Urban Mkandawire *v.* The Republic of Malawi
(Application No. 001/2013)

Separate Opinion of Judge Fatsah Ouguergouz

1. Even though I subscribe to the conclusions reached by the Court concerning the inadmissibility of the applications for interpretation and review of its judgment of 21 June 2013, filed by Mr. Urban Mkandawire, I do not entirely share the reasoning adopted to arrive at these conclusions and would like to explain why.

I – Concerning the application for interpretation

2. In paragraph 6 of the present judgment, the Court notes, and rightly so, that in terms of Rule 66 (1) of the Rules, any party may request the Court to give an interpretation "for the purpose of executing a judgment", and that, in the instant case, the judgment for which interpretation is sought, has declared that the application is inadmissible for failure of exhaustion local remedies by the Applicant. The Court then points out that the judgment in question imposesno obligation capable of being executed and concludes that the application for interpretation is not possible in terms of the relevant provisions of the Protocol and the Rules. In my opinion, that is what would have been enough to say on the matter.

3. The Court however deemed it necessary to consider whether a second condition under Rule 66 of the Rules was met, that is to say that the application shall "state clearly the point or points in the operative provisions of the judgment on which interpretation is required".

4.In that regard, the Court notes thatthe application is, on the contrary, "generally incoherent and incomprehensible", and concludes that the nine "points"mentioned by the Applicant can never be points for interpretation.[1] In

[1] I would like to underline here that one of the nine «points» referred to by the Applicant in his application relates to paragraph 41 of the 21 June 2013 judgment, that is to say its operative part (see paragraph 4 (d) of the present judgment); it is however for the African Commission and not for the African Court to respond to such a question.

my view, the Court ought to have ended its analysis on this conclusion and proceeded to consider the application for review.

5. In spite of this negative conclusion, the Court however decided that there were two "points" which needed clarification"for the avoidance of doubt". By doing that, the Court does not only implicitly accept the application for interpretation filed by the Applicant, but does so without explaining why it focuses on these two "points" in particular. Equally unclear is the assertion made in Paragraph 8of the judgment that "it is not important for the Court to determine the request, since it has already cited what Article 28 (1) of the Protocol and Rule 59 (2) of the Rules provide".

6. The Court further gave clarification on the 90 days Rule contained in Article 28 (1) of the Protocol by noting that "when deliberations are concluded is an internal matter of the Court"and admitted that there was a typographical error in the judgment of 21 June 2013 which resulted in the publication of a *corrigendum*.

7. I am of the view that the developments in Paragraphs 8 and 9 of this judgment are tantamount to "justifications" which should not have been given, especially with regard to the application of the 90 days rule, the meaning of which remains up to now ambiguous.[2] The Court should have therefore avoided such developments.

8. To summarize, the Court, in the instant case, could simply have rejected the application without going into all the different considerations contained in paragraphs 7, 8 and 9 of the judgment. In the examination of similar applications, which are manifestly unfounded, the Court could in the future draw inspiration from Rule 80 (3) of the Rules of the European Court of Human Rights which provides that "the original Chamber may decide of its own motion to refuse the request on the ground that there is no reason to warrant considering it".

II –Concerning the application for review

9. I do not share the interpretation of paragraphs 2 and 3 of Article 28 of the Protocol made by the Court in paragraph 14 of the present judgment. The expression "without prejudice" used in paragraph 3 of this Article should, in my

[2] It should indeed be noted that there is a discrepancy between the English and French versions of this provision: the English version refers to the completion of the «deliberations» of the Court while the French version refers to the completion of the «instruction» of the case, that is to say all the procedural steps (filing of written and oral arguments by the parties) before the matter can actually be decided by the Court.

opinion, simply be conceived as providing for an exception to the principle of the "final" character of the judgments of the Court enshrined in the preceding paragraph.

10. I am also of the view that the Court should have clearly spelt out the three conditions for admissibility of an application for review as provided for by the Protocol and the Rules, that is to say that the application 1) must contain new evidence,2) which the Court "or" the Applicant had no knowledge of when the judgment was being rendered, and 3) to be submitted within six months of the date the said party discovered the new evidence.

11. In so doing, the Court could have taken advantage of this occasion to make a useful clarification on some of the weaknesses contained in the Protocol and the Rules on this issue.

12. The discrepancy between the English and French versions of paragraph 3 of Article 28 of the Protocol could indeed explain why one of the three conditions which it poses is not identical to that of paragraph 1 of Rule 67 of the Rules.

13. The French version of paragraph 3 of Article 28 of the Protocol makes it possible for the Court to review its judgment in the light of new evidence "which was not within its knowledge at the time of its decision"; for its part, the English version of this paragraph does not contain such a condition.

14. As for paragraph 1 of Rule 67 of the Rules, both the English and French versions provide that it is the "party" which files the application for review, that is not supposed to have had knowledge of the new evidence at the time the judgment was rendered.

15. In this regard, it is important to point out that the instruments governing the functioning of other international Courts and dealing with the issue of revision or review, require that both the Court and the party requesting the review must have been unaware of the new fact; this is for example provided for by Article 25 of the Protocol establishing the Court of Justice of the Economic Community of West African States,[3] Article 48 (1) of the Protocol establishing the African Court of Justice and Human Rights,[4] Article 61 (1) of the Statute of the

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[3] «An application for revision for 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».

[4] «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».

International Court of Justice[5] and Article 80 (1) of the Rules of the European Court of Human Rights.[6]

16. What is even more fundamental is the fact that these three instruments refer to the existence of a new "fact" and not to a new "evidence", which is quite different; they also provide for two other important conditions, that the party applying for revision did not negligently ignore the new factand that this new fact should be of such a nature as to be a "decisive factor" on the verdict of the matter decided by the disputed judgment.

17. In my view, these questions relating to the meaning to be given to Article 28 (3) of the Protocol and Rule 67 (1) of the Rule sought to have been given at least as much attention by the Court as the question relating to the meaning to be given to Article 28 (1) of the Protocol and Rule 59 (2) of the Rules, relating to the 90 days deadline in which the Court must render its judgments.

18. Lastly, I would like to underline that in the operative part of the judgment, the Court decided to reject the application for interpretation whereas in its reasoning it made a decision on two of the nine "points" contained in the request of the Applicant.

Fatsah Ouguergouz
Judge

Robert Eno,
Registrar

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[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] «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 American Convention of Human Rights, the Statute as well as the Rules of the Inter-American Court of Human Rights, do not contain provisions dealing with revision of judgments; these three instruments make reference only to the issue of interpretation of judgments.