AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

Dissenting Opinion of Judge Blaise Tchikaya

On the Judgments in

Application No. 051/2016 *Nzigiyimana Zabron v. Tanzania*
and
Application No. 048/2016 *Dominick Damian v. Tanzania*
4 June 2024

1. I was diametrically opposed to the majority of the Honourable Judges during the lengthy deliberations preceding the adoption of the *Nzigiyimana Zabron v. Tanzania* and *Dominick Damian v. Tanzania* decisions on 4 June 2024.

2. With these two judgments, the African Court confirmed its long-held position as espoused in its *Ally Rajabu and others* decision of 8 December 2019. Unlike the other judgments on the death penalty, these decisions introduce a new dimension that is just as controversial. This relates to unduly lengthy domestic procedures or unreasonable delay in rendering national judgments.

3. I have penned previous opinions that have sufficiently demonstrated my opposition to the death penalty, which is anachronistic and inappropriate, even when it is mandatory. In the present *Zabron* and *Damian* cases, it would be useful to revisit the issue, as the death penalty still seems to prevail in the Court's majority decisions.

4. The irregularity arising from undue prolongation of domestic procedures is compounded by the fact arising from the imposition of the death penalty. The

protection of individual rights was manifestly infringed. What we have here is a violation caused by the passage of time and the depth or gravity of the violation.[1]

5. The two issues will be discussed, starting with the issue of (I) reasonable time in domestic proceedings and, (II) secondly, the question of the death penalty.

I. The *Zabron* and *Damian* decisions violate the principle of a speedy trial

6. Contrary to popular belief, the principle of a speedy trial is not new. It has always been a key factor in the efficiency of judicial systems. It is a very old principle,[2] that the Court debated in these two landmark judgments handed down early 2024. Paradoxically, the Court draws different consequences in each case. We take a fundamentally critical and contrary approach to both decisions, irrespective of the majority position.

7. The provisions of the European Convention on the concept of reasonable time, which are now adopted throughout international human rights law, are quite clear:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

8. It should be emphasised that the concept has made it possible to demand a rethinking of justice delivery in terms of efficiency, credibility, speed and

[1]Pillay (Nav.), L'impératif de "comprendre les violations des droits de l'homme" se trouve encore justifiée : See *Establishing Effective Accountability Mechanisms for Human Rights Violations*, 2024, Doc. United Nations.

[2]This principle is enshrined in Article 6(1) of the European Convention on Human Rights (3 May 1974) and Article 14(3) of the ICCPR (16 December 1966). See also Mboumegne Dzesseu (S. F.), Le temps du procès et la sécurité juridique des requérants devant la CAfDHP, *Annuaire africain des droits de l'homme*, 2019, vol. 3, p. 72- 92.

fairness.[3] So much so that the "right to time" has now emerged as a new subjective right in legal proceedings.

9. The principle is so important that it is used even when texts are silent thereon, as Jean-Marc Thouvenin points out.[4] The International Court of Justice (ICJ),[5] the Inter-American Court[6] and the European Court of Justice apply it, sometimes without an explicit treaty basis.[7] The prevailing idea is that a person cannot be placed under arrest or brought to trial without knowing as soon as possible or within a reasonable time what penalty he faces. In such cases, major rights are violated, the right to legal certainty is violated, the right to be presumed innocent is disregarded or the possible violation of the right to a fair trial. These rights are afforded even greater protection in criminal cases. Paradoxically, the Court, by majority decision, refrained from adopting this approach in the present cases.

10. In both cases[8] the issue of adjournments was discussed. The gravity of the facts and the need to continue deliberations necessitated adjournments, as set out in Article 260(1)[9] of the Criminal Procedure Act. Hearings are held sessionally. In

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ECHR, *Allen v. United Kingdom*, 21 February 1975 See Berger (H.), *La jurisprudence de la Cour européenne des droits de l'homme*, Sirey, 1996, no. 38 § 315 *et seq*.

[4] Thouvenin (Jean-M.), Le délai raisonnable, *Le droit international et le temps*, SFDI, Colloque de Paris, 2001, pp. 109 *et seq*.

[5] PCIJ, *Case of the Free Zones of Upper Savoy and the District of Gex*, 7 June 1932, pp. 170; ICJ, *Preah Vihear Temple Case*, 15 June 1962, p. 23; UNAT Case, ICJ Reports 1973, p. 209, para. 63.

[6]The Inter-American Court of Human Rights has always reiterated the need to guarantee presumed victims or their families, effective access to justice within a reasonable timeframe. An unduly delayed trial is in itself a breach of judicial guarantees. See *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*. (Merits, reparations and costs). Judgment of 21 June 2002. Serie C No. 94, par. 145; *Case of Noguera et al. v. Paraguay*, para. 83; *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families v. Brazil*, para. 222.

[7]See The *Frierdich and Company* cases (1905), *RSA*, vol. X, 54, Bishoff (1903), RSA, vol. X, p. 420, Responsibility of Germany for acts committed after. 31 July 1914 and before Portugal entered the War. (1930), RSA, vol. Il, p. 1039.

[8] On 8 July 2004, *Nzigiyimana Zabron* deliberately killed a man named *Fadhili Seleman*. Convicted of murder by the Tabora High Court, he was sentenced to death by hanging. The death sentence was commuted to life imprisonment on 25 June 2012. In the case of *Damian et al*, on 27 December 2007, *Mr Damian* and his brother *Daniel* (who was not a party to the proceedings) attacked their mother, Mrs Astella Damian, with clubs in Kitwechenkula, Karagwe District of Tanzania. They also tried to burn her to death. The victim subsequently died as a result of the attack. He was convicted of the murder of Astella Damian and sentenced to death by hanging on 14 December 2012 by the High Court sitting in Bukoba. See. § 3 and 4 of the judgment.

[9] Article 260(1) - The High Court may, at the request of the prosecutor or the accused, if it considers that the adjournment is warranted, adjourn the trial of any accused to its next session held in the district or in any other appropriate place, or to a subsequent session.

fact, and on the issue of reasonable time, the Court revisited, in the main, its 2016 judgment *Wilfred Onyango Nganyi and Others v. Tanzania*, (ACtHPR) 18 March 2016).[10] However, as pointed out, it did not make the same finding in the two judgments, even though, despite the two-year difference in the duration of the domestic proceedings (5 years and 7 years), both the judicial delays and their consequences were identical.

11. In *Damian*, the Court held that:

> "(...) The Respondent State did not violate the Applicants' right to be tried within a reasonable time, as protected by Article 7(1)(d) of the Charter", § 70.

12. However, in *Zabron*, it held that:

> "(...) the Respondent State has violated the Applicant's right to be tried within a reasonable time, as guaranteed by Article 7(1)(d) of the Charter". § 82.

13. In its reasoning, the Court held in the *Zabron* case that in order to determine if the period from 21 July 2004, when Mr Zabron was arrested, until 19 June 2012, when his trial opened, that is, seven years, ten months and twenty-nine days, constituted reasonable time, it took into account the three criteria already set out in *Wilfred Onyango Nganyi and Others v. Tanzania* (18 March 2016).

14. It is deplorable that while the Court is cognisant of the applicable criteria, it failed to observe their useful effects. The first criterion relates to whether the

[10]ACtHPR, *Wilfred Onyango Nganyi and Others v. Tanzania*, 18 March 2016: The Court held that the determination of whether or not domestic proceedings have been unduly prolonged had to be made on a case-by-case basis, taking into account the circumstances of on each case. In the case of *Onyango Nganyi and others*, the 7 years that the case had been pending before domestic courts were considered unreasonable, so that the proceedings were unduly prolonged. ACtHPR, *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v. Burkina Faso*, 28 March 2014 , the Court made the same determination; as well as in other decisions such as ACtHPR, *Peter Joseph Chacha v.Tanzania*, 28 March 2014.

complexity of the case: investigations and the need for scientific evidence,[11] can delay a trial. However, the case involved allegations of murder, none of which were complex. In addition, the Respondent State only gave evidence and produced various exhibits a few months after the arrest. The case could not be considered complex.

15. The second criterion relates to the conduct of the Parties. From the Applicant's arrest to his arraignment, there was nothing to suggest that the procedure was delayed in the cases in question.

16. Finally, the third criterion relates to the exercise of due diligence by the authorities of the Respondent State. This requirement combined with the requirement that the accused be sentenced to death if convicted, there were good reasons to afford the Applicant a speedy trial, especially as the record clearly shows that all the main evidence was gathered after the arrest (21 July 2004).

17. This move by the Court did not have the expected consequences. Although the Court emphasised that the conduct of the Respondent State's authorities was contrary to the duty of care required by Article 7(1)(d) of the Charter, it only awarded the sum of 300,000 Tanzania Shillings in the operative part (XII of the operative part) for more than 7 years of criminal proceedings assorted with a possible mandatory death sentence. Many elements of human rights protection and redress were disregarded.

18. I take issues with the Court's approach in *Damian* as well. In the present case, the Court holds that the right to be tried within a reasonable time is an important aspect of the right to a fair trial.[12] It follows from the foregoing that legal proceedings must be conducted with speed and diligence to bring them to a conclusion within a reasonable time. In my opinion, the *Damian* case presents quite different dynamics, in fact and in law.

[11] ACtHPR, *Wilfred Onyango Nganyi and others v. Tanzania*, 18 March 2016.
[12] See *Case above*, § 127 and *Benedicto Daniel Mallya v. Tanzania*, 26 September 2019.

19. In the instant case, five years and three months elapsed between the investigation and delivery of judgment. This is the time that elapsed between the Applicant's arrest on 27 August 2007 and the commencement of his trial on 30 November 2012. The Court's reasoning, which was essentially inward-looking and manifestly unconcerned with human rights, considered this time limit to be reasonable. As shown in § 67 of the judgment:

> "(...) after the Applicant was committed to the High Court for trial on 3 June 2009, the matter was adjourned to the next session to be fixed by the District Registrar on a date to be notified and the Applicant was remanded in custody. When the matter was next brought for hearing on 31 May 2012, it was adjourned again as the session had come to an end. On 27 and 29 November 2012 respectively, the prosecution requested again for two further adjournments on account of ongoing hearings in other cases, which had yet to be completed. The Applicant's trial eventually started on 30 November 2012", § 67 of the judgment.

20. The Court further states in its reasoning that:

> "(...) criminal trials in the Respondent State are conducted by sessions and expediency in respect of cases being tried is contingent not only on the calendar of sessions, but also on the scheduling of pending matters. As it arises from the record of the present Application, the Applicant's trial was deferred on successive occasions due to lack of time as the sessions had ended before the matter could be heard", § 68 of the judgment.

21. The Court's holding is decidedly paradoxical. On this point, it should sanction the Respondent State for lack of diligence. It is a legal principle that the State cannot cover up violations of rights by its "own inadequacies". The Court could not therefore hold that:

> "(...) considering the circumstances of the case, this Court is of the view that the time of five (5) years and three (3) months that

elapsed from the Applicant's arrest to the commencement of his trial cannot be considered as unreasonable within the meaning of Article 7(1)(d) of the Charter" § 69 of the judgment.

22. There is no question of sacrificing the needs of good administration of justice.[13] It is necessary for the courts to take the time required for trial proceedings, but they must ensure that the time taken is used only for the judicial acts necessary for the trial and its function, and is not used merely to compensate for the laxity of the judicial machinery.[14] The 5 years and 3 months taken, mainly as a result of adjournments , particularly in the *Damian* case, constituted undue delay.

23. However, it is accepted that postponements or adjournments of hearings are normal, owing to factual or legal reasons that can only be determined by the investigating authority. Postponements of hearings can also be at the behest of the defence itself. Judgment should be delivered within two months of the last hearing. However, this does not justify proceedings that drag on for years.

24. Prosecutors should endeavour to be diligent and act promptly with regard to the procedure for listing cases and scheduling hearings. A speedy judicial response gives defendants the feeling that they have not been forgotten by the law. Urgency can be seen as one of the tenets of judicial efficiency[15]. This is even more the case in criminal matters, as in the *Damian* and *Zabron* cases.

25. It is a fact that the judge is caught between two pitfalls, both of which are fundamentally antithetical: firstly, the trap of a poor-quality investigation, which may be incomplete, or even misconducted or botched. Secondly, there is the potential pitfall of an unduly long investigation that undermines the rights of defendants to a fair trial. Be that as it may, these hazards are a function of

[13] See the study by Gerard (P.), Ost (F.) and Kerchove (M. van de) eds, *L'accélération du temps juridique*, Publications des facultés universitaires Saint-Louis, Brussels, 2000.
[14] See Mélanges R. Perrot. Nouveaux juges, nouveaux pouvoirs? *Dalloz*, 1996, pp. 337 et seq. ; CEPEJ, *Un nouvel objectif pour les systèmes judiciaires: le traitement de chaque affaire dans un délai optimal et prévisible*, spec. No. 4; Magendie (J.-C.), Célérité et qualité de la justice, La gestion du temps dans le procès. Rapport remis au Garde des sceaux, *La documentation française*, 2004, p. 19 *et seq.*
[15] See also the study by Bastar (B.), Delvaux (D.), Mouhanna (C.), Schoenaers (F.), Vitesse ou précipitation? La question du temps dans le traitement des affaires pénales (...), *Droit et*sociétés, 2015, vol. 2, p. 271-286.

internal judicial management, which is often due to the scant budgets available to national judges or to the internal circulation of findings. People must be afforded the protection of international human rights courts when these hazards affect their rights.[16]

26. The issue is also serious to the extent that all accused persons are entitled to the presumption of innocence prior to being finally sentenced. Years of unwarranted pre-trial detention constitutes a clear violation of rights, including the right to the presumption of innocence. There is a direct link between respect for the presumption of innocence and reasonable time limit for a criminal trial.[17] This is a principle espoused by the present opinion.

27. The Court reiterated the principle in both judgments, noting in particular that Article7(1)(c) of the Charter provides that:

> "Every individual shall have the right to have his cause heard ... and the right to be presumed innocent until proved guilty by a competent court or tribunal..."

28. It so happens that in § 106 of the *Damian* judgment, the Court:

> "Dismisses the Applicant's allegations that his right to be presumed innocent until proved guilty by a competent court or tribunal was violated and finds that the Respondent State did not violate Article 7(1)(b) of the Charter" *(Dominick Damian judgment*, § 106).

29. This holding is incomprehensible (it is identical to § 123 of the *Nzigiyimana Zabron* judgment)); if one considers that this assessment of the presumption of innocence was made before the final indictment was handed down, the State

[16] Dubucq (C.), La rapidité au détriment de la qualité : l'instauration d'une justice pénale " efficace ", *Contentieux/Affaires spéciales*, 2020.

[17] Bastard (B.) and Mouhanna (Ch.), *Une justice dans l'urgence. Le traitement en temps réel des affaires pénales*, PUF, 2007, 200 p. ; KOVAR (Jean-P.), *Le délai raisonnable de jugement : une part indissociable de la justice,* ENA-Strasbourg, 2014, 40 p.

indeed violated the presumption of innocence of the accused by holding him for such a long and continuous period without completing the trial.

30. In both *Damian* and *Zabron*, insufficient action was taken following the failure to implement internal procedures promptly and without wasting time. It is in this respect that I dissociate myself from the majority position in these two judgments.

II. The mandatory death penalty, the other identifier of capital punishment, violates human rights

31. As said earlier, with these two judgments, the African Court confirmed its position in its *Ally Rajabu and others* decision of 8 December 2019. This state of the Court's jurisprudence still seems questionable.

32. In the *Damian* case, the Applicant's arguments, which do not necessarily contest his guilt, are as follows:

> "(...) the Respondent State violated his right to life under Article 4 of the Charter by imposing the mandatory death penalty without giving due consideration to the personal circumstances of the offender and the particular offence, including its specific aggravating or attenuating circumstances (...) the Respondent State imposed the death penalty based solely on its mandatory nature in municipal law (...)".[18]

33. It was to be expected that the Applicant would call for the application of international law, a call that does not appear to have been heeded by the Court in this case. It preferred to simply recall the penalty provided for under the Respondent State's domestic law.[19] The same arguments can be found in the case of *Nzigiyimana Zabron*, who was also sentenced to death:

[18] see *Judgment*, § 115.
[19] This is confirmed by the Respondent State, which maintains that: "(...) the imposition of the death penalty for murder is in accordance with the Tanzanian Penal Code. (...) the death penalty may be

> "(...) the Respondent State imposed the death penalty based solely on its mandatory nature in municipal law while such sentence was not warranted or compatible with his right to life due to his good character and lack of any prior criminal history. The Applicant further submits that the Respondent State also failed to prove that it imposed the death sentence because the offence was most serious in nature and his case was the rarest of the rare".[20]

34. As we have said, the Court's reasoning on this point, in relation to the so-called mandatory death penalty, still seems to us specious and strange. It holds in § 146 of the *Zabron* judgment that :

> "Respondent State violated the Applicant's right to life under Article 4 of the Charter by failing to allow the judicial officer to take into account the nature of the offence and the circumstances of the offender in the imposition of the death penalty, notwithstanding the subsequent commutation of the death sentence".

35. This reasoning seems specious because the Court refuses to expatiate on its assertion that the sentence is contrary to the international law applicable by the Court. The Court should clearly invalidate the death penalty in order to protect the right to life. There is no need to refer the matter to domestic courts, which are faced with the "glass ceiling" that is domestic law[21]. The Court could not conclude its reasoning on this point by saying that:

> "The Respondent State violated the Applicant's right to life under Article 4 of the Charter owing to the arbitrary imposition of the death penalty as

imposed for the most serious crimes and that, under Article 196 of its Penal Code, crimes punishable by death are of a serious nature, which was the case of the Applicant.

[20] See *Judgment*, § 125.

[21] This is a well-known controversy. The French Conseil d 'Etat relaunched the issue, without much interest, in the *Sarran, Levacher and others case*, decision of 30 October 1998. According to the Conseil d'Etat: "the supremacy conferred [by Article 55 of the Constitution] on international commitments does not apply, in the domestic order, to provisions of a constitutional nature". In the domestic order, the hierarchy of norms derives from the Constitution, which is the supreme text from which all the authorities of the State, and in particular its judicial bodies, derive their power. The place of the Constitution and European Union law continued to be debated. v. See Long (M.), Weil (P.), Braibant (G.), Delvolvé (P.) Genevois (B.), *Les grands arrêts de la jurisprudence administrative*, 16th edition, 2007, p. 773.

the judicial officer lacked discretion to take into account the nature of the offence and the circumstances of the offender in the mandatory imposition of the death penalty".[22]

36. This reasoning is also strange in that it appears to assert that domestic law and international law are separate regimes as regards the law applicable to the death penalty, even though "*International Law is a part of Law of The Land*".[23] This last question is also symptomatic of the systemic dichotomy between international law and domestic law. The non-imposition of capital punishment is supposedly a requirement of international law that the sovereign domestic order is therefore not obliged to follow.

37. The recent case of Poland is insightful. On 7 October 2021, the Polish Constitutional Court handed down a decision that shook the foundation of European regional international law, a foundation that remains *mutatis mutandis* identical to those of all regional constructions. The Polish Constitutional Court held that the European Court of Justice's interpretation of European treaties is incompatible with the Polish Constitution on many points. In response, the European Commission initiated infringement proceedings against Poland on 22 December 2021.

38. I therefore reiterate[24] my opposition to the spirit of these decisions, insofar as they disregard the international texts abolishing the death penalty. Europe has become a death penalty-free zone and it is thanks to the instrumentality of international human rights law. It would be dubious to consider that, notwithstanding the universal nature of this right, the regime abolishing this penalty applies only European citizens.[25]

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[22] See *Judgment*, § 146.

[23] Blackstone (W.), *Commentaries on the Laws of England* , (1765-69), Online, Library of Liberty.

[24] See the statement by the same author in the following Judgments: Application No. 030/2016 *Romward William v. United Republic of Tanzania* ; Application No. 017/2016 *Deogratius Nicholaus Jeshi v. United Republic of Tanzania* ; Application No. 050/2016 *Crospery Gabriel and Ernest Mutakyawa v. United Republic of Tanzania.*

[25] In 1983, the Council of Europe adopted the first binding instrument unconditionally abolishing the death penalty in peacetime: Protocol No. 6 to the European Convention on Human Rights, ratified by all 46 member states. In 2002, 13 Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances was

39. Once again, the world's legal conscience is gradually taking a more human face as it stives to understand the profound meaning of Article 4 of the Charter, which makes human life inviolable in all its forms and procedures. It is deplorable, as *Damian* and *Zabron* show, that the "mandatory death sentence" should be in any form predictable. Analysts, philosophers, and thinkers have pointed this out. The French analyst Albert Camus puts it clearly:

> "Capital punishment is not simply death. It is as different in essence from the deprivation of life as a concentration camp is from a prison. (...) It adds to death a set of rules, a premeditation that is public and known to the future victim, an organisation that is in itself a source of moral suffering more terrible than death. There is therefore no equivalence. "But what then is capital punishment but the most premeditated of murders, to which no criminal's deed, however calculated it may be, can be compared?".[26]

40. It therefore seems unacceptable that, in its reasoning, the Court should resort to positions which tend not towards abolishing the death penalty but rather towards relativising the development. This is the thrust of §§ 130 and 142 of the *Damian and Zabron* decisions, respectively:

> "The Court also takes cognisance of international jurisprudence with regard to the consideration of the circumstances of the offender in imposing the mandatory death penalty. In *Dial and Others v. Trinidad and Tobago*, the IACHR held that when certain laws make it mandatory to impose a death sentence automatically, this does not permit the trial courts to consider the particular circumstances of the accused including their criminal record.[27] The High Court of Malawi in *Kafantayeni and Others v. Attorney General* stated that, in a capital case, the right to a

adopted. Reservations and derogations from the Protocol are not possible. It came into force on 1 July 2003.

[26]*Camus (A.), Réflexions sur la peine capitale, Calman-Levy, coll. "Liberté de l'esprit", Paris, 1957, 245 p.; see also Koestler (A.), Réflexions sur la peine capitale, Paris, Gallimard, coll. "Folio, 2002 (1st ed. 1955), 282 p. Translated from the English (Reflexions on hanging).*

[27]ACtHPR, *Nzigiyimana Zabron v. Tanzania*, *op. cit*, 3 June 2024, § 140. v. *Dial et al. v. Trinidad and Tobago,* Judgment of 21 November 2022, § 48.

fair trial requires that offenders be permitted to present evidence of mitigation relevant to the individual circumstances either of the offence or of the offender (...)".[28]

41. This tendency towards relativising the death penalty is even more pronounced in the wording of the *Dominick Damian* judgment. [29] It reads:

> "(...) The Court further takes note of international human rights case-law on the seriousness and gravity of an offence that warrants the imposition of the mandatory death penalty. For example, the Inter-American Court of Human Rights (IACHR) has held that intentional and unlawful deprivation of another's life can and must be recognized and addressed under various factors that correspond with the wide range of seriousness of the surrounding facts, taking into account the different facets that can come into play such as a special relationship between the offender and the victim, motives for the behaviour, the circumstances under which the crime is committed and the means employed by the offender".

42. This is to say, without deploring it, that certain crimes are in themselves worthy of the death penalty. In our view, therefore, the Court does not seem to have fully appreciated the seriousness of the death penalty. Accordingly, and with regret that I am unable to concur with the opinion of the Honourable Judges, I pen this dissenting opinion.

Blaise Tchikaya, Judge

Done at Arusha this Fourth Day of June, Two Thousand and Twenty-Four, the French version being authoritative.

[28] *Kafantayeni and others v. Attorney General*, Constitutional Petition No. 12 of 2005. See also *Attorney General v. Susan Kigula and 417 others*, Constitutional Petition No. 03 of 2006 (Supreme Court of Uganda), §§ 63 and 64 and *Mutiso v. The State*, Criminal Appeal No. 17 of 2008, pp. 8, 24 and 35 (30 July 2010), Court of Appeal of Kenya.

[29] ACtHPR, *Dominick Damian v. Tanzania*, cited above, § 126.