claims and prejudice the decision of the Court on the merits!
15. As for real harm, it is noteworthy that the Applicant being a sitting member of the current parliament, the suspension thereof and the loss of benefits attached thereto (salary, allowances, etc.) certainly constitute real harm that cannot be restored to the initial state if the Court were to declare the actions taken by the Respondent State in breach of the principles enshrined in the Charter,
16. Indeed, holding elections which will put in place a new parliament, could in no way restore the Applicant's rights and would make it impossible to execute any decision of the Court rendered in favour of the Applicant.
17. Furthermore, in paragraph 35 of its Ruling, the Court considers that it would risk delving into the merits, if it were to grant the Applicant's request to stay elections in the instant case.

- 18.** In my opinion, prayers for provisional measures must be considered against the backdrop of the nature of the request itself!
- 19.** A request for suspension of an act can in no way be considered as a request relating to the merits insofar as it is temporary and only a request for annulment of the act can be determined by a Judge on the merits, because it meets the requirements in terms of form and the merits.
- 20.** In my opinion, therefore, the Court should have declared the request for suspension well-founded as it was not only provisional but temporary and urgent, given that the event of holding elections was imminent and unequivocally prejudicial to the Applicant.