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

Application 001/2012 (Review)

Frank David Omary and Others v. United Republic of Tanzania

Separate Opinion of Judge Fatsah Ouguergouz

1. Although I subscribe to the conclusions of the Court regarding the inadmissibility of the Application for Review of its Judgment of 28 March 2014, filed by Messrs Frank David Omary and Others on 28 June 2014, I believe that the Court should have spelt out more clearly the conditions that must be met for an Application for Review to be admissible under the Protocol and the Rules. In this regard, it was incumbent on the Court to clearly pronounce itself on certain ambiguities on this issue, in the Protocol and in the Rules, and to close the gaps in these two instruments by specifying the other essential conditions which an application for revision must meet to be declared admissible.

I – The ambiguities in the Protocol and in the Rules

2. I would point out, in this respect, that the English and French versions of Article 28, paragraph 3, of the Protocol do not tally. This is certainly the reason why one of the three conditions set forth in this paragraph is not identical with that which is provided for in Rule 67, paragraph 1, of the Rules.

3. The French version of Article 28, paragraph 3, of the Protocol indeed allows the Court to revise its judgment in light of new evidence "which was not within its knowledge at the time the decision was delivered";[1] the English version of this paragraph does not, for its part, contain such a condition.[2]

[1] "La Cour peut […] réviser son arrêt, en cas de survenance de preuves dont elle n'avait pas connaissance au moment de sa décision et dans les conditions déterminées dans le Règlement intérieur".

[2] "[…] the Court may review its decision in the light of new evidence under conditions to be set out in the Rules of Procedure".

4. As regards Rule 67, paragraph 1, of the Rules, both the French and English versions provide that it is the "party" seeking the revision that must be unaware of the new evidence at the time the judgment was delivered[3]; it does not mention lack of knowledge of the evidence on the part of the "Court" before the delivery of its judgment.

5. In this respect, it is important to note that the instruments governing the functioning of other international courts and dealing with revision matters[4] require that both the Court and the party seeking a revision must have been within the aforesaid lack of knowledge; this is the case under Article 61 (1) of the Statute of the International Court of Justice,[5] Article 25 of the Protocol establishing the Court of Justice of the Economic Community of West African States,[6] and Article 80 (1) of the Rules of the European Court of Human Rights.[7] This is equally the case under Article 48 (1) of the Protocol on the Statute of the

[3] The French version of Article 28 (3) of the Protocol also provides that the Court may review its decision "en cas de survenance de preuves", whereas the English version of the same clause provides that the Court may review its decision "in the light of new evidence"; the two linguistic versions of Rule 67, paragraph 1, of the Rules, for their part, refers to the "discovery" ("découverte") of such an evidence. The aforesaid terminological disparities do not in my view have particular legal consequences in regard to consideration of the admissibility of review applications.

[4] The American Human Rights Convention like the Statute and Rules of the Inter-American Court of Human Rights do not contain provisions on the revision of judgments; these aforementioned three instruments only make reference to the issue of interpretation of judgments. See, however, the application for revision of the judgment in the matter of *Genie Lacayo v. Nicaragua* filed by the Inter-American Commission but declared inadmissible by the Court in its Order of 13 September 1997, *Case of Genie-Lacayo v. Nicaragua (Application for Judicial Review of the Judgment on Merits, Reparations and Costs)*, Order of the Court.

[5] "An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence".

[6] "An application for revision of a decision may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the decision was given, unknown to the Court and also to the party claiming revision, provided always that such ignorance was not due to negligence".

[7] "A party may, in the event of the discovery of a fact which might by its nature have a decisive influence and which, when a judgment was delivered, was unknown to the Court and could not reasonably have been known to that party, request the Court, within a period of six months after that party acquired knowledge of the fact, to revise that judgment." The European Human Rights Convention, for its part, does not contain any provision on revision of the judgments of the Court; however, see the jurisprudence of the European Court in this regard, *infra,* footnote 15.

African Court of Justice and Human Rights[8] adopted on 1 July 2008 and which is expected to replace the Protocol establishing the existing Court.[9]

6. Furthermore, the foregoing four instruments make reference to the discovery of a "fact" and not of an "evidence", which is substantially different.

7. A fact may indeed be defined as "an event which occurred or took place"[10] and evidence may be defined as the "demonstration of the existence of a fact".[11] Although there are close links between "fact" and "evidence", these are two distinct concepts.

8. International jurisprudence however seems to recognize that an evidence may constitute a fact, discovery of which could provide grounds for a revision of a judgment.

9. The Permanent Court of International Justice made a restrictive pronouncement on this issue; according to the latter, a newly produced document may not constitute a new "fact".[12] The International Court of Justice, for its part, did not come out clear on this issue in the three Judgments it rendered on Applications for Revision;[13] it does not however exclude that a probative document could be regarded as a "fact".[14]

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[8] Paragraph 1 of this Article indeed reads as follows: "An application for revision of a judgment may be made to the Court only when it is based upon discovery of a new fact of such nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, provided that such ignorance was not due to negligence".

[9] This Protocol will enter into force upon ratification by fifteen (15) States; as at 1 April 2016, the Protocol had been signed by thirty (30) States and ratified by only five (5) States.

[10] Jean Salmon (dir.), *Dictionnaire de Droit international public*, Bruxelles, Bruylant, 2001, p. 493.

[11] Jules Basdevant, *Dictionnaire de la terminologie du droit international*, Sirey, Paris, 1960, p. 474; evidence may also be defined as follows: "A - Demonstration of the existence of a fact or B - Element used to make such demonstration", Jean Salmon (dir.), *Dictionnaire de Droit international public*, *op. cit.*, p. 874.

[12] "As concerns new facts, there are none in the present case. It is true that, according to a communication received by the Court from the Conference of Ambassadors, the Conference was unacquainted with the documents sent by the Serb-Croat-Slovene State in support of its claim for revision until June 1923. But in the opinion of the Court fresh documents do not in themselves amount to fresh facts. No new fact, properly so-called, has been alleged", Permanent Court of International Justice, *Question of the Monastery of Saint-Naoum (Albanian Frontier),* Advisory Opinion of 4 September 1924, series B, No. 9, p. 22.

[13] *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), (Tunisia v. Libyan Arab Jamahiriya),* Judgment *ICJ Report 1985*, p. 192; *Application for Revision of the*

10. The European[15] and Inter-American[16] courts, for their part, also admit that a document could constitute a "fact", discovery of which is likely to provide grounds for revision of their judgments.

11. If it stems from this brief jurisprudential overview that an "evidence" can constitute a "fact", the conclusion cannot however be made that a "fact" necessarily forms part of an "evidence". The concept of "fact" is indeed wider than that of "evidence". As has been rightly emphasised, "*whether in the context*

Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), Preliminary objections (Yugoslavia v. Bosnia-Herzegovina), Judgment, *ICJ Report 2003,* p 7*; Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening) (El Salvador v. Honduras),* Judgment*, ICJ Report 2003*, p. 392.

[14] *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf*, pp 203-204, paragraphs 19-21, and p. 213, paragraphs 38-39. See also the dissenting opinion of Judge Paolillo appended to the Judgment rendered on 18 December 2003 with regard to the *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute,* pp. 421-423, paragraphs 29-34.

[15] See the three Judgments rendered by the European Court on revision. Case of *Pardo v. France (Revision)*, *Application 13416/87*, Judgment of 10 July 1996, p. 9, paragraphs 19, 20 and 24; the Court decided that as the documents (a letter and a document in the appeal file) have a decisive influence, they could be regarded as "facts" within the meaning of its Rules, and hence declared admissible the Application for Revision filed by the European Commission; see also the Judgment of 28 January 2000 rendered in the Case of *McGinley and Egan v. United Kingdom (Revision)*, Applications 21825/93 and 23414/94, and which the Court held that the letters could constitute "facts" (paragraph 31), but dismissed the Application for Revision on the grounds that the said facts "could reasonably be known" to the Applicants before the initial judgment was rendered (paragraph 36). See lastly the Judgment of 30 July 1998 rendered in the Case of *Gustafsson v. Sweden (Revision)*, Application 15573/89; the Court did not however make a ruling on the notion of "fact" and dismissed the Application on the sole ground that the new elements did not have decisive influence on the initial judgment.

[16] "The application for judicial review must be based on important facts or situations that were unknown at the time the judgment was delivered. The judgment may therefore be impugned for exceptional reasons, such as those involving documents the existence of which was unknown at the time the judgment was delivered; documentary or testimonial evidence or confessions in a judgment that have acquired the effect of a final judgment and is later found to be false; when there has been prevarication, bribery, violence, or fraud, and facts subsequently proven to be false, such as a person having been declared missing and found to be alive", *Case of Genie-Lacayo v. Nicaragua (Application for Judicial Review of the Judgment on Merits, Reparations and Costs),* Court Order of 13 September 1997, *op. cit*., p. 5, paragraph 12.

of revision or in another context, the concept of "fact" has never been reduced to physical evidence or documents".[17]

12. The distinction between "evidence" and "fact" is not therefore a matter of pure semantics since it may have important legal implications for the admissibility of an Application for Revision grounded in Article 28 (3) of the Protocol. It is consequently desirable that the Court should, one day, provide the necessary clarifications on this issue and not limit the opening of a revision procedure solely to the discovery of "evidence".

13. In the instant case, the Court made a ruling on the admissibility of the Application for Revision brought before it (paragraphs 32-52 of the Judgment) without clearly identifying the three conditions prescribed by the Protocol and the Rules, namely that the Application must: 1) be based on the discovery of new evidence, 2) which was not within knowledge of the Court "and/or" of the party seeking the revision at the time the judgment was delivered, and 3) must be filed within six months from the time when the evidence discovered came within the knowledge of the said party.

14. Still more fundamental, the Court did not even indicate that the aforementioned three conditions, though necessary, are not sufficient grounds for a revision of its judgments. I would therefore now address the lacuna in the Protocol and in the Rules which, in my opinion, the Court is supposed to fill through interpretation.

II – The lacuna of the Protocol and the Rules

15. Evidence discovered after the delivery of a judgment and unknown to the Court and to the party which invokes the said evidence, and invoked within six months after it was discovered, cannot indeed be sufficient grounds for a revision of a judgment. The party which invokes the discovery must not also demonstrate lack of diligence in the matter; in other words, that party must not have been negligent or faultily unaware of the new evidence before the delivery of the judgment, revision of which is being sought. It is also necessary, above all, that the evidence discovered should be of such nature as would exert decisive influence on the judgment delivered. These are the two key conditions set forth under the Statute of the International Court of Justice, the Protocol establishing the Court of Justice of the Economic Community of West African States, the Rules of the European Court of Human Rights and the Protocol

[17] Dissenting Opinion of Judge Vojin Dimitrijevich attached to the Judgment on the *Application for Revision of the Judgment of 11 July 1996 in the Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* p. 54, paragraph 6; see also the dissenting opinion of Judge Vladlen S. Vereshchetin (*ibid*., p. 40, paragraph 10) and the separate opinion of Judge Ahmed Mahiou (*ibid* p. 70, paragraph 2).

establishing the Statute of the African Court of Justice and Human Rights (see *supra*, paragraph 5).

16. The Court should therefore have used the powers inherent in its judicial function and the principle that "the court knows the law" (*jura novit curia*), to rule on the basis of the general principles of procedural law as enshrined in the aforementioned four instruments.

17. It is in light of the aforesaid principles of procedural law that the Court should have interpreted Article 28 (3) of the Protocol and 67 (1) of the Rules, unless the said principles are being deliberately set aside in order to throw the revision remedy wide open, the effect of which would however be to distort the revision institution.

18. Before pronouncing on the admissibility of the Application for Revision, the Court should therefore have clearly spelt out all the conditions for admissibility of such an application regardless of whether or not such conditions had been expressly prescribed by the Protocol and the Rules.

19. A perusal of the grounds for the Judgment (paragraphs 32-52 of the Judgment) gives the impression that the conditions providing the grounds for revision of a judgment are two in number: "*the requirements concerning time limit and the discovery of new evidence"* (paragraph 35).

20. However, the said conditions are, in my view, five in number:

1) The Application must be grounded on the "discovery" of an "evidence",
2) The evidence, discovery of which has been invoked, must be of such nature as can exert decisive influence on the initial judgment,
3) Such evidence must not have been within the knowledge of the Court and of the party which invokes it, prior to the delivery of the said judgment,
4) The party invoking such evidence must not have been negligent in being unaware of the evidence in question,
5) The Application for Revision must have been brought "within six months from the time the evidence discovered came within the knowledge of the party concerned".

21. It would then have been enough for the Court to indicate, as it did in paragraph 51 of the Judgment, that the afore-listed conditions are cumulative and that in case any of them has not been met, the Application for Revision must be dismissed; and then determine whether the said conditions have actually been met in the instant case.

22. The Court however proceeded directly to consider the requirement concerning "*the discovery of new evidence*" without indicating what that

consideration will entail (paragraphs 35-51). In so doing, the Court hardly evoked the condition, albeit fundamental, regarding the decisive influence that the new evidence must exert on the judgment for which revision is being sought (paragraph 49), and the no less fundamental condition that the Applicants must not be negligent in not being within the knowledge of the evidence in question before the delivery of the judgment (paragraph 50). The Court did not draw any conclusion with respect to this latter condition and then reverted (paragraph 51) to its finding as expressed in paragraph 49, apparently making the said finding the ground for its decision. A more systematic approach would, without doubt, have provided greater clarity to the Court's reasoning in the present judgment.

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23. The recourse to revision of a judgment of the Court, by its very nature and purport, should be exercised and be accepted exceptionally in a way to avoid undermining the principle of the authority of a matter already judged (*res judicata*) embodied in the decisions of the Court and any other judicial organ.[18] It is indeed necessary not to endanger legal certainty by encouraging the parties not satisfied with a judgment of the Court to request a revision of such a judgment.

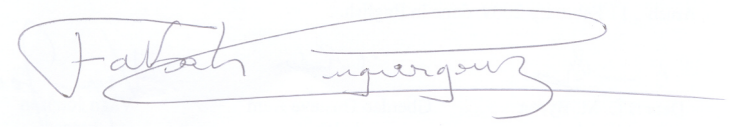
24. For an Application for Revision not to be transformed into an ordinary appeal procedure not prescribed by the Protocol, such application must conform to strict conditions which must equally be strictly interpreted by the Court. For the purpose of ensuring the proper use of the revision remedy, it is absolutely necessary that potential litigants before the Court be cognizant of the real meaning of the texts governing this extraordinary remedy.

25. Predictability of procedural standards is surely a guarantee for legal certainty, and for such standards to be predictable, they must be clear and intelligible. Pending a possible amendment of the Rules governing the question of revision in particular,[19] such clarification must be made through the judicial

[18] This has been emphasized by the Inter-American Court of Human Rights in the following terms: "The legal motives envisaged as reasons for the remedy of revision are restrictive in nature, inasmuch as the remedy is always directed against orders that have acquired the effect of *res judicata*, that is, against judgments of a decisive nature or interlocutory judgments that are passed and put an end to the proceeding", *Case of Genie-Lacayo v. Nicaragua (Application for Judicial Review of the Judgment on Merits, Reparations and Costs), op. cit*., p. 5, paragraph 11; see also, European Court of Human Rights, *Application No. 13416/87, Matter of Pardo v. France (Revision),* judgment of 10 July 1996, p. 9, paragraph 21.

[19] For reasons of legal certainty, it will also be desirable to introduce a time limit within which every Application for Revision must be submitted; see for example Article 25 (4) of the Protocol establishing the Court of Justice of the Economic Community of West African States, which provides for a deadline of five years; see also Article 61 (5) of the Statute of the International Court of Justice or Article 48 (5) of the Protocol on the Statute of the African

rulings of the Court: indeed, the judgments, advisory opinions and orders undoubtedly possess pedagogical virtues, the importance of which must not be underestimated especially in these initial years of the Court's existence. Consequently, the Court should have seized the new opportunity[20] offered by the present judgment to clearly lay down the conditions for admissibility of an Application for Revision, by making use of the rather wide power of interpretation implicitly conferred on it by Articles 60 and 61 of the African Charter, relating to "Applicable principles".[21]



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Court of Justice and Human Rights both of which provide that no Application for Revision may be submitted after the expiry of a ten years deadline effective from the date of delivery of the judgment, revision of which is being sought.

[20] See in this respect the Judgment rendered by the Court on 28 March 2014 regarding the interpretation and review of its Judgment of 21 June 2013 in the matter *Urban Mkandawire v. Republic of Malawi*, as well as paragraphs 9 to 16 of my separate opinion attached to that judgment.

[21] The Protocol on the Statute of the African Court of Justice and Human Rights and the Protocol establishing the Court of Justice of the Economic Community of West African States belong without any doubt to the category of African instruments mentioned in Article 60; the Statute of the International Court of Justice, which forms an integral part of the United Nations Charter, is for its part clearly one of these "general international conventions laying down rules expressly recognized by Member States of the African Union", referred to in Article 61.