FIDÈLE MULINDAHABI v. REPUBLIC OF RWANDA

Application No. 04, 05, 10 and 11 of 2017

JUDGMENTS
26 JUNE 2020

Separate Opinion

of

Judges Rafâa Ben Achour
and
Blaise Tchikaya

1. We concur with the position adopted by the Court on admissibility, jurisdiction and operative provisions in the four *Mulindahabi v. Rwanda* judgments adopted by unanimous decision of the judges sitting on the bench.

2. By this Opinion, we wish to express a position on a point of law. This opinion clarifies a point relating to the Court's subject-matter jurisdiction on which our Court has often proceeded by economy of argument.

3. In our view, Article 3 of the Protocol, while taking account of the general framework of the jurisdiction it lays down, should also be understood in terms of the scope given to it by Article 7 of the same Protocol. Since the *Mulindahabi* species do not pose any particular problems of jurisdiction, there were no a priori reasons for the emergence of such a debate. However, the question did emerge and therefore required clarification which would be valid for other judgments delivered or to be delivered by the Court.

4. A breadcrumb trail structures the analysis. These are two waves of decisions that characterize the Court's jurisprudence. The cut-off point is generally in 2015, when the Court delivers its *Zongo*[1] judgment. The decision on jurisdiction in this case is given in 2013. It can be supported because a reflection seems to be beginning on the choices in terms of procedure with the *Mohamed Abubakari* judgment in 2016[2]. The Court begins to work, as noted by Judges Niyungeko and Guissé, more "distinctly: first all questions relating to its jurisdiction (both the preliminary objection and the question of its jurisdiction under the Protocol), and then all questions relating to the admissibility of the application"[3].

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[1] AfCHPR, *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo and the Burkinabè Movement of Human and Peoples' Rights v. Burkina Faso, Judgement on Reparations*, 5 June 2015.

[2] AfCHPR, *Mohamed Abubakari v. United Republic of Tanzania*, 3 June 2016, §§ 28 and 29

[3] Dissenting opinion of Judges Gérard Niyungeko and El Hajji Guissé in the *Urban Mkandawire v. Republic of Malawi judgment*, 21 June 2013.

5. Thus, in the first part, we shall examine the state of the matter, i.e. the envisaged readings of Articles 3 and 7 of the Protocol in determining the Court's subject-matter jurisdiction. In the second part, devoted to the second wave of decisions, the use of Articles 3 and 7 will evolve.

I. Article 3 and 7 of the Protocol through the Court's doctrine and case-law

6. In our view, the two Articles 3 and 7 of the Protocol should be read together, as one sheds light on the other. They are complementary. For the reasons that follow, they cannot be separated. The Court's subject-matter jurisdiction is therefore based on both the first paragraph of Article 3 and Article 7 of the Protocol. We shall first present a restrictive reading of these provisions (A) before turning to their reference in certain decisions of the Court which we describe as first wave (B).

A. A restrictive reading of Articles 3 and 7 of the Protocol

7. Article 3(1) of the Protocol, on the jurisdiction of the Court, reads as follows:

> "1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned".

Article 7, on applicable law, states in one sentence that:

> "The Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the States concerned".

8. Different readings of these two Articles have emerged. Reading them separately, some have argued that their functions should not go beyond the title given to them by the successive drafters of the Convention. Article 3(1) applying strictly and exclusively to the jurisdiction of the Court and the other, Article 7,

referring solely to the applicable law. This approach is restrictive and, in fact, does not correspond, on closer inspection, to the approach which the Court itself has followed through its case-law since 2009.

9. It was also noted that Article 7 would be a mere repetition of Article 3(1) and is, in this respect, superfluous. Professor Maurice Kamto supports this reading in particular when he states that "Articles 3 and 7 are a legal curiosity"[4]. They would have no equivalent in the statutes of other regional human rights jurisdictions. The "Ouagadougou Protocol should have confined itself to this provision, which makes Article 7 all the more useless as its content is likely to complicate the Court's task"[5].

10. It is not clear whether the drafters of the Protocol intended to exclude certain categories of legal rules, such as custom, general principles of law, etc., from the scope of the Protocol. The use of the phrase "ratified by the States concerned" in both Articles might lead one to believe[6] that the Court should only take into account conventions ratified by States. It would be difficult to explain why the next paragraph, 3(2), recognizes the Court's "jurisdiction". It is well known that for the purpose of establishing the grounds for its jurisdiction, the scope of the applicable law should be opened up. The Court cannot, as will be discussed below, be limited in the reasons for its jurisdiction when it is challenged. In the latter case there is a clear manifestation of the link between Article 3 and Article 7 of the Protocol.

11. This was, in short, the interpretation adopted by the Court on the reading of Rule 39 of its Rules:

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[4] Commentary on Article 7 of the Protocol. *The African Charter on Human and Peoples' Rights and the Protocol on the Establishment of the African Court, article-by-article commentary*, edited by M. Kamto, Ed. Bruylant, 2011, pp. 1296 et seq.

[5] *Idem*

[6] Professor Maurice Kamto tends towards this appreciation. He states that "The restriction of the law applicable by the Court to the Charter and the said legal instruments creates an effect of implicit amputation of the scope of the relevant rules applicable by that jurisdiction. It deprives the Court and the parties brought before it of the application or invocation of "African practices in conformity with international standards relating to human and peoples' rights, customs generally accepted as law, general principles of law recognised by African nations, as well as case law and doctrine", referred to in Article 61 of the *ACHPR*, v. Idem, 1297.

"1. The Court shall conduct a preliminary examination of its jurisdiction and the admissibility of the application [...].

2. ... the Court may request the parties to submit any factual information, documents or other material considered by the Court to be relevant".

In calling for "the submission of any information relating to the facts, documents or other materials which it considers relevant", the Court wishes to inquire into all aspects of the applicable law, as noted in the heading of Article 7.

12. The other reading is to regard the two Articles as complementary and, where the conflict so requires, as being necessary for the Court to further develop its jurisdiction. This was not the case in the *Mulindahabi* decisions, but the Court has done so on various occasions.

B. The Court's reading of Articles 3 and 7 in its first wave of decisions

13. The first phase of the Court considered in the interest of the analysis ranges from the *Michelot Yogogombaye*[7] judgment (2009) to the *Femi Felama*[8] judgment (2015). This breakdown shows the evolution of the Court and its judicial involvement on the one hand, and on the other hand, it makes it possible to periodize its commitments as to the bases of its jurisdiction.

14. The Court has always accepted that the provisions of Articles 3 and 7 provide a firm basis for its jurisdiction to respond to human rights disputes. It has done so from its earliest years. It had perceived the openings left by its jurisdiction as formulated in the Protocol. The former Vice-President of the African Court, Judge Ouguergouz, states in his study that: "Article 3 § 1 of the Protocol provides for a very broad substantive jurisdiction of the Court [...]. The liberal nature of this provision is confirmed by Article 7, entitled "Applicable law"[9].

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[7] AfCHPR, *Michelot Yogogombaye v. Republic of Senegal*, 15 December 2009; see also, Loffelman (M.), *Recent jurisprudence of the African Court on Human and Peoples' Rights*, Published by Deutshed Gesellschaft...GIZ, 2016, p. 2.

[8] AfCHPR, *Femi Falana v. African Commission on Human and Peoples' Rights*, Order, 20 November 2015.

[9] Ouguergouz (F.), La Cour africaine des droits de l'homme et des peuples - Gros plan sur le premier organe judiciaire africain à vocation continentale, *Annuaire français de droit international*, volume 52, 2006, pp. 213-240.

15. Two elements are apparent in the provisions of Articles 3(1) and 7 of the Protocol: first, the case where the disputes in question are based from the outset on provisions of the Charter; second, where the Court, not having a clearly defined rule, would have to seek them in conventions ratified by the Respondent States. In reality, the Court has always used both approaches. It has always found itself drawn into international law whenever it is part of the law accepted by States.

16. What the Court is seeking to do from 2011 in the case of *Tanganyika Law Society and The Legal And Human Rights Centre v. United Republic of Tanzania and Reverend Christopher Mtikila v. United Republic of Tanzania*:

> The Court also had to rule on the issue of applicability of the Treaty establishing the East African Community, in light of Articles 3(1) and 7 of the Protocol, as well as Rule 26(1)(a) of the Rules of Court. These three provisions contain the expression "any other relevant human rights instrument ratified by the States concerned" which expressly refers to three conditions: 1) the instrument in question must be an international treaty, hence the requirement of ratification by the State concerned, 2) the international treaty must be "human rights related" and 3) it must have been ratified by the State Party concerned[10].

17. The 2015 *Femi felana* case, which completes the first wave of the Court's decisions, expresses in all cases the Court's two-step reasoning on its jurisdiction. In the first stage, it states the basis of its jurisdiction (Article 3(1)) and in the second stage, it gives, through the applicable law (Article 7), the reasons for its choice.

18. In this case, the application was directed against an organ of the African Union, established by the African Charter on Human and Peoples' Rights, namely, the African Commission on Human and Peoples' Rights. Under Article 3(1) of the Protocol, the Court first states that it has jurisdiction to hear and determine all

[10] AfCHPR, *Tanganyika Law Society and The Legal And Human Rights Centre v. United Republic of Tanzania and Reverend Christopher Mtikila v. United Republic of Tanzania*, Order, 22 September 2011, §§ 13 and 14.

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. It goes on to say that, although the facts giving rise to the complaint relate to human rights violations in Burundi, it was brought in the present case against the Respondent, an entity which is not a State party to the Charter or the Protocol. Finally, in its reasoning in § 16 of the judgment, the Court bases itself on a consideration of general applicable law.

> "The relationship between the Court and the Respondent is based on the complementarity. Accordingly, the Court and the Respondent are autonomous partner institutions but work together to strengthen their partnership with a view to protecting human rights throughout the continent. Neither institution has the power to compel the other to take any action".

The Court's application of general law reflects the complementarity between that law and the law that governs its substantive jurisdiction.

19. The same approach is found in the discussion on jurisdiction in the *Zongo* (2013)[11] case. The Court states that: "Under Article 3(1) of the Protocol ... and Article 3(2) of the same Protocol, "in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide ...". It goes on to state, appropriately, that :

> "The Court goes on to note that the application of the principle of the non-retroactivity of treaties, enshrined in Article 28 of the Vienna Convention on the Law of Treaties of 23 May 1969, is not in contention between the Parties. What is at issue here is whether the various violations alleged by the Applicants would, if they had occurred, constitute "instantaneous" or "continuing" violations of Burkina Faso's international human rights obligations".

20. It is apparent that the Court's reasoning does not focus strictly on the rules concerning its jurisdiction, but also extends it to the law applied by it.

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[11] AfCHPR, *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo and Blaise Ilboudo and the burkinabè Movement of Human and Peoples' Rights v. Burkina Faso*, Decision on Preliminary Objections, 21 June 2013, § 61, 62, 63.

II. The relationship between Articles 3 and 7 of the Protocol as regards the Court's subject-matter jurisdiction: confirmation in the second wave of decisions

21. The drafters of the Protocol provided judges with a kind of "toolbox" through these two articles, which they would make good use of. They are only bound by the consistency and the motivation of their choice. Indeed, quite obviously, the two articles have often been used together in the Court's second decade of activity. It will first be shown that the Court's approach is also present in international litigation.

A. The Court's approach is confirmed by the practice of international litigation

22. This approach is known from international litigation, even before the African Court was established. It is, in fact, consistent with the logic of law. Its manifestation can be found in jurisprudential work as old as that of the Permanent Court of International Justice (PCIJ) confirmed by the jurisprudence of the International Court of Justice (ICJ).

23. It was by reasoning on its applicable law that the PCIJ extended its jurisdiction to human rights issues long before the wave of such law following the Second World War. The august Court was already doing its job of protecting fundamental rights in well-known cases[12].

24. There has been a known shift in the jurisdiction of arbitral tribunals in this area. The jurisdiction of these courts is strictly fixed within conventional limits, but they have integrated human rights issues by making a specific reading of their applicable law[13].

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[12] CPJI, Advisory Opinion, *Minority Schools in Albania*, 6 April 1935; Advisory Opinion, German Settlers in Poland, 10 September 1923; Advisory Opinion, *Treatment of Polish Nationals and Other Persons of Origin*, 4 February 1932

[13] Cazala (J.), Protection des droits de l'homme et contentieux international de l'investissement, *Les Cahiers de l'Arbitrage*, 2012-4, pp. 899-906. v. in particular, Tribunal arbitral CIRDI (MS), S.A., 29 May 2003, *Tecnicas Medioambientales Teemed SA v. Mexico*, §§ 122-123; S.A., CIRDI, *Azurix Corporation v. Argentina*, 14 July 2006, §§ 311-312; see S.A., ICSID (MS), *Robert Azinian and Others v. Mexico*, ARB(AF)/97/2, 1 November 1999, §§ 102-103.

25. The African Court already applies this methodology, which is well known in international litigation law. In addition to generally having the "competence of jurisdiction" in the event of a dispute, the international courts and the international instruments creating them often give them the legal basis to deploy their jurisdiction. In a complex argumentation the ICJ recalled that it has :

> "an inherent power which authorizes it to take all necessary measures, on the one hand, to ensure that, if its jurisdiction on the merits is established, the exercise of that jurisdiction does not prove futile, and, on the other hand, to ensure the regular settlement of all points in dispute...."[14] .

Professors Mathias Forteau and Alain Pellet saw this as a kind of implicit jurisdiction within the competence of the International Court of Justice[15].

26. Sometimes the international judge, in order to clarify a position or to explore other aspects inherent in its jurisdiction, uses the applicable law rather than the strict rules which conventionally define and frame its jurisdiction.

27. The affirmation of the role of the ICJ in international human rights law provides an example of this. In 2010, the Court in The Hague rendered its judgment on the merits in the case of *Ahmadou Sadio Diallo - Guinea v. Congo-Kinshasa*[16]. The Court ruled on claims of violations of human rights treaties. This case showed that, in addition to having general jurisdiction over the rights of States,

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[14] *Nuclear Tests Case (New Zealand v. France)*, Judgment of 20 December 1974, ECR 1974, pp. 259-463

[15] Forteau (M.) and Pellet (A.), *Droit international public*, Ed. LGDJ, 2009, p. 1001; Visscher (Ch. De), Quelques aspects récents du droit procédural de la CIJ, Ed. Pédone, 1966, 219 p.; Santulli (C.), Les juridictions de droit international : essai d'identification, AFDI, 2001, pp. 45-61.

[16] The ICJ states that "having regard to the conditions under which Mr. Diallo was expelled from Congolese territory on 31 January 1996, the Democratic Republic of the Congo violated Article 13 of the International Covenant on Civil and Political Rights and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights", or that "having regard to the conditions under which *Mr. Diallo* was expelled from Congolese territory on 31 January 1996, the Democratic Republic of the Congo violated Article 13 of the International Covenant on Civil and Political Rights and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights", or that "having regard to the conditions under which Mr. Diallo was expelled from Congolese territory on 31 January 1996, the Democratic Republic of the Congo violated Article 13 of the International Covenant on Civil and Political Rights and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights". Diallo was arrested and detained in 1995-1996 with a view to his deportation, the Democratic Republic of the Congo violated article 9, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights and article 6 of the African Charter on Human and Peoples' Rights. This case showed that the general jurisdiction enjoyed by the ICJ, which relates to "any matter of international law" under Article 36 §2 (b) of its Statute, can be extended to human rights.

the International Court of Justice could without hindrance to its jurisdiction, deal with the question of human rights.

28. In this sense, it may be observed that an increasing number of international courts have specialized in human rights, without having an initial mandate to do so. On closer inspection, this is mainly due to their *applicable law*. The cross-cutting nature of the rules of international law has a clear impact on the deployment of jurisdiction. It is thus understandable that in addition to the provisions framing the jurisdiction, the Protocol establishing the African Court has taken them over in terms of applicable law.

29. The same analysis can be made with regard to the European Court of Human Rights. In the *Nicolai Slivenko*[17] judgment of 2003, the Court stated that it should not "re-examine the facts established by the national authorities and having served as a basis for their legal assessment" by reviewing the "findings of the national courts as to the particular circumstances of the case or the legal characterization of those circumstances in domestic law", but at the same time recognized that it was part of its task "to review, from the Convention perspective, the reasoning underlying the decisions of the national courts". The doctrine derived from the idea that the Court was increasing the intensity of its review of judicial decisions. This can only be achieved through a broad reading of the law which the Court is mandated to apply. It can thus be said that the applicable law and jurisdiction stand together, the latter is undoubtedly a common thread.

B. Links established between Articles 3 and 7 in the second wave of Court decisions

30. Where the Court finds a difficulty or possible challenge to its jurisdiction, it shall combine the two Articles 3(1) and 7. It uses these two complementary texts. It does not, however, feel bound to indicate explicitly the use thus made of Article 7, and that is what we regret.

[17] ECHR, *Nicolai Slivenko v. Latvia*, 9 October 2003.

31. In its *Abubakari*[18] judgment, the Court emphasizes :

> "28. More generally, the Court would only act as an appellate court if, inter alia, it applied to the case the same law as the Tanzanian national courts, i.e., Tanzanian law. However, this is certainly not the case in the cases before it, since by definition it applies exclusively, in the words of Article 7 of the Protocol, "the provisions of the Charter and any other relevant human rights instruments ratified by the State concerned".

In the following paragraph, it concludes:

> "On the basis of the foregoing considerations, the Court concludes that it has jurisdiction to examine whether the treatment of the case by the Tanzanian domestic courts has been in conformity with the requirements laid down in particular by the Charter and any other applicable international human rights instruments. Accordingly, the Court rejects the objection raised in this regard by the Respondent State".

32. In the 2016 case, *Ingabire Victoire Umuhoza v. Republic of Rwanda*[19], the Court states, once again, without citing Article 7, that :

> "As regards the application of the Vienna Convention to the present case, the Court observes that while the declaration made under Article 34(6) emanates from the Protocol, which is governed by the law of treaties, the declaration itself is a unilateral act which is not governed by the law of treaties. Accordingly, the Court concludes that the Vienna Convention does not apply directly to the declaration, but may be applied by analogy, and the Court may draw on it if necessary. (...) In determining whether the withdrawal of the Respondent's declaration is valid, the Court will be guided by the relevant rules governing declarations of recognition of jurisdiction as well as by the principle of the sovereigntý of States in international law. With regard to the rules governing the recognition of jurisdiction of international courts, the Court notes that the

[18] ACHPR, *Mohamed Abubakari v. United Republic of Tanzania*, 3 June 2016, §§ 28 and 29.
[19] ACHPR, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Decision on the Withdrawal of the Declaration, 5 September 2016

provisions relating to similar declarations are of an optional nature. This is demonstrated by the provisions on recognition of the jurisdiction of the International Court of Justice,4 the European Court of Human Rights5 and the Inter-American Court of Human Rights", §§ 55 and 56.6.

33. However, the Court says that it is guided by the relevant rules governing declarations of recognition of jurisdiction as well as by the principle of the sovereigntý of States in international law, it is a recourse to Article 7 of the Protocol. In that the latter article allows it to rely on any relevant human rights instrument.

34. On its jurisdiction in the *Armand Guehi*[20] case in 2016, the Court proceeds in the same way. It cites Article 3(1), but resorts to other texts. One wonders whether the Court simply finds its jurisdiction in respect of interim measures or whether it simply applies provisions outside the Charter to do so. It says:

> "Having regard to the particular circumstances of the case, which reveal a risk that the death penalty might be imposed, thereby infringing the Applicant's rights under Article 7 of the Charter and Article 14 of the International Covenant on Civil and Political Rights, the Court decides to exercise its jurisdiction under Article 27(2) of the Protocol", § 19.

35. The complementarity between these two Articles, which should be cited together, is expressed. For in Article 3(1) the Court finds its jurisdiction without difficulty and bases it on it; and in Article 7 the Court, by having recourse to other texts, is also founded in law by virtue of the fact that its applicable law authorizes it to do so. Accordingly, in the *Actions for the Protection of Human Rights (APDH) v. Republic of Côte d'Ivoire*[21] judgment also delivered in 2016, from § 42 to § 65, the Court sets out a reasoning for establishing its jurisdiction. This can only be understood by reading the two articles, 3(1) and 7 together. In particular, it says that :

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[20] AfCHPR, *Armand Guehi v. United Republic of Tanzania*, Interim Measures Order, 18 March 2016

[21] AfCHPR, *Actions for the Protection of Human Rights (APDH) v. Republic of Côte d'Ivoire (Merits)*, 18 November 2016.

"The African Institute of International Law notes that the link between democracy and human rights is established by several international human rights instruments, including the Universal Declaration of Human Rights, Article 21(3), (...) The Institute further maintains that the African Charter on Democracy is a human rights instrument in that it confers rights and freedoms on individuals. According to the Institute, the Charter explains, interprets and gives effect to the rights and freedoms contained in the Charter on Human Rights, the Constitutive Act of the African Union, the Grand Bay Declaration and Plan of Action (1999), the Declaration on the Principles Governing Democratic Elections in Africa5 and the 2003 Kigali Declaration".

36. The Conclusion on jurisdiction that follows from this suite of instruments in § 65 is suggestive:

> "The Court concludes that the African Charter on Democracy and the ECOWAS Protocol on Democracy are human rights instruments, within the meaning of Article 3 of the Protocol, and that it is therefore competent to interpret and apply them."

37. It follows that the Court in its first decade uses Article 3(1) to determine its jurisdiction as set out in the Protocol. As in established judicial practice, the Court uses the applicable law recognized by the "States concerned" to extend or further establish its jurisdiction. In this case, it makes use of Article 7 of the Protocol. The question of priority between the two Articles does not arise, as it is a matter of the particular case and of the choice made by the Court. The two Articles are equally involved in the general question of the Court's jurisdiction to hear cases.

38. In its judgment in Jonas (2017), at paragraphs 28, 29 and 30, the Court goes beyond Article 3 on its own motion, stating that:

> "Article 3 of the Protocol does not give the Court the latitude to decide on the issues raised by the Applicant before the domestic courts, to review the judgments of those courts, to assess the evidence and to reach a conclusion", § 25.

39. It concludes that it has jurisdiction as follows:

> "The Court reiterates its position that it is not an appellate body in respect of decisions of the domestic courts. However, as the Court emphasised in its judgment in *Alex Thomas v. the United Republic of Tanzania*, and confirmed in its judgment in *Mohamed Abubakari v. the United Republic of Tanzania*, this circumstance does not affect its jurisdiction to examine whether proceedings before national courts meet the international standards established by the Charter or other applicable human rights instruments. The Court therefore rejects the objection raised in this regard by the Respondent State and concludes that it has subject-matter jurisdiction[22]. The Court does not appear to be taking a position on the question of which of the two Articles is the basis for its jurisdiction.

40. In order to refute the Respondent State's contention and to establish its jurisdiction in the *Nguza*[23] Judgment, the Court begins by relying first on its own jurisprudence[24]. It goes on to have recourse to the applicable law in general, namely:

> "as it stressed in the judgment of 20 November 2016 in the case of *Alex Thomas v. United Republic of Tanzania* and confirmed in the judgment of 3 June 2016 in the case of *Mohamed Abubakari v. United Republic of Tanzania*, this does not exclude its jurisdiction to assess whether proceedings before national courts meet the international standards established by the Charter or by other applicable human rights instruments to which the Respondent State is a party", §§ 33 et seq.

It then infers jurisdiction from this and refers to Article 3 of the Protocol:

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[22] AfCHPR, *Christopher Jonas v. United Republic of Tanzania*, Judgment, 28 September 2017: Convicted and sentenced for robbery of money and various other valuables, *Mr. Christopher Jonas* filed this application alleging a violation of his rights during his detention and trial. The Court found that the evidence presented during the domestic proceedings had been assessed according to the requirements of a fair trial, but that the fact that the Applicant had not received free legal aid constituted a violation of the Charter.

[23] AfCHPR, *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. Republic of Tanzania*, 23 March 2018.

[24] AfCHPR, 15/3/2013, *Ernest Francis Mtingwi v. Republic of Malawi*, 15 March 2013, § 14; *Alex Thomas v. United Republic of Tanzania*, 20 November 2015, §; 28/3/2014, *Peter Joseph Chacha v. United Republic of Tanzania*, 28 March 2014, § 114; *Ernest Francis Mtingwi v. Republic of Malawi*, 15 March 2013, § 14.

Accordingly, the Court rejects the objection raised by the Respondent State, ...". It has subject-matter jurisdiction under Article 3(1) of the Protocol, which provides that the Court "shall have jurisdiction in all cases and disputes submitted to it ...", § 36.

41. This reversal of logic by the Court is not in vain. It makes it possible to appreciate how the applicable law is not external to the determination of jurisdiction, which is well defined by the Protocol.

42. Orders for the indication of provisional measures do not present the same difficulties. It may be observed, as in the *Ajavon*[25] Case, that the Court's prima facie decision does not require recourse to its applicable law (7 Article). This is stated in paragraph 28:

> "However, before ordering interim measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but merely that it has *prima facie* jurisdiction".

The Court does not have such jurisdiction.

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43. Article 3, in particular the first paragraph, sets out the scope of the Court's jurisdiction. However, this cannot be understood without the law which the Court applies, that is, Article 7, with which it should be more regularly associated in its decisions. This scope of jurisdiction is not limited...as long as the Court is within its applicable law, it is within its jurisdiction. This place of applicable law is also present when discussing the Court's jurisdiction to hear a case under Article 3(2). The links between these articles are at the root, they are ontological.

[25] AfCHPR, *Sébastien Germain Ajavon v. Republic of Benin*, Order, 7 December 2018.

Rafâa Ben Achour
Judge of the Court

Blaise Tchikaya
Judge of the Court

Arusha, 5 July 2020