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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

APPLICATIONS No. 009/2011 and No. 011/2011

TANGANYIKA LAW SOCIETY & THE LEGAL AND HUMAN RIGHTS CENTRE, AND REV. CHRISTOPHER R. MTIKILA

V.

THE UNITED REPUBLIC OF TANZANIA

Separate opinion of Vice-President Fatsah Ouguergouz

1. I am of the view that there is a violation by the Respondent State of the rights guaranteed under Articles 2, 3 (2), 10 and 13 (1) of the African Charter; however, I do not think that the reasons invoked in arriving at

such a conclusion have been articulated with sufficient clarity in this Judgment. Moreover, the Court should have first pronounced itself on the issue of its jurisdiction to deal with the two applications before considering the issue of the admissibility of the said applications; it should equally have set aside more substantial developments to the treatment of these two important issues.

I) Jurisdiction of the Court

2. The Court has first to ensure that it has the jurisdiction to deal with an Application before considering its admissibility. It has to do so *proprio motu* even if the Respondent State has not raised a preliminary objection in that regard. In the exercise of its contentious function, the Court can indeed only use its jurisdictional powers against State Parties to the Protocol and within the limits set by that instrument regarding the status of entities entitled to refer matter to it and the type of disputes that can be submitted to it. It is only when an application is filed against a State Party to the Protocol and within the limits set by the said Protocol that its admissibility could be considered by the Court. Besides, it is in that chronological order that issues of jurisdiction and admissibility are dealt with in the Protocol (Articles 3 (1), 5 and 6; see also Rule 39 of the Rules of Court).

3. In the Brief in Response to the Application of the 1st Applicants, the Respondent raised two objections on the admissibility of the Application; in its Brief in Response to the Application of the 2nd Applicant, the

Respondent raised five objections on the admissibility of the Application. In its Briefs in Response to the two Applications, the Respondent however addressed both issues of admissibility and merits. For reasons related to the proper administration of justice, the Court therefore decided not to suspend the proceedings on the merits of the case but to join consideration of the objections raised by the Respondent to that of the merits in both Applications, as allowed under Rule 52 (3) of the Rules. The Rejoinders of both Applicants as well as the oral pleadings of all the Parties thus dealt with the jurisdiction of the Court and the admissibility of both Applications as well as with the merits of the case.

4. It should be noted here that the Respondent did not formally raise any objection to the jurisdiction of the Court. Although in its Brief in Response to the second Applicant (pages 9-11, par. 19-23), it presented its five preliminary objections as objections to the admissibility of the Application, its 3rd, 4th and 5th objections should in fact be considered as objections relating to the jurisdiction of the Court.

5. The Court's jurisdiction to deal with an application brought against a State party and originating directly from an individual or a non-governmental organisation is mainly governed by Articles 3 (1) and 5 (3) of the Protocol. This jurisdiction must be considered both at the personal level (*ratione personae*) and at the material (*ratione materiae*), temporal (*ratione temporis*) and geographical (*ratione loci*) levels.

I) Personal jurisdiction

6. Article 3 of the Protocol, entitled "Jurisdiction", deals with the general jurisdiction of the Court, whereas Article 5, entitled "Access to the Court", deals specifically with the personal jurisdiction of the Court. Though they are different in form, the issues of the "jurisdiction" of the Court and "access" to the Court are closely related in the context of the Protocol. The Court's jurisdiction is also treated under Article 34 (6) of the Protocol, to which makes reference Article 5 (3) mentioned above.

7. Articles 5 (3) and 34 (6) of the Protocol, read together, show that direct access to the Court by an individual or a non-governmental organization is subject to the deposit by the Respondent State of a special declaration authorizing such access.

8. In the instant case, the Court has first ensured that the Respondent State is one of the State Parties to the Protocol which have made the declaration under Article 34 (6). As the 1st Applicants are two non-governmental organizations, the Court has similarly ensured that they enjoyed an observer status with the African Commission on Human and Peoples' Rights. The Court has then concluded that, these two cumulative conditions being met, it has jurisdiction *ratione personae* to deal with the two Applications.

9. The issue of the jurisdiction *ratione loci* of the Court was not raised by the Respondent and there can be no dispute in that regard considering the nature of the violations alleged by the Applicants. The Court did not therefore need to consider the issue of its jurisdiction *ratione loci*.

10. It is not however the case of the jurisdiction *ratione materiae* and *ratione temporis* of the Court even if the Respondent did not raised a formal objection challenging the Court's jurisdiction; these objections were indeed implicitly raised in the submissions on the Preliminary objections to the admissibility of the Application from the 2nd Applicant.

2) Material jurisdiction

11. In its Brief in Response to the Application of the 2nd Applicant, the Respondent argues in its 3rd, 4th, and 5th objections to the admissibility, respectively, that the "Application contains provisions inconsistent with Rule 26 (1) (a) of the Rules of Court (...) and Article 7 of the Protocol (...)", that it is "relying on the Treaty establishing the East African Community which was not in existence at the time the Applicant took the Government of Tanzania to Court in 1993" and that "it is retrospective with regard to the Protocol" (see also the Public Hearing of 14 June 2012, *Oral Hearing Verbatim Record*, p. 26, lignes 36-37, p. 27, lines 1-9, and p. 27, lines 15-26, respectively).

12. In support of its 3rd Preliminary objection, the Respondent argues that the Treaty establishing the East African Community of 30 November 1999, is not "a human rights instrument" within the meaning of Article 7 of the Protocol and Rule 26 (1) (a) of the Rules of Court and that, as a result, "it is extraneous to this case" (Paragraphs 19-20 of the Brief in Response; see also the Public Hearing of 14 June 2012, *Oral Hearing Verbatim Record*, p. 26, lines 19-20). In its Rejoinder, the 2nd Applicant noted that

"Article 3 (1) of the Protocol (...) does not specify which instrument should be considered as a human rights instrument" and argues further "that any Treaty containing provisions on the protection of human rights should be considered as relevant and within the jurisdiction of the Court" (Paragraph 13). At the Public Hearing of 15 June 2012, the second Applicant indicated that "the East African Treaty (...) does have in Article 6 a provision that protects the human rights" and "that provision not the entire treaty but that particular provision (...) is part of applicable law before the Court" (Public Hearing of 15 June 2012, *Oral Hearing Verbatim Record*, p. 12, lines 20-23).

13. Therefore, contrary to what it indicated in Paragraph 87 of the Judgment, the Court had also to determine whether the Treaty establishing the East African Community was applicable in the light of Articles 3 (1) and 7 of the Protocol, as well as Rule 26 (1) (a) of the Rules of Court.

14. These three provisions make mention of "any other relevant human rights instrument ratified by the States concerned" and direct reference to three requirements: 1) The instrument in question must be an international treaty, hence the requirement that it be ratified by the State concerned, 2) this international treaty must "relate to human rights" and 3) it must have been ratified by the State concerned. These three requirements are cumulative and, if met, the Court would again have had to ensure that the said treaty is "relevant" to the treatment of the matter.

15. On the issue of whether a particular treaty can be considered as "a human rights instrument", the Court could, for instance, have suggested that some distinction be made between treaties which deal mainly with the protection of human rights and those which address other issues but

which contain provisions related to human rights. Treaties of the first category which are crafted in such a manner as to give "subjective rights" to individuals could beyond any doubt be considered as human rights instruments; they are human rights instruments *par excellence*. Treaties of the first category providing essentially for undertakings by States Parties and no subjective rights to individuals could also be considered as human rights instruments. For treaties of the second category, that is treaties the main purpose of which is not the protection of human rights but which contain provisions relating to human rights, their case is more problematic insofar as the said provisions generally do not grant subjective rights to individuals within the jurisdiction of States Parties. The Court possessing «*la compétence de sa compétence*» (Article 3 (2) of the Protocol), it is for it to determine which are the treaties relating to human rights falling within its material jurisdiction, taking due consideration of their «relevance» for the examination of a case (Article 3 (1) of the Protocol).

16. Such a weighty issue as the applicable law required consideration by the Court especially as the latter had asserted in Paragraphs 122 and 123 of the Judgment, that its jurisdiction extends to the interpretation and application of both the 1966 International Covenant on Civil and Political Rights and the 1948 Universal Declaration of Human rights. This assertion of the Court raises questions in relation to the first instrument which is a treaty providing for an international monitoring body, the Human Rights Committee of the United Nations; the risk of fragmentation of the international jurisprudence should indeed not be overlooked. Such an assertion also raises questions in relation to the

second instrument which is in fact a resolution of the United Nations General Assembly.

3) Temporal jurisdiction

17. In its written submissions, the Respondent did not raise any Preliminary objection to the temporal jurisdiction of the Court, other than that on the Treaty establishing the East African Community. At the Public Hearing of 15 June 2012, the Respondent however challenged the temporal jurisdiction of the Court as follows: "our contention with retrospectivity is hinged only on the aspect of the Eleventh Constitutional Amendment Act No. 34 of 1994, which was enacted before the Government of the United Republic of Tanzania ratified the Protocol to the African Charter establishing the African Court. The Court cannot adjudicate on matters which transpired prior to Tanzania having ratified the instruments and placing the United Republic of Tanzania under the jurisdiction of this Court, hence the issue is retrospective" (Public Hearing of 15 June 2012, *Oral Hearing Verbatim Record*, p. 27, lines 16-21); the Respondent added as follows: "the international principle is that international treaties are not retrospective. [...] This principle is applicable to the United Republic of Tanzania with regard to Article 34 (6) of the Protocol to the African Charter establishing an African Court" (Public Hearing of 15 June 2012, *Oral Hearing Verbatim Record*, p. 27, lines 30-31 and p. 28, lines 1-5).

18. At the same Public Hearing, the 2nd Applicant for his part stated that: "the violations that were alleged goes before the setting up of the Charter

and the issue of retroactivity that Tanzania raises is not relevant. And we would like to refer to what we have already argued that violation existed in the past, it continues to exist" (Public Hearing of 15 June 2012, *Oral Hearing Verbatim Record,* p. 13, lines 11-14).

19. Since it had to ensure that it had jurisdiction to deal with the matter before it, the Court, as required, considered the merits of the 6th Preliminary objection of the Respondent, even though it was raised belatedly, that is, during the second round of oral pleadings.

20. I am however of the view that in dealing with this objection, the Court should have made a clearer distinction between the obligations of the Respondent under the African Charter and its obligations under the Protocol and the optional declaration. The 2nd Applicant indeed mixed up these two kinds of obligations (see Paragraph 81 (3) of the Judgment) and the Court should have lifted any ambiguity in this matter by clearly indicating that in the instant case its personal jurisdiction is solely based on the Protocol and the optional declaration.

21. On the basis of the non-retroactivity of treaties, a well-established principle in international law, the Court cannot be seized of allegations of violations of human and people's rights by an individual or by a non-governmental organization unless such alleged violations occurred after the entry into force for the State concerned, not only of the African Charter but also of the Protocol and, more important, of the optional declaration; Article 34 (6) of the Protocol does not suffer any ambiguity in this regard since it provides that "the Court shall not receive any petition under Article 5 (3) involving a State Party which has not made such a declaration".

22. In the instant case, the critical date for determining the jurisdiction of the Court to deal with the Applications cannot therefore be the date of entry into force for Tanzania of the sole African Charter or the Protocol; the only date to be considered is that of the deposit by Tanzania of the declaration under Article 34 (6) of the Protocol, that is 29 March 2010. It is therefore clear, on this basis, that any alleged violation of the African Charter by Tanzania occurring before that date would not fall within the temporal jurisdiction of the Court unless in circumstances where such violation bears a continuous character.

23. In Paragraph 84 of the Judgment, the Court should have clearly indicated that the only date to be considered in the instant case is the date of entry into force of the optional declaration for the Respondent State and not the date of entry into force of the Charter or the Protocol for the said State; it should then have focused its attention on the sole issue of the continuous character of the alleged violations beyond the critical date of 29 March 2010.

II) Admissibility of the Applications

24. The Court should have considered, even in a summary manner, the issue of the legal interest to act of the Tanganyika Law Society and the Legal Human Rights Center, the two non-governmental organizations which lodged the first applications.

25. Indeed, a distinction needs to be made between the "capacity to act" and "the interest to act" before the Court. The capacity of an entity to act relates to its authority to appear before the Court and therefore comes

within the personal jurisdiction of the Court in relation to the Applicant. The interest to act, for its part, refers to the notion of legitimate interest, in other words the legally recognized or protected interest, the existence of which the Court has to independently determine in each case. In other words the capacity to act deals with the applicant whereas the interest to act relates to the action that he or she undertakes.

26. An action before the Court is indeed only allowed if the applicant justifies his or her own interest in initiating it. To show proof of such interest, the applicant must accordingly demonstrate that the action or abstention of the Respondent State applies to a right which the applicant has or the right of an individual on behalf of which it wishes to seize the Court.

27. In the instant case, since Mr. Mtikila, whose rights have allegedly been violated, is party to the case, the issue at stake is one of ascertaining if a non-governmental organization is also allowed to file an application based on the same allegations. It would have been a different situation if Mr. Mtikila had not initiated an action before the Court and that both non-governmental organizations had acted for Mr. Mtikila and initiated action on his behalf.

III) Merits

28. I am of the view that barring independent candidates from certain elections and the correlative obligation to belong to a political party are not in themselves violations of Articles 10 and 13 (1) of the African Charter; they can only be violations of those provisions if they are

considered as unreasonable or illegitimate limitations to the exercise of the rights enshrined in the said provisions (see, on a similar matter, the findings of the Inter-American Court of Human Rights in Paragraphs 193 and 205 of its judgment of 6 August 2008 in the case *Castañeda Gutman v. Mexico*).

29. Unlike Articles 22 and 25 of the International Covenant on the Civil and Political Rights, Articles 10 and 13 (1) of the African Charter do not provide in a satisfactorily manner for the freedom of association and the right of the citizen to freely participate in the government of his or her country.

30. The main weakness of these two provisions of the Charter lies in the claw-back clause they contain. Both articles indeed provide that the freedom of association and the right of the citizen to freely participate in the public life of his or her country must be exercised "in conformity with the rules laid down by law". That clause does not appear in Article 25 of the Second Covenant which, for its part, provides that the guaranteed rights should be exercised "without discrimination and unreasonable restrictions". This provision consequently allows for "reasonable" restrictions, such as those based on the age of the person for instance. It is our view that Articles 10 and 13 (1) of the Charter should be interpreted in the same spirit. The limitations that the lawmaker could provide to the exercise of those guranteed rights must be reasonable or legitimate, that is they would need to comply with a number of objective criteria. Since Articles 10 and 13 (1) are silent, one could usefully refer to the criteria set out in the second Paragraph of Article 27 of the Charter even though this provision is *a priori* intended to prevent the abuse that the individual might likely commit in the exercise of his or her rights and freedoms

rather than to protect the individual from abusive limitations to his or her rights and freedoms by the State, as it is emphatically suggested in the formulation of this article and its location in the Chapter relating to the duties of the individual.

31. At any rate, in the final analysis, and as stated by the African Commission and confirmed by the Court in Paragraph 112 of the Judgment, this provision may be viewed as a general claw-back clause which restricts the margin of maneuver of States Parties as far as limitations are concerned. The only limitations to the exercise of the freedom of association and the right of citizens to freely participate in the government of their countries would consequently be those required to ensure "respect for the right of others, collective security, morality and common interest".

32. One can thus conclude that, according to the African Charter, the freedom of association and the right to freely participate in the government of a country are not absolute as the exercise of such rights is subject to limitations by the States Parties. One can equally conclude that the powers of limitation by States Parties are also not absolute in that they must comply with certain requirements: the restrictions must be provided by law and should be necessary to ensure "respect for the rights of others, collective security, morality and common interest".

33. Consequently, it lies with the Respondent State to show that the restrictions it has applied to the freedom of association and the right to freely participate in the government of the country were not only provided by law but also necessary to ensure "respect for the rights of others, collective security, morality and common interest".

34. Such proof has, however, not been forthcoming from the Respondent State. That is what the Court ought to have expressed in a clearer manner particularly with regard to the right to freely participate in the government of the country. Paragraphs 109 *in fine,* 111, 113 and 114 of the Judgment indeed suggest that the barring of independent candidates from certain elections and the correlative obligation to belong to a political party are in "themselves" violations of Articles 10 and 13 (1) of the Charter, whether or not such limitations are reasonable. The reasoning of the Court would had been clearer if its various sequences and the corresponding paragraphs of the Judgment were positioned in a more coherent manner so to show that it is the fact that the limitation to the rights concerned were unreasonable that led the Court to the conclusion that the said rights had been violated. Paragraph 109, in particular, is not at its right place in the reasoning of the Court (it should be located upstream) and Paragraph 108, for its part, addresses issues which are extraneous to the instant case.

35. Having found that Articles 10 and 13 (1) of the Charter had been violated, the Court could only have concluded that there was violation of the principles of non-discrimination and of the equal protection of the law as enshrined in Articles 2 and 3 (2), respectively.

36. The principle of non-discrimination, on one hand, and the principles of equality before the law and of equal protection of the law, on the other, are in close relationship. They are so to say the two sides of the same coin, the first principle being the corollary of the second ones. Their main difference under the African Charter lies in their respective scope.

Indeed, according to Articles 2 and 3 of the Charter, the principle of non-discrimination applies only to the rights guaranteed in the Charter, whereas the principles of equality apply to all the rights protected in the municipal system of a State party even if they are not recognized in the Charter.

37. In the instant case, the Court should have started its reasoning by clearly indicating this distinction and stating that the alleged discriminations actually relate to two rights guaranteed in the Charter. After having established that there actually exists a violation of these two rights and that various groups of peoples were given a different treatment, the Court should have underlined that any difference of treatment does not necessarily constitute a discrimination. Indeed, as the Human Rights Committee of the United Nations indicated in its General Comment of Article 26 of the Second International Covenant, "differentiation is not discrimination if it is based on objective and reasonable criteria and if the aim is legitimate in light of the Covenant" [1] (see a similar statement of the European Court of Human Rights in the case *Lithgow v. United Kingdom*[2]).

38. It is only after having laid down these premises, that the Court should have dealt, as it did in Paragraph 119 of the Judgment, with the objective

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[1] *General Comment No.18, Non-Discrimination,* adopted by the Committee on 10 November 1989 during its 37th Session, Paragraph 13; see also, for example, its Views adopted on 15 July 2002 and relating to Communication No. 932/2000, Human Rights Committee, *Doc. CCPR/C/75/D/932/2000*, 26 July 2002, pp. 21-24, Paragraphs 12.2-13.18.

[2] According to the European Court, for the purpose of Article 14 of the European Convention, a difference of treatment is discriminatory if it «has no objective or reasonable justification», that is, if it does not pursue a «legitimate aim», *Application No 9063/80,* Judgment of 8 July 1986, Series A, No. 102, Paragraph 177, *European Human Rights Report*, 1986, No. 8, p. 329.

and reasonable nature of the limitations introduced by the Tanzanian constitutional amendments, and ruled that the aim of the difference of treatment is not legitimate in light of the Charter.

Judge Fatsah Ouguergouz

Vice-President

Dr. Robert Eno

Registrar