**DISSENTING OPINION OF JUDGE RAFAÂ 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-founded[1] 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,

[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 the doctrine of *res subjudice* which prohibits two competent international jurisdictions from adjudicating concurrently on a case involving similar allegations.

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 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 communication[6] 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.

---

[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 01 April 2022.

[6] Communication No 001/2022.

# 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 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 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

[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.

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 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 Court[10] and has been applied by the Court on several occasions.[11] When two

[9] § 50 of the Ruling.
[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.

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 litispendence only in respect of cases pending before the African 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]

[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 litispendance 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

[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.

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).

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

[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.
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.

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.

### 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.

[17] § 56 of the Ruling.
[18] *Id*.
[19] § 58 of the Ruling.

## 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 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]

[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).

[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.

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.*

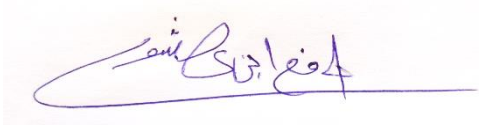
18. As I argued in my dissenting opinion on the *Dexter Eddie Johnson* case, only a decision of a judicial nature "settles" a case, that is, it closes the legal debate and orders the State to take a number of measures and actions likely to put an end to the violations of the law. This is what happened 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 result[23] 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 means[24] which it must certainly fulfil in good faith, but which does not lead to its international responsibility being called into question.

***

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.

**Judge Rafaâ Ben Achour**



[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".