AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

Matter of

Bernard Anbataayela Mornah
v.
Republic of Benin,
Republic Burkina Faso,
Republic of Côte D'Ivoire,
Republic du Ghana,
Republic du Mali,
Republic du Malawi,
Republic de Tanzania,
Republic de Tunisia

Intervenors
Sahrawi Arab Democratic Republic (SADR) and Republic of Mauritius

Separate Opinion
of
Judge Blaise Tchikaya, Vice-President

JUDGMENT
22 September 2022

Introduction

1. ***The African Court's jurisdiction***

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Introduction

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 September 23, 2022[1]. 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 that led to its decision.

2. On November 14, 2019, a Ghanaian national [2], *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[3]. 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*[4] 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 [5]. 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] AfCHPR, *Bernard Anbataayela Mornah v. Benin* and others, September 23, 2022.
[2] He is the National Chairman of the Convention of People's Party in Ghana.
[3] Respectively on the following dates: Benin, August 22, 2014; Burkina Faso, January 25, 2004; Côte d'Ivoire, January 25, 2004; Ghana, January 25, 2004; Mali, January 25, 2004; Malawi, September 9, 2008; Tanzania, March 29, 2010; Tunisia, August 21, 2007.
[4] 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.
[5] AfCHPR, judgment, op. cit. at § 1 and § 8 et seq.

> mines and oil reserves that it exploits to the detriment of the Sahrawi people[6].

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[7]. 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" [8], so tentacular, could not be contained by a simple question of law.

7. As the facts of the matter highlighted by the decision show [9], 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....

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 [10]. On 25 May 2021, the Respondent State confirmed its participation in the public

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[6] AfCHPR, *Bernard Anbataayela Mornah v. Benin and others*, Judgment, September 23, 2022, § 11 et seq..

[7] V. Ruling *Bernard Anbataayela Mornah v. Benin et al.* (Interventions) September 25, 2020. v. Joint Opinion of Judge Blaise Tchikaya.

[8] 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 aiguise les appétits, Revue Géopolitique, July 20, 2015.

[9] *Idem*., § 8 - 14.

[10] AfCHPR, *Léon Mugesera v. Republic of Rwanda*, Judgment, 27 November 2020, § 14.

hearing held on June 10 and 11, 2021, but did not send a representative to the hearing[11]. The Court decided, in accordance with its jurisprudence, to render its judgment by default with respect to the Republic of Benin[12]. This default was taken into account by the Court.

9. The Court was clearly at the convergence of different decisions on the Saharawi issue[13]. 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"[14].

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.).

I. 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.

1.1 Objections to jurisdiction overruled

[11] 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.
[12] *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.
[13] 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.
[14] *Arrêt*, § 14.

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[15]. 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 Cote 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 [16].

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 by the Charter or by any other human rights instrument ratified by the State concerned[17].

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

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[15] *Idem, § 56 et seq..*

[16] ICJ, *United States Diplomatic and Consular Staff in Tehran, Iran v. United States* Order on Provisional Measures and Merits, December 15, 1979 and May 24, 1980.

[17] See AfCHPR, *Kalebi Elisamehe v.Tanzania*, June 26, 2020, § 18; *Joseph Mukwano v. Tanzania*, AfCHPR, March 24, 2022, § 22; *Kenedy Ivan v. Tanzania*, March 28, 2019, § 20; *Shukrani Masegenya Mango and others v. Tanzania*, September 26, 2019, § 29..

States[18]. 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*[19] 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 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*[20]. In the latter decision, the Court established its jurisdiction, notwithstanding its controversial decision on the merits [21]. 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

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[18] 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.

[19] 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.

[20] 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..

[21] 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).

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[22]. 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[23].

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;

- 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 March 23, 1995, explaining the obligations of States as to the meaning of Article 1[24] (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.

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[22] 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..

[23] The European Court retained extraterritorial responsibilitý 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 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.

[24] 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".

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.

1.2.- Subscription to the admissibility of the application before the Court

24. Some questions were raised in relation to Article 56 of the Charter [25], but they did not prevent the judges from unanimously 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[26]. 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.

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[25] 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 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..

[26] 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*, July 9, 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".

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.

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[27]. 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:

[27]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*, March 19, 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 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, 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[28]. 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"[29].

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

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[28] 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.

[29] AfCHPR, Norbert Zongo v. Burkina Faso (merits), § 92; Alex Thomas v. Tanzania (merits), November 20, 2015, § 73.

of Justice in its Advisory Opinion of 16 October 1975, of which the referendum 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[30].

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[31]. 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.

II. 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.

2.1- Unanimity on the absence of a violation

39. It emerges from the conclusions submitted to the Court that the 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

[30] 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...

[31] 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, May 13 to 27, 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.

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[32]. Normally, it would be established against these States a responsibility with an obligation to repair damage caused to others[33]. 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, ...[34].

42. Tanzania and Mali's argument that they were not responsible for the lack of evidence to support the allegations of violations. These 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.

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[32] 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.

[33] The ICJ has said this in several cases. In the Phosphates of Morocco case, June 14, 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*, April 9, 1949; Case concerning Military and Paramilitary Activities in and against Nicaragua, Order on Provisional Measures, May 10, 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 *GabčÌkovo-Nagymaros Project,* Judgment, 25 September 1997.

[34] Judgment, § 242 et seq.

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 [35].

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).[36]

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.

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

[35] This is the logical consequence, which the Court does not consider to be present in the present case (see *Factory of Chorzo*, 13 September 1928, p. 47). See also ICJ, Mavrommatis Concessions *, March 26, 1925; ICJ, *Temple of Preah-Vihear* *, June 15, 1962 and Request for Interpretation, November 11, 2013; SA, Martini, May 3, 1930.
[36] Articles 1-3, ILC Draft Articles on State Responsibility (2001).

> 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[37].

The Court considered that the Respondent States had not exceeded the obligations to which they were subject.

2.2- 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[38].

49. In the case of the *Rome Gold Decision*[39], which gave the principle its name, or in the *East Timor Case*, the International Court of 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* [40] before the International Court of Justice in 1995.

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[37] *Arrêt*, § 314.

[38] 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.

[39] 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 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.

[40] ICJ, *East Timor*, June 30, 1995: On February 22, 1991, Portugal brought a case before the ICJ against

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:

> 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 [41].

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:

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.

[41] *Judgment*, § 18.

> 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 [42].

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 (...).[43]

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 Charter would be valid [44].

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.

Judge Blaise TCHIKAYA, Vice President

[42] *Idem.,* § 321.
[43] Judgment, § 323.

[44] 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.