Judgement

Jebra Kambole v. United Republic of Tanzania

Application No. 018/2018

Dissenting Opinion

of

Judge Blaise Tchikaya

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1. To say that I disagree with the majority of my honourable colleagues in favour of the Court's judgment in the *Jebra Kambole* case is an understatement, given the many differences of opinion. These differences of opinion have run through the whole case before the Court. They begin with the identification of the legal question raised, through the procedure followed, to the point where the Court believes that this is the solution.

2. The special feature of a judicial decision on human rights is that it finds violations and, if appropriate, orders reparations. The *Jebra Kambole* decision singularly succeeds in the ruse of departing from this principle, not because of the nature of the case, but because the Court focuses on non-issues, on points of rights that are not rights, even though the only Article 7 paragraph 1 that could be discussed here was sufficient - even if, in this case, the account was not there either. The legal "mille-feuille" generated by the Court in this case gives the impression of a great opacity.

3. To tell the truth, I was even able to consider, for solid reasons that must be reiterated, that the Court's jurisdiction was not established and was open to discussion. The heavy question of public law raised - the proclamation of the President of the Republic - required that the "Court strengthen its argument" (Words dear to Judge Suzanne Mengué). In view of the material basis of the dispute, the conviction that the Court was able to judge this question was not so prominent in the camp of those who supported this judgment.

4. I am of the opinion that it would be better to obtain, through internal discussion, a judicial decision that is rigorous in law rather than the time taken for a dissenting opinion. From this point of view, my regret is total. This is all the truer given that the African Court, by its decisions, after more than a decade (or nearly fifteen years), has earned admiration and respect. It has become an indispensable judicial relay for the functioning of democracies on the continent.

5. Before getting to the substance of the *Kambole case*, it will be necessary to consider the reflections of Charles Evans Hughes, Judge at the Permanent Court of Arbitration (PCA) and Member of the Permanent Court of International Justice (PCIJ). His words sum up my current situation very well:

> "A dissenting opinion expressed in a court of last resort is an appeal to the ever-present spirit of the law, to the intelligence of a future day when a later decision may rectify the error into which the judge giving that opinion believes the court has fallen"[1].

[1] v. in Philip C. Jessup, *The Development of International Law by the International Court*, 1958, note 10, p. 66; Mr. Charles Evans Hughes was elected a judge of the CPJI in 1928..

6. The following discussion will be based on two pillars: on the one hand, on a few discordant points retained by the court (I.); on the other hand, on the fundamental inconsistencies with international human rights law that appear in the decision (II).

I. The *Jebra Kambole* Decision: a few discordant points

7. The threads of the "Gordian knot" in which the Court set itself begin with the way in which it identified the question brought by *Mr. Kambole*. The problem had to be put there, although it seemed in many ways specific. It was, in fact, by its nature, out of all proportion to the Court's usual applications.

A. The special nature of the *Jebra Kambole* case

8. The question put by the Applicant was of a special nature. Tanzanian lawyer, *Jebra Kambole*, is a member of the Tanganyika Law Society. By an application filed on 4 July 2018, he challenges the provisions of Article 41(7) of the Constitution of the Republic of Tanzania. This application was to be considered by the Court despite the fact that the Respondent State had filed a declaration of withdrawal on 21 November 2019 under Article 34(6) of the Protocol allowing individual and NGO applications. The Court also confirmed by Order that the withdrawal had no retroactive effect and had no impact on pending cases[2].

9. The Court is therefore, in this rare instance, seised of a question of public law, which appears to be of the first order: the result of the election of the President of the Republic. This Applicant's connection to the question raised may surprise as to his interest in acting, since he was not a priori a candidate for that result, but the Court will rightly[3], hear the case.

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[2] v. *Ingabire Victoire Umuhoza* v. Rwanda. Judgment on Jurisdiction. 03 June 2016, v. *Ingabire Victoire Umuhoza v. Rwanda*, Decision (Jurisdiction), 03 June 2016 1 RJCA 584 § 67; v. also; in the Ghati Mwita case, the Court confirmed that the withdrawal of the said withdrawal will take effect twelve months after the date of deposit of the instrument of withdrawal, in this case 22 November 2020: CAIDHP, *Ghati Mwita v. United Republic of Tanzania* (Provisional Measures Order), 9 April 2020, §§ 4 and 5..

[3] In addition to Article 56 of the Charter and Article 30 of the Rules of Procedure, which lay down the conditions for bringing a case before the Court, it is understandable that, since suffrage is universal, the remedies attached to it are also universal.

10. I do not agree with the analyses of my hon. colleagues on this case. I disassociate myself from the methodology of the examination used and the legal issues assumed to be relevant to this proceeding. Thus, in its entirety, the operative part of the Judgment obliges me to this dissenting opinion.

11. In the third paragraph of its judgment, the Court recalls that *Mr Kambole* asks the Court to sanction the following:

> "The fact that the Respondent State allowed the Constitution to contain such a provision prohibiting any person who felt aggrieved by the results of the presidential election from bringing proceedings before the Tanzanian courts constitutes a violation of Articles 1, 2, 3(2) and 7(1)(a) of the African Charter".
> [1]

The Tanzanian has thus allegedly failed to fulfil its obligations.

12. The constitutional provision challenged by the Applicant is Article 41(7), according to which ...:

> "Where a candidate is declared duly elected by the Electoral Commission in accordance with this Article, no court shall have jurisdiction to investigate his election".

13. While the point of law is clear, the same cannot be said of the choices made by the majority of the Court. Leaving aside the question of harm to the individual, the Court was faced with a classic review of conventionality. The Court had to rule on the validity of a domestic text in the light of the principles of the international human rights order. Two elements would judicially follow:
- Was the Applicant's application admissible?
- Was the application valid in law?

[1] AfCHPR, *Jebra v. United Republic of Tanzania*, 11 July 2020, § 3.

The majority choices of the Court on these two points are surprising.

B. The points identified by the Court

14. From the foregoing, the Court concludes firstly that the Respondent State has acted in a discriminatory manner. Article 41(7) of the Tanzanian Constitution would introduce discrimination. I do not share this view. The Court cites its decision in *APDH v. Côte d'Ivoire*, in which it recognized that discrimination is:

> "A differentiation between persons or situations on the basis of one or more non-legitimate criteria".[5]

This definition from Professor Jean Salmon's dictionary[6] is defensible, but it is manifestly inappropriate in the present case because it does not say what the specificity of the situation is. This is not a case of a constitutional provision that is available to everyone, which would be denied to others on the basis of an unjustified criterion.

15. Whatever definition of discrimination is used [7], it will not be taken into account. It cannot be accepted that the constituent power of the Respondent State intended to support one group or individual over another by adopting the provisions of Article 41(7). What is understandable is that the elected President, by virtue of his position (which will have to be reconsidered) has benefited from adjustments that would be favourable to him by virtue of his new functions. This is far from any discriminatory situation[8]. The Court seems to suggest that any statutory claim is a challenge for non-discrimination.

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[5]AfCHPR, *Actions for the Protection of Human Rights (APDH) v. Republic of Côte d'Ivoire* (Merits), 18 November 2016, *RJCA*, p. 697, § 147.

[6] *Dictionnaire des droits de l'homme*, edited by Andriantsimbazovina (J.), Hélène Gaudin (H.), Maguenaud (J.-P), Rials (S.) and Sudre (F.), PUF, 2008, p. 284

[7]The African Charter is careful not to use the term "discrimination". The term has been reinvested by African case-law, but its contribution in the present case is questionable in that it assimilates discrimination to the principle of equality and does not bring out its nuances. v. AfCHPR, *Tanganyika Law Society and Others v. United Republic of Tanzania (Merits) (2013), 1 RJCA* p. 697, § 147. 34, §106; and the Court stated in *African Commission on Human and Peoples' Rights v. Kenya*, Order (Interim Measures), 15 March 2013 that "the right not to be discriminated against is linked to the right to equality before the law and equal protection of the law, rights enshrined in Article 3 of the Charter". Section 3 simply states that "All persons are equal before the law. All persons are entitled to equal protection of the law"

[8]Weil (P.), *Liberté, égalité, discriminations*, Ed. Grasset and Fasquelle, 2008, pp. 9-10.

16. The Court's basic argument is that section 41(7) does not have the same effect on all citizens. Thus, the Court points out that:

> "While those who support the winning candidates may have no incentive to apply to the courts for redress as part of the electoral process, other sub-groups of voters may be willing to seek judicial intervention to enforce their rights".[9]

17. It should be noted, on the one hand, that these voters expressed themselves in this way and, on the other hand, that they expressed themselves democratically on the basis of a democratic process. Article 41(7) applies to all voters without distinction. All are bound by it. One wonders why the reasoning of the august Court in this case begins its consideration of the merits of the case with the inappropriate idea of discrimination, albeit indirect.

18. The majority in this decision is tempted by the equal protection of the law enshrined in s. 3(2) of the Charter:

> "All persons are entitled to equal protection of the law.

The approach is similar to that followed in importing the previous concept. It is all in all, the Court seems to say in passing, on the same basis, to the consideration of equality before the law. It notes:

> "The principle of equality before the law, which is implicit in the principle of equal protection of the law and equality before the law[10]. (...) Nevertheless, equal protection of the law also presupposes that the law protects every individual, without discrimination".

19. The Court sees in this case a link between equality before the law and the principle of access to the courts. While this link clearly exists, it is not automatic in this case.

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[9] AFCHPR, *Jebra Kambole v. United Republic of Tanzania*, op. cit. § 74..

[10] *AfCHPR, Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema dit Ablasse, Ernest Zongo and Blaise Ilboudo and the Burkinabè Movement of Human and Peoples' Rights v. Burkina Faso*, (Preliminary Objections), 21 June

Without referring to the specific characteristics of these principles, it should be recalled that access to the courts - to be considered solely in terms of this principle - involves prior procedural rules and may be subject to adjustments, depending on the matters and persons concerned. In judicial law, not everything is melted into a mould. The questions lead to specific or specific procedures. Prisoners' rights before the judge may differ from those of a citizen enjoying full civil and political rights. Rather, it was a question of trying to understand the meaning and useful effect of Article 41 (7) of the Constitution of the Respondent State. The question posed by the court was why the person elected in a presidential election was removed from judicial scrutiny.

20. The same applies where the Court considers that there is an alleged violation of the Applicant's right to have his case heard. It concludes that the Respondent State violated his right under Article 7(1)(a) of the Charter [11]. There is a question of identification of the actual issue before the Court. The majority of my Dear Colleagues argue that:

> "This means that, whatever the nature of the grievances, whether well-founded or not, as far as they relate to the declaration of the winner in the presidential election by the Electoral Commission, no judicial remedy is available to any person who feels aggrieved in the respondent State". [12]

21. The majority of my Honourable Colleagues thought that there was a dispute over the electoral procedure. The question of law put to the Court relates to the preposition directly contained in Article 41(7): "in so far as it relates to the declaration of the winner in the presidential election". This preposition in the sentence of the Article in question is as essential as it is blindingly obvious. The whole of the *Jebra Kambole* judgment does not see it. Yet this preposition, the main one here, obliged the Court to examine the special status of the newly elected President of the Republic. This special status is enshrined in all the advanced legal systems of the world.

2013, 1 RJCA, p. 204; Judgment (Merits), 28 March 2014, 1 *RJCA* 226, Judgment (Reparations), 5 June 2015, 1 RJCA, p. 265

[11] Section 7(1)(a) of the Charter: "(1) Everyone has the right to have his or her case heard. This right includes : (a) the right to bring before the competent national tribunals any action violating the fundamental rights granted and guaranteed to him by the conventions, laws, regulations and customs in force"

[12] AfCHPR, *Jebra Kambole v. United Republic of Tanzania*, op. cit, § 97

22. After this reading of a few selected points, it is appropriate to consider the main points of disagreement on which the Court has mistakenly based its decision.

II. The Jebra Kambole Decision: fundamental points of disagreement

23. Undoubtedly, the *Kambole case* should have had a different judicial outcome. The decision handed down raises questions, including on the basis of admissibility.

A. The fundamental flaw in the decision: A flagrant inadmissibility of the application

24. The Court should have dealt with the admissibility of the application in a precise manner, an aspect on which, as a matter of settled law, it has previously ruled.[13] Clearly, *Mr Kambole's* Application was not presented to the Court within a reasonable time. Moreover, the Court acknowledges that:

> "The possibility of bringing an action against the Respondent State in relation to the violation alleged by the Applicant was only offered from March 2010. However, the present Application was filed in July 2018, eight (8) years and four (4) months after the filing of the declaration"[14]

25. This period of more than 8 years is prohibitive. The Court innovates and overturns all its previous jurisprudence without giving a solid justification. It justifies itself as follows:

> "Consequently, even if, in the present case, the Applicant brought the matter before the Court eight (8) years and four (4) months after the Respondent State filed its declaration, in view of the lack of any remedy

[13] Article 6.2 of the Protocol states that: "The Court shall rule on the admissibility of applications having regard to the provisions of Article 56 of the Charter"; in particular Article 39, which presents it as "the Court shall decide on the admissibility of applications having regard to the provisions of Article 56 of the Charter"

[14] - *AfCHPR, Jebra Kambole v. United Republic of Tanzania, § 47*

available to the Applicant and the continuing nature of the alleged violation, the Court concludes that it is not necessary to set a time-limit as provided for in the first aspect of Article 40(6) of the Rules of Court"[15].

This argument of my Honourable Colleagues in the majority comes up against two stumbling blocks: (i) it confuses the nature of the violation with its continuing nature and (ii) the procedure applicable to the Court must take account of a reasonable, i.e. not excessive, time-limit for bringing the matter before the Court. Even before ruling on the question, the Court must be sure of its procedural time limits[16].

26. This time-limit must be contained. It corresponds to a period of time which allows the victim, under conditions of law and fact to be determined by the Court, to submit his or her complaint. The most important thing is not that the Court should assume that the time limit is fixed under section 56 of the Charter, but that it should consider how reasonable the time limit for referral appears to be. This reasonable time is required for any application after the exhaustion of domestic remedies, regardless of the alleged violation. The Court has in fact established that the reasonableness of the time limit for its referral depends on the particular circumstances and must be assessed on a case-by-case basis.[17] *Mr. Kambole* will have waited more than eight (8) years to submit the application to the Court. This excessively long time is unfortunate and should motivate the rejection of the application, given that the Applicant is a lawyer and also a member of the Tanganyika Law Society which is an NGO with observer status at the African Commission on Human and Peoples' Rights.

27. This last point is central. The combination of two major qualities means that the Petitioner is very familiar with the laws of his country. Could he be unaware of the existence of such an important text of the Constitution? This renders unjustifiable the delay of more than 8 years for a violation that is said to be continuous, and therefore visible, for a lawyer of his quality. In addition, the *Tanganyika Law Society*, a learned

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[15] AfCHPR, *Jebra Kambole v. United Republic of Tanzania*, §§ 48-53.

[16] The universality of this approach may be recalled, see in particular ICJ, East Timor, Portugal v. Australia, 30 June 1995; the Hague Court holds that the *erga omnes* opposability of a norm and the rule of consent to jurisdiction are two different things. The lawfulness of the conduct of a State cannot be determined when the decision to be taken involves an assessment of the lawfulness of the conduct of another State which is not a party to the proceedings. This latter rule is the basis of international procedure. In such cases the Court cannot rule, even if the right in question is enforceable *erga omnes*.

[17] *Anudo Ochieng Anudo v. United Republic of Tanzania (Merits) (2018)* 2 RJCA 257, § 57

society to which *Mr. Kambole* says he belongs, has often appealed to the Court. It has some practice in this regard.[18] The delay of more than 8 years especially taken in this case should be sanctioned by the Court. It is sufficient in itself to establish the procedural vacuity of the application. Neither the Petitioner nor the *Tanganyika Law Society* are profane or "indigent" in constitutional matters.

28. The decision to the contrary on this point is novel. It is in a way the end of the earlier case law,[19] developed by the Court itself, in which it held that the Applicant's indigence could justify a delay. The lay nature of the law was also one of the grounds.

29. Paradoxically, the excessively long time-limit in the present case does not lead to rejection even though the Applicant is a lawyer. In so doing, the Court reverses a case-law position which it has held without interruption since at least 2015, in which it has shown and held that the Applicant's indigence and profane nature removed the requirement of a reasonable time limit. This position of the Court appears, inter alia, in AfCHPR, *Onyachi and Njoka v. Tanzania*, 28 September 2017, 2 RJCA p. 65; *Jonas v. Tanzania, 2 RJCA*, 28 September 2017, p. 101.

30. A position that the Court has upheld throughout 2018, including AfCHPR, *Isiaga v. Tanzania*, 21 March 2018, 2 RJCA, p. 218; *Gombert v. Côte d'Ivoire*, 2 RJCA, 2018, 2 RJCA, p. 270; *Nguza v. Tanzania*, 23 March 2018, 2 RJCA p. 287; *Mango v. Tanzania*, 11 May 2018, 2 RJCA, p. 314. The Court clearly reiterated this in Evarist v. Tanzania. Tanzania, 21 September 2018, 2 JCAR, p. 402; *Guehi v. Tanzania*, 7 December 2018, 2 JCAR, p. 477 ...and many others.[20]

31. Surprising position taken in *Kambole*, as it runs counter to the regime applicable to continuing violations. It is recognized that even in the face of continuing violations the Court retains control over its rules of procedure. Its role is not open to the *ad vitam æternam* plaintiffs. A continuing violation cannot postpone the time limit for appeal indefinitely. The judges require the applicants to show diligence and initiative in the

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[18] See in particular AfCHPR, *Tanganyika Law Society, the Legal and Human Rights Centre and Reverend Christopher R Mtikila v. United Republic of Tanzania*, Decision (joinder), 22 September 2011, 1 JCJA, p. 33; Judgment (merits), 14 June 2013 (2013), 1 JCJA, p. 34; Judgment (reparations), 13 June 2014, 1 JCJA, p. 74

[19] v. AfCHPR, *Alex Thomas v. United Republic of Tanzania*, 20 November 2015, § 66 et seq., the Court noted that "the applicant maintains that his application was lodged within a reasonable time after domestic remedies had been exhausted, having regard to the circumstances and his particular situation as a lay person, indigent and in detention"

[20] V. notamment AfCHPR, *Ramadhani v. Tanzania*, (2018) 2 RJCA, p. 344 ; *William v. Tanzania*, (2018) 2 RJCA, p. 426 ; *Paulo v. Tanzania* (2018) 2 RJCA, p. 446 ; *Werema v. Tanzania*, (2018), 2 RJCA, p. 520

face of continuing breaches by the State. The abundant case-law on this point, in particular ECHR, *Sargsyan v. Azerbaijan*,[21] is very clear in § 129 on a disappearance case::

> "When examining the Turkish Government's plea of non-observance of the six-month time-limit, the Court recalled that the human rights protection mechanism established by the Convention had to be concrete and effective, that this principle applied not only to the interpretation of the normative clauses of the Convention but also to its procedural provisions, and that it had implications for the obligations incumbent on the parties, both the governments and the Applicants. For example, where speed is of the essence in resolving a matter, it is incumbent on the Applicant to ensure that his or her complaints are brought before the Court with the necessary promptness to enable them to be decided properly and fairly".

32. This obligation on Applicants to be diligent in the presentation of appeals is important for legal certainty. The European Court makes it quite clear that this "is an obligation incumbent on the parties, both the governments and the Applicants". It expresses it as follows in § 31 of the *Kolosov and Others v. Serbia* judgment:

> "Nevertheless, the Court recalls that the continuing situation may not postpone the application of the six-month rule indefinitely. The Court has, for example, imposed a duty of diligence and initiative on Applicants wishing to complain about the continuing failure of the State to comply with its obligations in the context of ongoing disappearances or the right to property or home (...) While there are, admittedly, obvious distinctions as regards different continuing violations, the Court considers that the Applicants must, in any event, introduce their complaints "without undue delay", once it is apparent that there is no realistic prospect of a favourable outcome or progress for their complaints domestically"[22].

This should be the exact way to address the effect of the continuing nature of the infringement of the procedure before the Court.

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[21] ECHR, *Sargsyan v. Azerbaijan*, 14 December 2011

[22] ECHR, *Sokolov and Others v. Serbia*, 14 January 2014.

33. As such, the *Kambole* decision would not have passed the admissibility stage. It should have been declared inadmissible. Moreover, the decision contains only a weak statement of reasons in terms of the national margin of appreciation, which is a major right under the Tanzanian system of law applicable to the President-elect.

B. A summary approach to the NPM (the national margin of appreciation)

34. The Court has developed a legal tradition that has not yet been contradicted in its judicial work. Traditionally, when a principle is relevant to a case, it considers it, then rejects or validates it. This is even attached to the function of judging. The most fundamental remains the way in which the Court gives reasons, if any, for its rejection.[23] This was not the case with the so-called "national margin of appreciation" (NMA) standard in the *Jebra Kambole* case. It would be superfluous to demonstrate its relevance in the present case, since the matter falls within the primary civil service and the sphere of State sovereignty.

35. It has been established that the State has a national margin of appreciation (NOM)[24] on its territory, a concept recognized since 1976 in international human rights law. So many States have the disputed provisions in their domestic law. These provisions can only be legally understood through the NPM. States may, in certain cases, restrict rights and freedoms for reasons of public order, public health, national security... This is a

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[23] In particular, one can consider the *Court's reasoning in Mohamed Abubakari* of 2016. The Applicant is rebuked by the State for failing to cite the exact provision to justify the Court's jurisdiction. The Court will take up the issue to show the basis for that jurisdiction. In § 32 of this case the Court states: "jurisdiction is a question of law which it must itself determine, whether or not that question has been raised by the parties to the proceedings. It follows that the fact that a party has relied on provisions which are allegedly inapplicable is of no consequence, since in any event the Court is aware of the law and is able to base its jurisdiction on the appropriate provisions. ... the Court rejects the objection to its jurisdiction raised here by the Respondent State. The Court considers that it has jurisdiction ratione materiae to consider the present case, inasmuch as the alleged violations all concern *prima facie* the right to a fair trial,6 as guaranteed in particular by Article 7 of the Charter". The demonstrative and inductive approach used by the Court in these elements shows the Court's effort of persuasion. v. AfCHPR, *Mohamed Abubakari v. United Republic of Tanzania*, 3 June 2016.

[24] The European Court puts it in the following terms in its Handside judgment §§ 49 and 50: "the Court has jurisdiction to give a final judgment on whether a 'restriction' or 'sanction' is compatible with freedom of expression as protected by Article 10 (art. 10). The national margin of appreciation thus goes hand in hand with European supervision. The latter concerns both the purpose of the disputed measure and its "necessity". It relates both to the basic law and to the decision applying it, even when it emanates from an independent court. In this connection, the Court refers to Article 50 (art. 50) of the Convention ("decision taken or (...) measure ordered by a judicial or other authority") as well as to its own case-law (Engel and Others judgment of 8 June 1976). ECHR, *Handside v. the United Kingdom*, 7 December 2016

moderating concept, which would be well reconciled with the African community interest in that it allows, as in other continents, the pluralism of constitutional systems.

36. The proclamation of the President and his or her internal status, which are of the very nature of domestic public law, should be considered more rigorously. The elements of the Judgment do not only partially convey this conviction in the sense. They do not draw sufficient conclusions from it. The Court decides as follows:

> "The Court notes that the margin of appreciation left to the State is a recurring feature of international jurisprudence .... The margin of appreciation refers to the limit at which international supervision must give way to the State party's discretion to enact and enforce its laws".[25]

37. The Court goes on, endorsing the position of the African Commission on Human and Peoples' Rights, recalling that:

> "Similarly, the doctrine of appreciation guides the African Charter, in that it considers the Respondent State to be better disposed to adopt policies, (...) given that the State is well aware of its society, its needs, its resources, (...) and the fair balance needed between the competing and sometimes conflicting forces that make up its society".[26]

38. The Court does not give the fundamental reason why it rejects the NPM in this case. However, the applicable case-law has laid down criteria for assessing its relevance in the event of invocation by a State.[27] Rather, it will conclude on this point with a surprising argument:

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[25] AfCHPR, *Jebra Kambole v. Tanzania*, §§ 79

[26] AfCHPR, *Jebra Kambole v. Tanzania*, §80 citing the Commission, Prince v. South Africa (2004), AHRLR 105 (ACHPR 2004), § 51

[27] v. elements of discommendation and assessment of this theory formulated by the European Court, ECHR, *Observer and Guardian v. the United Kingdom*, 26 November 1991: "The Contracting States enjoy a certain margin of appreciation in assessing the existence of such a need, but this is coupled with European supervision of both the law and the decisions applying it, even when they emanate from an independent court. The Court therefore has jurisdiction to give the final ruling on whether a "restriction" is compatible with the freedom of expression protected by Article 10 (art. 10). (d) It is not the task of the Court, when exercising its review, to substitute itself for the competent domestic courts, but to review under Article 10 (art. 10) the decisions which they have given in exercise of their discretion. It does not follow that it should confine itself to ascertaining whether the respondent State has used this power in good faith, carefully and reasonably"

> "This distinction is such that individuals within the Respondent State do not have the possibility of bringing proceedings simply because of the subject-matter of their complaints, while other individuals with complaints unrelated to the presidential election are not excluded".[28]

39. Even considering the established human rights provisions, it is not trivial to deprive a State of its sovereignty of domestic legal order, which international human rights law otherwise recognizes. The NAM has this vocation, in that it preserves, under the control of the human rights judge, a diversity of internal laws, on issues such as the status of the elected President. As Professor Pellet[29] said, in any event:

> "The breakthrough of human rights in international law does not call into question the principle of sovereignty, which seems to remain (if correctly defined) a powerful organizing factor of the international society and an explanation, always enlightening, of international legal phenomena".

40. There remains, therefore, the feeling of a genuine "misunderstanding". In its most accurate sense: a misunderstanding that consists in taking one thing for another.

C. The feeling of a genuine "misunderstanding" in the decision

41. *Mr Kambole* challenges the provisions of Article 41(7) which remove any challenge after the proclamation of the elected candidate. In the grounds of its decision, the Court rejects the "complaints relating to the presidential election". Disputes relating to the electoral procedure or operations are not the same as those relating to the status of the winning candidate.

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[28] AfCHPR, *Jebra Kambole v. Tanzania*, § 82

[29] Alain Pellet, Droits-de-l'hommisme et droit international", Droits fondamentaux, N. 01, 2001, p. 48-20; La mise en oeuvre des normes relatives aux droits de l'homme, CEDIN (H. Thierry and E. Decaux, eds.), *Droit international et droits de l'homme - La pratique juridique française dans le domaine de la protection internationale des droits de l'homme*, Montchrestien, Paris, 1990, p. 126.

42. No country in the world opens the challenge of the President-elect to all after the election procedure has been completed.[30] Article 41(7) of the Respondent State formulates it in its own way, no more than that. This is not the issue on which the Court decides in the decision. It talks about the right of Tanzanian citizens to challenge the election of the President. It does not address the question of the legal status that Tanzanian domestic law attributes to the elected President. Do the provisions of Article 41(7) consider the result to be final or not? This main question, the only one contained in *Mr Kambole's* appeal, is not discussed. There seems to be a real "misunderstanding".

43. The Court believed, on examining the terms of Article 41(7), that the Tanzanian constituent refused to accept the election in the proceedings. There is undoubtedly a "quiproquo" because, in my view, the terms of that Article refer to the elected candidate. Once it is enshrined and final, it becomes free from challenge. That is common public law. There is a misunderstanding of the subject matter of the dispute.

44. Article 46, paragraph 2, of the Guinean Constitution of 7 May 2010, as revised on 7 April 2020, does not say any more: "If no dispute relating to the regularity of the electoral process has been filed by one of the candidates with the registry of the Constitutional Court within eight days of the day on which the first overall total of the results was made public, the Constitutional Court shall proclaim the President of the Republic elected". Any procedural operation shall take place prior to the proclamation. In the same vein, the Kenyan Constitution of 2010.

45. The Constitution of neighbouring Kenya of 5 August 2010 also does not provide for a procedure to challenge the proclaimed elected candidate. Article 138 of the Constitution states in paragraph 10 that

> "Within seven days after the presidential election, the chairperson of the Independent Electoral and Boundaries Commission shall- (a) declare the result of the election; and (b) deliver a written notification of the result to the Chief Justice and the incumbent President".

[30] France, tempted by an opening, restricts the submission of appeals to two days following the ballot. However, the final result will not be contested

46. The issue that the Court addresses is that of the regularity of the electoral operations. This is a different matter altogether. It figures prominently in many constitutions. The choice consists, as in the Beninese[31] and Congolese,[32] Senegalese[33] constitutions, in particular, in making a provisional proclamation. This does not concern the regime that rightly applies to the elected candidate. The final result is not open to question. For obvious reasons, the electoral quarrels took place earlier. That is what is ultimately formulated, in other words, the provisions of Article 41.7.

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47. There will undoubtedly be a after *Jebra Kambole*...The Court's decisions on admissibility, including on the reasonable time limit, will undoubtedly be read and scrutinized. However, the Court's path in this decision was not so simple: to uphold a restrictive reading of the "normative margins" of States or to say the domestic law of the State, which in any case legitimately restricted a right...but which one? The pan-African jurisdiction will undoubtedly have new opportunities to clarify the content of the national margin of appreciation, subsidiarity, proportionality, etc., in the application of Article 7 of the Protocol (applicable law).

48. In Professor Flauss' classification of human rights trends[34], one of them is not lacking in interest. That of the advocates of "moderate evolutionism". According to this trend, the protection of human rights would benefit from relying more on the established rules of international law and taking them into consideration more frequently, while advocating, in certain cases, the particularization of the rules of international law. The Court does not appear to be following such an approach in the present decision[35].

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[31] Article 49, paragraph 3, of the Beninese Constitution of 11 December 1990, as revised on 7 November 2019, is *mutatis mutandis* a prototype of this provision: "...If no dispute as to the regularity of the electoral process has been lodged with the Registry of the Court by one of the candidates within five days of the provisional proclamation, the Court shall declare the ... President of the Republic ... definitively elected ...".

[32] v. Article 72 of the Congolese Constitution, 15 October 2015

[33] v. Article 35, paragraph 2, of the Constitution of Senegal of 22 January 2001, as revised on 5 April 2016

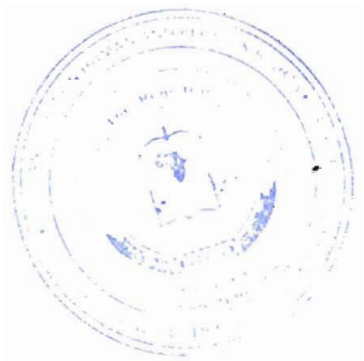
[34] Flauss (J. F.), La protection des droits de l'homme et les sources du droit international, S.F.D.I., Strasbourg Colloquium, La protection des droits de l'homme et l'évolution du droit international, Pedone, Paris, 1998, pp. 13-14.

[35] The African human rights system does not include a safeguard clause. This constitutes for its Arusha Court a source of obligation of vigilance on the restrictions of the rights which accrue to States. v. Les développements de Ouguergouz (F.), *La charte africaine des droits de l'homme*, Ed. PUF, 1993, p. 255; v. Virally (M.), Des moyens utilisés dans la pratique pour limiter l' effet obligatoire des traites, *Les clauses échappatoires en matière*

49. Far from being complacent, it is with deep regret that I note that I have not been able to convince the majority of my Dear Colleagues of a better approach. I therefore accept this dissenting opinion, which I would have wanted to avoid.

Blaise Tchikaya

Judge of the Court



d'instruments internationaux relatifs aux droits de l'homme, IV ème colloque du département des droits de l'homme, Université Catholique de Louvain, Bruxelles, Bruylant, 1982, pp. 14-15.