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(000853 – 000848) RM

The Matter of Kenedy Ivan v. United Republic of Tanzania

Application No. 025/2016

Separate Opinion of Judge Blaise Tchikaya

1. The African Court in Arusha has been asked to rule, once again, on a case of breach of Article 7 of the African Charter on Human and Peoples' Rights on the right to a fair trial. In this case of *Kenedy Ivan v. Tanzania*[1], I expressed my concurrence with the operational part adopted by the Court. My support stems from the fact that this operational part, in essence, recognizes that the Respondent State failed in its obligations in this regard and should award compensation to the Applicant, excluding his release[2].

2. The fact remains that, without originality and almost incidentally, the *Ivan* case called on the Court to develop the real powers of the African human rights judge in relation to the powers exercised by the first judges, that is, the judges of the domestic courts. Two related aspects of the same question in the Ivan case will therefore be addressed in this opinion. On one hand, the capacity of the Court as an appellate court and on the other hand, it will consider the link between the jurisdictions exercised by the Court with the provisions of international instruments. These aspects stem from paragraphs 23 to 29 of the Judgment.

I. The Arusha African Court, an Appeal Court?

3. This question is not new. In fact, in the jurisprudence of 2018 in the matter of *Evarist Minani*[3], Judge Ben Achour underscored the following position in his opinion: that "the Court reiterates its decision in paragraph 81 that it... is not an appellate Court", adding that "this is more than obvious in as much as we are in the presence of a continental court whose jurisdiction ...

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[1] The Applicant was sentenced to 30 years in prison for the offence of armed robbery and alleges that he was deprived of his right to a fair trial.
[2] AfCHPR, Judgment *Kenedy Ivan v. Tanzania*, 28/3/ 2019, § 98 et seq., p. 24.
[3] AfCHPR, Judgment *Evariste Minani v. Tanzania*, 27/9/2018, Separate Opinion, § 2.

extends to all cases and disputes submitted to it concerning the interpretation and application of the Charter ... the Protocol and any other relevant Human Rights instrument ratified by the States concerned". The Court is not an appeal Court, and this is a legally obvious fact.

4. What can one make of this legally obvious fact, given that the Court repeatedly reverts to it with different reasons? The requisite explanations lie naturally in the founding act of the Court, the Protocol which, in its Article 3 sub-article 1 on Jurisdiction stipulates that: "The jurisdiction of the Court shall extend to all cases and disputes...". This provision, as it stands, does not pronounce itself on the entire regime attached to the Statute of the Court. If we combine this provision with the Preamble to the Protocol[4], we can read the international and conventional character of the functions exercised by the Court. This basis is primarily internationalist[5]. It is in these terms that paragraph 27 of the judgment should be understood: "This Court exercises jurisdiction as long as the rights allegedly violated are protected by the Charter or any other human rights instruments ratified by the Respondent State".

5. This current position has its justification[6], but it needs to be further explained and understood. From the standpoint of domestic law, the appellate judge determines an appeal seeking to have a judgment rendered by a lower court overturned or annulled. The appellate court is required, where appropriate, to review cases in fact and in law. Accordingly, it may

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[4] Moreover, in regard to the Protocol: "Member States note that the African Charter on Human and Peoples' Rights reaffirms adherence to the principles of Human and Peoples' Rights, freedoms and duties contained in the declarations, conventions, and other instruments adopted by the Organization of African Unity and other international organizations".

[5] It may be noted in the Case of *Vapeur Wimbledon* (PCIJ, *Vapeur Wimbledon, France and Others* 23/8/ 1923) pertaining the application of the principle of the superiority of international law over domestic acts In this case, it related to the German Orders banning the use of the Kiel canal. The first question to which the judge at the Hague had to provide an answer is that which pertained the scope of the German decision of 21/3/1921 which denied access to and passage through the Kiel canal; a decision which the Court found to be in contradiction with the treaty.

[6] Christina (C.), recent decisions of the Inter-American Human Rights Commission (1983-1987), *AFDI*, 1987. pp. 351-369; she notes therein the position of Judge Hector Gros Espiell: "the submission of a (contentious) matter to the Court does not constitute an appeal" v. Wittenberg, *Admissibility of claims before international courts*, *RCADI*, 1932, t. III, p. 1 *et seq.*

overturn a decision, partially or completely, or uphold the same. It also has the possibility of changing the reasons, without necessarily changing the operative part of the judgment, which is the function of the Arusha Court. In terms of the Protocol, these are functions of judicial superiority, functions of re-establishment of the law for the sake of the right of individuals.

6. The question already came up in the mid-1950s, when, in light of a matter before the General Assembly at the International Court of Justice[7], Louis Cavaré concluded that "it is of considerable practical interest and easily discernible to do so. In the face of the decision of an organ, governments must know whether such decision offers the authority of a mandatory sentence or whether it boils down to a mere proposal, a recommendation or an advice. Their attitude in both cases must be fundamentally different.[8]"

7. The principle is established in international law, but it is also important for domestic law. This is emphasized hereunder as regards international jurisdictions in the following terms: "Today, especially in ..., the multiplicity of organizations has also posed this problem which is essentially practical since its solution depends on the nature of the jurisdictions they exercise and the possibility or impossibility of certain appeals against the decisions of these authorities"[9]. In any event and in the words of the International Court of Justice in its opinion on the Reparation for Injuries Suffered in the Service of the United Nations *(Advisory Opinion, ICJ Reports 1949, p. 182):* "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties". It follows that this type of jurisdiction established on the basis of an international convention can render only decisions induced by the founding treaty, and has authority over domestic judgments

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[7] ICJ, Advisory Opinion, *Effects of the Awards of Compensation made by United Nations Administrative Tribunal, 13 July 1954,* Recueil 1954, p. 47: the Court infers from the judicial character of the United Nations Administrative Tribunal that the General Assembly is supposed to give effect to its judgment.
[8] Cavaré (L.), The Notion of International Jurisdiction, *AFDI*, 1956. pp. 496 et seq.
[9] *Idem*, pp. 499 et seq.

8. This analysis is present in the position expressed by the Inter-American Court of Human Rights, which states that: "Where a State is party to an international treaty such as the American Convention, all its organs, including its judges, are also subject to that treaty, and hence subject to an obligation to ensure that the effects of the provisions of the Convention shall not be diminished by the application of rules that are variance with its object and purpose". It goes on to say in this report that: "Judges and bodies related to the administration of justice at all levels are obliged to exercise *ex officio* a "control of conventionality" between the internal rules and the American Convention, obviously within the framework of their respective competences and the corresponding procedural rules"[10]. These elements impact on the constitution of a jurisdictional power, be it the power of appeal or that of simple control.

9. Article 1 of the European Convention on Human Rights states that: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." In this case, the jurisdiction of the Member State is interpreted in light of international law. This tends to enshrine the status of the appeal judge. In the important ECHR decision, *Bankovic et al. v. Belgium et al.,* 12 December 2001[11], it may be noted that: "The obligation of the Court in this respect is to take into account the particular nature of the Convention, a constitutional instrument of a European public order for the protection of human beings, and its role, as it emerges from the Article 19 of the Convention, is to ensure compliance by the Contracting Parties with the undertakings they have entered into."[12] This jurisdiction of the Court is certainly defined by the consent of the parties to the Convention, but it acquires *ipso jure,* a real authority, a power comparable to that of a court of appeal, a full appellate jurisdiction. It is therefore natural to consider that the Court of Arusha has such a jurisdictional power in an internationalist hierarchy of the jurisdictions involved here, national as well as international.

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[10] IACHR, *Report 2012*, p. 62 et seq.
[11] ECHR, *Bankovic and Others v. Belgium and Others*, 12/12/2001, 52207/99
[12] *Idem.*, § 80.

II. A jurisdiction resolutely tied to international instruments

10. It may happen that States refuse the intervention of an international judge to re-try a dispute, even if they have adopted the arbitration clause in an international convention. This hypothesis does not affect the Arusha Court, but it remains a possibility that international law leaves open to States or to parties. The global trend in this regard has been to challenge or restrict the devolution of international jurisdiction. In the 1960 Case of the arbitral award rendered by the King of Spain on 23 December 1906[13], The Hague Court specified this occurrence: "The Court is not called upon to say whether the arbitrator has correctly or badly adjudicated. These considerations and those thereto attached are irrelevant to the functions which the Court is called upon to perform in the present proceedings and which are to determine whether it is proven that the award is null and void"[14]. The fullness of the devolution of appeal was thereby excluded.

11. States may indeed choose, in sovereignty and exceptionally, that an international judge, seized by them in a case, does not consider himself as an appeal judge. This was the case in the dispute over the *Arbitral Award of 31 July 1989, Guinea-Bissau v. Senegal*, in respect of the decision of the International Court of Justice[15]. The Court found that "the two parties were in agreement that the present proceedings constitute an action in non-existence and nullity of the award rendered by the Tribunal, and not an appeal against that award or an application for review thereof; as the Court has had occasion to point out in connection with the complaint of nullity presented in the case of the Arbitral Award rendered by the King of Spain on 23 December 1906"[16].

12. This same restriction is found in the present *Case of Ivan* at the Court in § 26; The Court reiterates its position in the matter of *Ernest Francis Mtingwi v. Republic of Malawi*[17], in which it noted that it is not an appellate body with respect to decisions of national courts". On the other hand, the Court's response in the *Alex Thomas* case should be clarified.

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[13] *ICJ., Reports, 1960, p. 192.*
[14] *Idem*, p. 26.
[15] ICJ, *Arbitral Award of 31 July 1989, Guinea-Bissau v. Senegal*,12/11/1991.
[16] Idem, § 25
[17] AFCHPR, *Ernest Francis Mtingwi v. Malawi*, 15/3/2013, *§ 14.*

13. The Court states "however, as it pointed out in the case of *Alex Thomas v. United Republic of Tanzania*[18] that "while the African Court is not an appeal body for decisions rendered by national courts, this does not preclude it from examining the relevant procedures before the national authorities to determine whether they are in consonance with the standards prescribed in the Charter or with any other instrument ratified by the State concerned"[19]. The Court may be reminded of two elements: a) to declare that "this does not preclude it from examining the relevant procedures before the national authorities", is not in consonance with the current exercise of the judicial function of the Court, the purpose of which is to examine domestic procedures used by national courts in matters of human rights; (b) to declare that "the African Court is not an appellate body for decisions rendered by the national courts" may lead to a voluntarist dimension of the Court, whereas the Court exercises jurisdiction determined *à priori* by interstate conventions and protocols. The Court has a resolutely special jurisdiction, specifically recognized by the contracting parties to the Protocol establishing the Court. This jurisdiction, where established, is a legal and objective *datum.*

14. The Arusha Court does not seem to call to question the so-called notion of national assessment which is now recognized in international human rights law. This concept indeed combines the national powers with the judicial powers that the Court derives from the Protocol; a national determination of issues such as property, religious freedom, freedom of expression, the notion of public danger ... and many others for which States' laws have also provided common provisions.

Blaise Tchikaya
Judge at the Court
12 March 2019

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[18] AFCHPR, *Alex Thomas v. Tanzania,* 20/11/2015, *§ 60 to 65*
[19] Op cit, *Alex Thomas v. Tanzania, §* 130 ; see also AFCHPR, *Christopher Jonas v. Tanzania,* 28/9/ 2017, *§* 28; AFCHPR, *Ingabire Victoire Umuhoza* v. *Rwanda,* 24/11/2017, *§* 52 ; and AFCHPR *Mohamed Abubakari v. United Republic of Tanzania*