

AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA
<b>AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS</b> <b>COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES</b>		

**THE MATTER OF**

**HAROLD MBALANDA MUNTHALI**

**V.**

**REPUBLIC OF MALAWI**

**APPLICATION No. 022/2017**

**JUDGMENT**

**23 JUNE 2022**



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**The Court composed of:** Imani D. ABOUD, President; Blaise TCHIKAYA, Vice-President; Ben KIOKO, Rafaâ BEN ACHOUR, Suzanne MENGUE, M-Thérèse MUKAMULISA, Chafika BENSAOULA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Modibo SACKO - Judges; and Robert ENO, Registrar

In accordance with Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") and Rule 9(2) of the Rules of Court (hereinafter referred to as "the Rules"), Justice Tujilane R. CHIZUMILA, a national of Malawi, did not hear the Application.

In the Matter of

Harold Mbalanda MUNTHALI

*Represented by:*

Messrs Barnet and James  
Attorneys & Law Consultants  
Barnet and James Law firm  
Zomba, Malawi

Versus

REPUBLIC OF MALAWI

*Represented by:*

- i. Miss Lumbani MWAFULIRWA, Senior State Advocate, Ministry of Justice and Constitutional Affairs;
- ii. Mr Mabvuto KATEMULA, Chief Legal Officer, Ministry of Foreign Affairs and International Cooperation; and

- iii. Mr Oliver GONDWE, Principal Legal Officer, Ministry of Foreign Affairs and International Cooperation.

after deliberation,

*renders the present Judgment:*

## **I. THE PARTIES**

1. Mr Harold Mbalanda Munthali (hereinafter referred to as "the Applicant") is a Malawian national. He is a son of late Mr Mbalanda Mweziwapala Munthali (hereinafter referred to as "the deceased") and brings this claim on his own behalf and on behalf of the estate of the deceased in his capacity as the administrator for the alleged unlawful confiscation of the deceased's properties.
2. The Application is filed against the Republic of Malawi (hereinafter referred to as "the Respondent State"), which became party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 23 February 1990 and to the Protocol on 9 October 2008. It also deposited, on 9 October 2008, the Declaration under Article 34(6) of the Protocol through which it accepts the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations (NGOs).

## **II. SUBJECT OF THE APPLICATION**

### **A. Facts of the matter**

3. The Applicant submits that, on 26 January 1976, supposedly under the Forfeiture Act, the Government of the Respondent State confiscated all personal and real property of the deceased and vested it in the Government

through the office of the Administrator General.<sup>1</sup> The forfeiture, the Applicant alleges, did not require the Government to pay any compensation to the victim and the deceased did not receive any compensation.

4. Following the adoption of a new Constitution in 1994 and as part of dismantling the one-party State that prevailed at the time of the forfeiture, the Respondent State established a National Compensation Tribunal (hereinafter referred to as “the Tribunal”) with a life span of ten (10) years. The Tribunal was exclusively vested with the resolution of claims with respect to alleged criminal and civil liability of the Government for acts that occurred before 1994. According to the Applicant, no action could be instituted before ordinary courts in relation to such acts except by the Tribunal itself.
5. The Applicant further submits that sometime in or around 1995, the deceased filed a complaint to the Government through the Chief Legal Aid Advocate who took up the matter with the Attorney General, and on 6 August 2002 referred the deceased to the Tribunal. Having investigated the matter, the Administrator of the Tribunal, on 21 and 24 June 2003, addressed to the competent authorities of the Respondent State various correspondences notifying them of the Tribunal’s intention to hand over the properties to the deceased. However, the said authorities objected to the hand over and the Tribunal was not able to complete the matter until it concluded its operation upon the expiry of its life span.
6. Frustrated by the processes before the Tribunal, the deceased lodged an action before the High Court of Malawi, which, on 21 October 2005, delivered a judgment in default declaring that the confiscation constituted a violation of the deceased’s right to property; that he was entitled to compensation; and ordering that the said properties be returned to him. In implementation of the

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<sup>1</sup> Forfeiture Act, Malawi, 25 January 1966, An Act to empower the Minister to declare certain persons subject to forfeiture: to provide for the forfeiture and disposition of the property of such persons: to provide that such persons shall be disabled to sue for or alienate property and to enforce judgments: to provide for indemnity of any person disposing or otherwise dealing with such property: and for matters incidental thereto and connected therewith.

said order, the Sheriff of the Respondent State recovered some of the deceased's properties.

7. However, when the matter was set down for assessment of damages, the High Court, on 29 January 2008, issued an Order dismissing the claim for compensation on the grounds that it was time barred under the Limitation Act and fell within the purview of the Tribunal. According to the Applicant, the deceased did not appeal to the Supreme Court of Appeal of Malawi and did not receive any compensation until he died on 2 November 2010.
8. On 7 August 2012 and severally thereafter, the Applicant wrote to the Attorney General of the Respondent State over the claim of the deceased's estate, seeking an effective remedy. On 23 May 2016, the Attorney General responded that the Government could not compensate the deceased's estate outside the framework of the Tribunal.

#### **B. Alleged violations**

9. The Applicant alleges that the conduct of the Respondent State constitutes a violation of the rights to equal protection before the law, and to have one's cause heard protected under Articles 3(1), and 7(1) of the Charter; and Articles 14(1) and 16 of the International Covenant on Civil and Political Rights (hereinafter "the ICCPR"). The Applicant further alleges the violation of the right to property guaranteed under Article 14 of the Charter.

### **III. SUMMARY OF THE PROCEDURE BEFORE THE COURT**

10. The Registry received the Application on 28 July 2017, and served it on the Respondent State on 3 November 2017.
11. The Parties filed their pleadings on the merits and reparations within the time prescribed by the Court and these were duly exchanged.

12. On 3 April 2020, the Registry requested the Applicant to submit additional evidence both on the merits and reparations within a period of ten (10) days from the date of receipt. At the expiry of the time allocated, the Applicant did not file any additional evidence.
13. Pleadings were closed on 21 April 2020, and the Parties were duly notified.
14. On 5 May 2021, the Registry informed the Parties that the Court has decided to conduct a public hearing slated on 7 June 2021.
15. On 7 June 2021, the Court held a public hearing at which both Parties were duly represented.
16. On 8 June 2021, the Registry informed the Parties that the Court had decided to initiate an amicable settlement procedure as provided for under Rules 64(1) of its Rules. As requested, both Parties agreed to the procedure and the Applicant filed its submissions in this respect on 23 September 2021. Despite several reminders, the Respondent State did not file any submission and, on 3 February 2022, informed the Court that it no longer wishes to be part of the amicable settlement process.
17. On 4 March 2022, the Registry informed the Parties that, taking notice of the Respondent State's withdrawal from the amicable settlement process, the Court had decided to resume the contentious proceedings and deliver its ruling in the matter.

#### **IV. PRAYERS OF THE PARTIES**

18. The Applicant prays the Court to make the following orders:
  - i. Declare that the Respondent State's conduct in effecting a forfeiture of the deceased's property was unlawful and contrary to international law.

- ii. Declare that by failing to resolve the deceased's claim, the Respondent State violated the Applicant's right to equal protection before the law; the right to have the deceased's cause heard and the right to property.
- iii. Direct that the Applicant be paid the sum of US\$ 1,104,539.87 representing the loss suffered by the deceased as a result of the forfeiture of his property.
- iv. Direct the Respondent State to compensate the Applicant and his family for the hardship suffered as a result of the conduct of the Respondent State.
- v. Make an order for costs.

19. The Respondent State prays the Court to:

- i. Dismiss the Application as inadmissible.
- ii. Order that the Applicant should bear the costs.

## V. JURISDICTION

20. The Court notes that Article 3 of the Protocol provides 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.
2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

21. The Court further notes that pursuant to Rule 49(1) of the Rules "[t]he Court shall ascertain its jurisdiction ... in accordance with the Charter, the Protocol and these Rules".

22. The Court observes that the Applicant avers that the Court has jurisdiction given that the Respondent State is a party to the Charter, the Protocol, and the ICCPR, and that he alleges violations of rights protected in the Charter and the ICCPR.



23. The Respondent State on its part does not object to the Court having jurisdiction over the Application.
24. Notwithstanding the Parties' agreement as stated above, the Court must, pursuant to a joint reading of the above-mentioned provisions of the Protocol and its Rules, carry out a preliminary examination of its jurisdiction.
25. The Court recalls that, to be considered, an application must fulfil all four aspects of its jurisdiction that is personal, material, temporal and territorial.

#### **A. Personal jurisdiction**

26. The Court notes, with respect to its personal jurisdiction that, as stated in paragraph 2 of this Judgment, the Respondent State is a party to the Protocol and has deposited the Declaration provided under Article 34(6) of the Protocol. As a consequence, the Court holds that it has personal jurisdiction to examine this Application.

#### **B. Material jurisdiction**

27. With regard to its material jurisdiction, the Court recalls that Article 3(1) of the Protocol confers on it the power to examine an application provided that it involves alleged violations of rights protected under the Charter or any other human rights instruments ratified by the State concerned.<sup>2</sup>
28. The Court notes that, in the instant matter, the Applicant alleges the violation of the rights to equal protection of the law, to have one's cause heard and the right to property protected under Articles 3(1), 7(1), 13 of the Charter and 14 of the ICCPR. Noting further that the Respondent State is a party to these

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<sup>2</sup> *Hamad Mohamed Lyambaka v. United Republic of Tanzania*, ACtHPR, Application No. 010/2016, Ruling of 25 September 2020, § 22; *Jebra Kambole v. United Republic of Tanzania*, ACtHPR, Application No. 018/2018, Judgment of 15 July 2020, § 21.

instruments, the Court holds that it has material jurisdiction to hear the Application.

### C. Temporal jurisdiction

29. In relation to its temporal jurisdiction, the Court notes that, as both Parties concur, the act of forfeiture and confiscation of the deceased's properties occurred in January 1976. The Court recalls that, as per its case-law,<sup>3</sup> such act was instantaneous in nature as it did not continue after the aforementioned date of 9 October 2008 on which the Respondent State deposited the Declaration recognising the jurisdiction of this Court to receive individual petitions. As a consequence, the Court finds that it does not have temporal jurisdiction over the originating act of forfeiture and confiscation of the deceased's property as it was instantaneous.
30. The Court however notes that, as earlier stated, the Applicant also alleges that the violations attributable to the Respondent State extend to the failure to return the properties and provide compensation. Noting that the latter alleged breaches occurred subsequently in time to the originating act of confiscation, the question that arises therefore is whether the claims related thereto fall within the temporal jurisdiction of this Court.
31. In this regard, the Court observes that the claims of failure to return the properties and pay compensation initially arose from investigations conducted by the National Compensation Tribunal, which after locating some of the properties and establishing that they belonged to the deceased, undertook processes for them to be handed over to him. The Tribunal addressed a notice of such intention to the authorities of the Respondent State. However, as it emerges from the file of the present Application, the Tribunal did not complete

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<sup>3</sup> See *Akwasi Boateng and Others v. Republic of Ghana*, ACtHPR, Application No. 059/2016, Ruling of 27 November 2020 (jurisdiction), §§ 53-62; *African Commission on Human and Peoples' Rights v. Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 64 and 65; *Norbert Zongo and Others v. Burkina Faso* (preliminary objections) (25 June 2013) 1 AfCLR 197, §§ 71-77, 83.

- the process and could therefore not make an Order before it wrapped up its activities as its life span had expired.
32. This Court further observes that the same claims arose in the proceedings initiated by the deceased before the High Court of the Respondent State. The said proceedings resulted first, in a default judgment dated 21 October 2005 by which the High Court declared that the confiscation violated the deceased's right to property and ordered both the restitution of the property and compensation for the confiscation. However, in an order dated 29 January 2008, the High Court, in considering assessment of damages, dismissed the claims for restitution and compensation on the grounds that the action was time barred under the Limitation Act and the matter fell within the exclusive purview of the National Compensation Tribunal.
33. In light of the foregoing, the last procedural act within the national judicial sphere is the Order issued by the High Court, which was on 29 January 2008. This procedural act therefore occurred prior to the date of 9 October 2008 when the temporal jurisdiction of this Court took effect in respect of the Respondent State by way of the deposit of the Declaration. However, the Court notes that the claims that formed part of the proceedings before the High Court are the basis for the alleged violation of the rights to equality before the law and fair trial in the present Application. Furthermore, the claim related to the breach of the rights to restitution and compensation as examined by the National Compensation Tribunal and subsequently by the High Court was not substantively addressed and thus remains unsettled to date.
34. It follows from the above findings that the claims related to the alleged violations of the rights to equality before the law, fair trial, restitution and compensation subsisted in time after the originating act of forfeiture and confiscation of property. The said alleged violations are therefore continuing as the lasting effect of the acts of forfeiture and confiscation.<sup>4</sup>

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<sup>4</sup> See *Jebra Kambole v. Tanzania*, §§ 23-24; *African Commission on Human and Peoples' Rights v. Kenya* (merits), §§ 64 and 65; *Norbert Zongo and Others v. Burkina Faso* (preliminary objections), §§ 71-77, 83. See also *Phosphates in Morocco (Italy v. France)*, 1938 P.C.I.J. (ser. A/B) No. 74 (June 14), p. 20.

35. As a consequence of the foregoing, the Court holds that it has temporal jurisdiction to hear the present Application with respect to equal protection of the law, fair trial, restitution and compensation.

#### **D. Territorial jurisdiction**

36. The Court holds that it has territorial jurisdiction to examine this Application given that the alleged violations occurred within the territory of the Respondent State, which is a party to the Protocol.
37. In light of the above, the Court holds that it has jurisdiction to hear the present Application.

### **VI. ADMISSIBILITY OF THE APPLICATION**

38. Pursuant to Article 6(2) of the Protocol, “[t]he Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.
39. In line with Rule 50(1) of the Rules, “[t]he Court shall ascertain ... the admissibility of an Application in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules.”
40. The Court notes that Rule 50(2) of the Rules, which in essence restates the provisions of Article 56 of the Charter, provides that:

Applications filed before the Court shall comply with all of the following conditions:

- a) Indicate their authors even if the latter request anonymity,
- b) Are compatible with the Constitutive Act of the Union and with the Charter;
- c) Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;

- d) Are not based exclusively on news disseminated through the mass media;
- e) Are sent after exhausting local remedies, if any, unless it is obvious that the procedure is unduly prolonged;
- f) Are submitted within a reasonable time from the date local remedies were exhausted or from the date the date the Commission is seized with the matter; and
- g) Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the Charter.

41. While some of the above conditions are not in contention between the Parties, the Respondent State raises two objections to the admissibility of the Application.

#### **A. Objections to the admissibility of the Application**

42. The first objection relates to exhaustion of local remedies while the second one is in respect of the submission of the Application within a reasonable time.

##### **i. Objection based non-exhaustion of local remedies**

43. The Respondent State argues that the Applicant should have filed a petition before the High Court, acting as a Constitutional Court, to hear his claim as one of breach of his constitutional right to property due to the National Compensation Tribunal's failure to conclude his case prior to winding up its operations. According to the Respondent State, the rights alleged to have been violated are guaranteed by the Constitution, and the Constitutional Court was empowered to enforce them if seized by the Applicant as it did in several instances.

44. The Respondent State further avers that the Applicant ought to have appealed the High Court's decisions before the Supreme Court of Appeal instead of prejudging the outcome of the proceedings before the latter. It is the Respondent State's submission that the Applicant failed to demonstrate that the appeal before the Supreme Court of Appeal did not offer any prospect of success.
45. The Applicant on his part argues that the deceased did not appeal to the Supreme Court of Appeal as it is manifest that such appeal would have been pointless and without any prospect of success, based on the jurisprudence of the Malawian courts.
46. The Applicant also submits that the deceased's Counsel attempted on several occasions to engage with the Ministry of Justice and Constitutional Affairs without success.

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47. The issues for determination are, first, whether the Applicant ought to have filed a case with the Constitutional Court for enforcement of his constitutional rights; and, second, if the Applicant should have appealed to the Supreme Court of Appeal or if he has proved that doing so did not offer any prospect of success.
48. This Court recalls that, within the meaning of Article 56(5) of the Charter, the Applicant is compelled to exhaust remedies that are available and effective among other factors.<sup>5</sup> Particularly on the requirement of effectiveness, the Court observes that a valid remedy must be assessed by its ability to address the Applicant's claim.<sup>6</sup> The Court has also held that there is no need for the Applicant to exhaust remedies that are futile.<sup>7</sup>

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<sup>5</sup> *Reverend Christopher Mtikila v. United Republic of Tanzania* (merits) (14 June 2013), 1 AfCLR 34, § 82.1; *Norbert Zongo and Others v. Burkina Faso* (merits) (28 March 2014) 1 AfCLR 219, § 68.

<sup>6</sup> *Jebra Kambole v. Tanzania*, §§ 38; *APDH v. Republic of Côte d'Ivoire* (merits) (18 November 2016) 1 AfCLR 668, § 94.

<sup>7</sup> *Reverend Christopher Mtikila v. United Republic of Tanzania* (merits) (14 June 2013) 1 AfCLR 34, § 82.3; *Lohe Issa Konate v. Burkina Faso* (merits) (5 December 2014) 1 AfCLR 314, § 112.

**a. Whether the Applicant ought to have approached the Constitutional Court**

49. The Court notes that pursuant to Section 108 of the Respondent State's Constitution, which also guarantees the right to property,<sup>8</sup> the High Court, sitting as a Constitutional Court, has original jurisdiction to review any action of the Government for conformity with the Constitution. This remedy should have therefore been effective in addressing the Applicant's claim as it arose in the proceedings before the National Compensation Tribunal and the High Court.
50. The Court however observes that, as it undisputedly emerges from the records of the present case, pursuant to Section 138 of the Respondent State's Constitution, the National Compensation Tribunal is vested with exclusive original jurisdiction to examine claims of confiscation of properties that occurred under the pre-1994 dispensation. The same Constitution provides for two main exceptions to the exclusive jurisdiction of the Tribunal which are that: i) the Tribunal itself may remit cases or questions of law to ordinary courts for determination where it does not have jurisdiction or in the interest of justice; and ii) the High Court may exercise jurisdiction to hear applications for judicial review and proceedings against private persons.
51. It follows from the foregoing that the above stated constitutional provisions prescribe an ouster of jurisdiction for all other courts, without providing a caveat in respect of the competence of the Constitutional Court. Furthermore, the powers of both the latter Court and the Tribunal are delineated by the same Constitution, which vests exclusive jurisdiction in the Tribunal. Finally, none of the above stated exceptions apply to the deceased's situation. As such, this Court considers that it would have been contrary to procedural effectiveness to revert to the Constitutional Court where the Tribunal had examined the deceased's claim, identified some of his properties and unsuccessfully engaged with the relevant authorities of the Respondent State for the said properties to be returned. This position is comforted by the High Court's finding

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<sup>8</sup> Section 28, Constitution of Malawi.

that it lacked jurisdiction among others because the claim fell within the exclusive purview of the Tribunal.

52. In light of these considerations, this Court finds that the Constitutional Court did not constitute an effective remedy that the Applicant ought to have exhausted prior to filing the present Application.

**b. Whether the Applicant should have appealed to the Supreme Court of Appeal**

53. The Court notes that Section 104 of the Constitution of the Respondent State provides that the Supreme Court of Appeal is competent to hear appeals from the High Court and such other tribunals as an Act of Parliament may prescribe. Section 21 of the Supreme Court Act further elaborates on its competence to hear appeals from the High Court on any civil matter.
54. Having said that, this Court considers that its earlier findings with respect to the Constitutional Court apply to the Supreme Court of Appeal. This Court remains cognisant of the argument made by the Respondent State, namely during the public hearing, that the Applicant could challenge the High Court's decision on assessment of damages before the Supreme Court of Appeal. However, in instances involving claims that are same as that of the Applicant, the Supreme Court of Appeal itself had declined to exercise jurisdiction, and affirmed the exclusive competence of the National Compensation Tribunal.<sup>9</sup> The Court considers this pronouncement of the highest court of the land made it superfluous for the Applicant to follow the same procedural course basically for the sake of doing so.

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<sup>9</sup> See e.g., *Donald Kaundama v. Attorney General*, MSCA Civil Appeal No. 43 of 2000, Judgment of 20 September 2002; *Attorney General v. JB Stennings Msiska*, MSCA Civil Appeal No. 42 of 1998, Judgment of 30 November 2000.



55. In light of the above, this Court finds that the Supreme Court of Appeal is not a remedy that the Applicant was compelled to approach before filing the present Application.
56. Given that none of the above considered remedies applied to the situation of the deceased, domestic remedies should be considered to have been exhausted when the High Court of the Respondent State dismissed his claim for compensation on 29 January 2008.
57. As a consequence of the foregoing, this Court dismisses the Respondent State's objection on the non-exhaustion of local remedies. The Court therefore holds that domestic remedies have been exhausted in the present Application.

**ii. Objection based on the failure to file the Application within a reasonable time**

58. The Respondent State avers that the Application was not filed within a reasonable time as it took the Applicant more than nine (9) years to do so, following the High Court's order of 29 January 2008. It also submits that the Applicant could not show that any of the exceptions to the rule of exhaustion of local remedies apply in his case, based on the jurisprudence of this Court and that of the African Commission on Human and Peoples' Rights. According to the Respondent State, the time spent by the Applicant to engage with the Attorney General should not be taken into account as the latter is not a judicial remedy as required under Article 56(6) of the Charter and stated in the jurisprudence of this Court.
59. The Applicant on his part alleges that the Application was filed within a reasonable time given that he attempted to engage with the Attorney General whose last communication on the matter is dated 18 October 2016. He further avers that the alleged violations are continuing.

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60. The issues for determination are whether the time within which the present Application was filed is reasonable or if the Applicant advances justifiable exceptions to a timely submission of the Application.
61. The Court recalls that, pursuant to Article 56(6) of the Charter, applications will be considered if they are filed within a reasonable time after exhausting local remedies if they exist, unless it is obvious that the procedure is unduly prolonged. These remedies should in principle be judicial and ordinary.<sup>10</sup> Furthermore, the onus lies on the Applicant to state and prove any exceptions that are applicable to the peculiar circumstances of the case.<sup>11</sup>
62. The Court also notes, as earlier established, that the Applicant exhausted local remedies when the High Court, on 29 January 2008, issued an order dismissing his application. However, the time to file the Application in this case should be computed from the date when the Respondent State filed the Declaration that is 9 October 2008. Therefore, it took eight (8) years, ten (10) months and nineteen (19) days before the present Application was filed on 28 July 2017.
63. The Court has however earlier found that the violations alleged by the Applicant are continuing in respect of the rights to equality before the law, fair trial, restitution and compensation. As a consequence, the alleged violations renew themselves day by day as long as they remain unsettled. As such, they may, at any point in time, form a cause of action before this Court thus making it irrelevant to adopt a strict application of the requirement of reasonable time within the meaning of Article 56(6) of the Charter.<sup>12</sup>

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<sup>10</sup> *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, §§ 63-65; *Wilfred Onyango Nganyi and Others v. United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 507, § 95; *Mgosi Mwita Makungu v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 550, §§ 44-46; *Lucien Ikili Rashidi v. United Republic of Tanzania* (28 March 2019) (merits and reparations) 3 AfCLR 13, § 44.

<sup>11</sup> See *Godfred Anthony and Another v. United Republic of Tanzania* (26 September 2019) (jurisdiction and admissibility) 3 AfCLR 470, §§ 48-49; *Hamad Mohamed Lyambaka v. United Republic of Tanzania*, ACtHPR, Application No. 010/2016, Ruling of 25 September 2020 (jurisdiction and admissibility), § 48.

<sup>12</sup> *Jebra Kambole v. Tanzania*, §§ 51-54.

64. In light of the above, the Court dismisses the Respondent State's objection on the filing of the Application within a reasonable time. The Court therefore holds that the Application meets the requirement of Article 56(6) of the Charter.

## **B. OTHER CONDITIONS OF ADMISSIBILITY**

65. The Court notes that there is no contention in respect of compliance with the requirements prescribed under Article 56(1), (2), (3), (4), and (7) of the Charter. Even so, the Court must satisfy itself that these conditions have been met.

66. From the record, the Applicant has been identified by name in compliance with Article 56(1) of the Charter.

67. The Application fulfils the requirement set out in Article 56(2) of the Charter as it does not contain any information suggesting that it is incompatible with the Charter of the OAU and the Charter.

68. The Application is not written in disparaging or insulting language and therefore meets the condition set out in Article 56(3) of the Charter.

69. Further, the Application is not based exclusively on news disseminated through mass media given that it is founded on official information and documents obtained from competent domestic institutions in fulfilment of the requirement prescribed in Article 56(4) of the Charter.

70. Finally, the Application does not deal with a case which has been settled in accordance with the principles the Charter of the United Nations or the Constitutive Act of the African Union or the Charter. This Application therefore meets the condition set out in Article 56(7) of the Charter.

71. As a consequence of the foregoing, the Court finds that all the admissibility requirements have been met and that the present Application is admissible.

## VII. MERITS

72. The Applicant alleges that the acts of the Respondent State amount to the violation of the rights to equal protection before the law and to have one's cause heard. The Applicant also alleges that the Respondent State violated the right to property.
73. In its written response to the Application and its submissions on reparations, the Respondent State denies any wrong doing and submits that its conduct does not violate any of the rights invoked by the Applicant.
74. While considering its competence *rationae temporis* earlier in the present Judgment, the Court held that it has jurisdiction to hear all the allegations made by the Application save for those related to the actual confiscation of the deceased's properties, which occurred in 1976, long before the Respondent State became a party to the Charter, the Protocol and made the Declaration. Given that the confiscation was based on the implementation of the Forfeiture Act, which ceased to exist after the Respondent State adopted its new Constitution in 1994, the Court will therefore not consider the alleged violation of the right to property.
75. Having said that, this Court observes that the issue central to the plea before domestic courts and which also arises before this Court is the restitution of the deceased's properties and compensation for the loss suffered due to the confiscation. This issue is no other than that of the right to a remedy although the Applicant did not expressly state so in his allegations and prayers.
76. The Court recalls that, as is now well-established in its case-law, there is no requirement that the Application should expressly state or cite the right or provision of the instrument allegedly violated. It is sufficient that the complaint

relates to rights guaranteed in the Charter or any other human rights instrument ratified by the State concerned.<sup>13</sup>

77. In light of the foregoing, the Court will now examine, in turn, the allegations of violation of the rights to equal protection before the law, to have one's cause heard and to a remedy.

#### **A. Alleged violation of the right to equal protection before the law**

78. The Applicant alleges that the Respondent State violated the right to equal protection before the law by not providing compensation and ousting the jurisdiction of domestic courts to entertain related claims.
79. The Respondent State refutes these allegations and contends that the alleged violation cannot be considered when local remedies were still available to the Applicant to vindicate the same right.

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80. Article 3 of the Charter provides that: "1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law."
81. The Court first notes that the Applicant alleges the violation of Article 3(1) of the Charter on the ground that the Respondent State did not provide compensation and ousted the jurisdiction of ordinary courts to examine the matter. However, the Court recalls that, in line with its case-law, equal protection of the law presupposes that the law protects everyone without discrimination.<sup>14</sup> Upholding this right therefore requires that not only the law but also the authorities in charge of its implementation ensure equal protection to

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<sup>13</sup> *Alex Thomas v. Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 45; *Wilfred Onyango Nganyi and Others v. Tanzania* (merits) (18 March 2016) 1 AfCLR 507, §§ 57, 58.

<sup>14</sup> *Action pour la Protection des Droits de l'Homme v. Côte d'Ivoire* (18 November 2016) 1 AfCLR 668, 146.

every citizen. Therefore, the violation alleged is rather of the right to equal protection of the law protected under Article 3(2) of the Charter.

82. In the present Application, it is not disputed that the National Compensation Tribunal examined petitions from many other citizens who were afforded remedies and their confiscated properties returned or compensation awarded to them for the loss suffered.<sup>15</sup> As for the deceased, his claim was never finalised by the Tribunal and attempts to vindicate his rights in ordinary courts were frustrated. It is worth recalling that the failure of the Tribunal to complete the deceased's case was due to the fact that the Respondent State's parliament declined to extend the mandate of the Tribunal. Furthermore, when seized by the Applicant, the Attorney General maintained that Government would not address the matter outside the framework of the Tribunal.<sup>16</sup>

83. The deceased and, later on the Applicant, were therefore left in a legal limbo whereas other Malawians in the same situation were afforded protection before the law. In the circumstances, it cannot be said that the Respondent State upheld the right to equal protection of the law.

84. The Court therefore finds that the Respondent State has violated Article 3(2) of the Charter.

#### **B. Alleged violation of the right to have one's cause heard**

85. The Applicant alleges that the Respondent State violated the right to have one's cause heard due to the failure to enforce the National Compensation Tribunal's decision, the failure to extend the life span of the Tribunal, and ouster of ordinary court's jurisdiction to entertain related claims.

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<sup>15</sup> See in general, Office of the Ombudsman, *Malawi's Unhealed Wounds: A Report on an investigation into allegations of maladministration and other irregularities by Malawi Government over the manner in which the National Compensation Tribunal was set up, operated and wound up*, October 2017.

<sup>16</sup> See Correspondence dated 23 May 2016 addressed by the Attorney General to Counsel for the deceased.

86. The Respondent State on its part avers that the deceased's filed an application before the High Court, which was dismissed for lack of jurisdiction and being time barred. It is the Respondent State's contention this allegation lacks merit and should be dismissed.

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87. Article 7(1) of the Charter provides that: "Every individual shall have the right to have his cause heard. ..." The Court notes that the Applicant also alleges violation of Article 14 of the ICCPR, which in the instant case is not any more detailed than Article 7(1) of the Charter in respect of the Applicant's claims. This Court will therefore examine only the alleged violation of Article 7(1) of the Charter.

88. The Applicant, under this allegation, raises three issues, namely i.) the failure to enforce the Tribunal's decision; ii.) the failure to extend the Tribunal's life span; and iii.) the ouster of domestic courts' jurisdiction.

**i. On the failure to enforce the Tribunal's decision**

89. The Court notes that, as part of the overall right to be heard, Article 7(1) of the Charter provides for "... a) The right to appeal to competent national organs against violating his fundamental rights ...". This right encompasses the right to have one's cause heard and to have the outcome of the said proceedings enforced.<sup>17</sup>

90. In the present Application, the Applicant alleges that the Respondent State's failure to enforce the decision of the Tribunal constitutes a violation of the right to have one's cause heard. However, as established earlier in this Judgment, while it investigated the matter, and engaged with the authorities to return those properties that had been identified to belong to the deceased, the Tribunal was unable to issue an actual Order. This Court is cognisant of evidence on file that,

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<sup>17</sup> Principle C(b)(ii), Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003).

in its communications to the authorities of the Respondent State, the Tribunal indicated that some of the properties confiscated had been identified as those of the deceased. The Tribunal also requested the same authorities to lend their cooperation for the said properties to be returned.

91. Notwithstanding their factual correctness, the Court considers that these communications cannot obligate the Respondent State as would have a formal Order. As a consequence, it cannot be said that the Respondent State did not comply with an Order when the Tribunal did not actually make any.
92. The Court therefore finds that the Respondent State has not violated the right to have one's cause heard in respect of the issue being considered.

**ii. On the failure to extend the Tribunal's life span**

93. With specific respect to the extension of the Tribunal's life span, the Court recalls States' duty under Article 1 of the Charter to adopt measures to give effect to the rights therein. The Court considers that, as part of this obligation, the Respondent State had the discretion to extend the life span of a tribunal which it established under its own Constitution.
94. The Court notes that, in the instant matter, it appears that the Respondent State took the option of granting exclusive jurisdiction to the Tribunal and subsequently decided not to extend its life span while ousting the jurisdiction of other ordinary judicial institutions to entertain matters left unresolved by the Tribunal. By doing so, the Respondent State left potential applicants and right-holders, including the deceased, in a limbo, a legal uncertainty, which constitutes a breach of the right to have one's cause heard in respect of the issue being examined.



### iii. On the ouster of domestic court's jurisdiction

95. Finally, regarding the ouster of domestic courts' jurisdiction, this Court recalls that, as per its case-law, ouster of domestic courts' jurisdiction generally leads to a breach of the right to have one's cause heard.<sup>18</sup>
96. In the instant matter, the Court notes that, as it has earlier found, neither the Supreme Court nor the Constitutional Court of the Respondent State were explicitly vested with jurisdiction to handle cases left unsettled by the Tribunal. As a matter of facts, the same Constitution, which established all three judicial bodies, expressly ousted the jurisdiction of all other courts with exceptions that are not applicable to the deceased. Such ouster of jurisdiction is affirmed by above referenced decisions of both the High Court and Supreme Court of Appeal.
97. This Court considers that, in the circumstances, the Respondent State deprived the deceased, and later on the Applicant, of an opportunity to pursue a new cause of action in ordinary courts after the Tribunal closed down without completing the matter. Similarly, the Applicant could not seek enforcement of the same finding in any other national judicial forum. It can therefore rightly be concluded that the ouster of jurisdiction of other domestic courts led to a breach of the right to have one's cause heard in respect of this issue.
98. As a consequence of the above, this Court finds that that the Respondent State violated the right to have one's cause heard protected under Article 7(1) of the Charter.

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<sup>18</sup> *Jebra Kambole v. Tanzania* (merits), §§ 96, 103, 104. See also, *Civil Liberties Organisation v. Nigeria* (2000) AHRLR 188 (ACHPR 1995), § 14.

### C. Alleged violation of the right to a remedy

99. The Applicant alleges that the Respondent State violated the deceased's right to have his confiscated properties returned and awarded compensation for the loss suffered.
100. The Respondent State on its part avers that domestic avenues were still available for the deceased and the Applicant to vindicate these rights but they did not make use of the same.

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101. The Court notes that, while it does not expressly provide for a right to a remedy, Article 1 of the Charter prescribes that "The Member States ..., parties to the present Charter shall recognise the rights enshrined therein ... and shall undertake to adopt legislative *and other measures* to give effect to them." Besides, Article 7(1)(a) of the Charter provides that "Everyone has the right to have his cause heard. This right comprises: a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force."
102. The Court considers that the right to a remedy derives from the obligation set out in Article 1 of the Charter to establish judicial or other such mechanisms to address alleged breaches of substantive rights protected in the Charter. This right to a remedy is further reinforced by a joint reading of Articles 1 and 7(1)(a) of the Charter. These provisions are in line with the general principle of law that a remedy must be afforded when rights are breached.
103. In the instant matter, as the verbatim record of the public hearing in this matter shows, the Respondent State does not deny that, subsequent to its 1994 constitutional dispensation, confiscation of properties effected under the

Forfeiture Act was declared wrongful and the Tribunal was set up to address related breaches. It is also undisputed that, in 1976, the deceased was subjected to forfeiture under the said Act.<sup>19</sup> In an Order dated 21 October 2005, the High Court found that “1. the confiscation of property by the Malawi Government is a violation of the Plaintiff’s right to property; 2. the Plaintiff is entitled to compensation for the confiscation; and 3. the said properties be returned to the Plaintiff”. Some of the said properties were actually returned in implementation of the afore cited Order.

104. The Court notes that tremendous efforts made by the deceased to have his properties returned and obtain compensation within the framework of the National Compensation Tribunal remained in vain. Furthermore, through its Order dated 29 January 2008 dismissing the Applicant’s assessment claim as time barred and falling exclusively within the jurisdiction of a Tribunal whose term has elapsed, the High Court confirmed that there was no glimmer of hope that the Applicant would obtain an effective remedy within the domestic sphere.
105. The Respondent State does not deny efforts vested by the deceased in seeking enforcement of his rights and numerous exchanges involving the Attorney General are sufficient evidence to that effect. Notably, as earlier established while determining the admissibility of this Application, both the High Court and Supreme Court of Appeal turned the Applicant back to the National Compensation Tribunal which they knew well was no longer in existence.
106. As such, the failure established above to return the properties of the deceased and provide compensation for the loss suffered constitutes a breach of the right to a remedy guaranteed under Article 7(1)(a) of the Charter as read jointly with Article 1 of the Charter.

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<sup>19</sup> See General Notice No. 102 of 26 January 1976, Forfeiture Act (Cap. 14:06) Mbalanda Mwezimwapala Munthali Notice Ref. No. DT/COM/173/97 of 7 February 2000 addressed by the Chief Legal Aid Advocate to the Attorney General; Notice Ref. No. NCT/C/452 of 21 June 2003 addressed by the Administrator of the National Compensation Tribunal to the Director of Fisheries, cc District Commissioner.

## VIII. REPARATIONS

107. Article 27(1) of the Protocol provides that

If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

108. The Court recalls its earlier judgments and restates its position that:

To examine and assess applications for reparation of prejudices resulting from human rights violations, it takes into account the principle according to which the State found guilty of an internationally wrongful act is required to make full reparation for the damage caused to the victim.<sup>20</sup>

109. The Court further restates that reparation "... must, as far as possible, erase all the consequences of the wrongful act and restore the state which would presumably have existed if that act had not been committed."<sup>21</sup>

110. The Court also recalls that measures that a State would take to remedy a violation of human rights includes, notably, restitution, compensation and rehabilitation of the victim, satisfaction and measures to ensure non-repetition of the violations taking into account the circumstances of each case.<sup>22</sup>

111. The Court reiterates that with regard to material prejudice, the general rule is that there must be existence of a causal link between the alleged violation and the prejudice caused and the burden of proof is on the Applicant who has to

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<sup>20</sup> *Sadick Marwa Kisase v. United Republic of Tanzania*, ACtHPR, Application No. 005/2016, Judgment of 2 December 2021, § 88; *Wilfred Onyango Nganyi and 9 others v. United Republic of Tanzania* (4 July 2019) (reparations) 3 AfCLR 308, § 13; *Ingabire Victoire Umuhoza v. Republic of Rwanda* (reparations) (7 December 2018) 2 AfCLR 202, § 19.

<sup>21</sup> *Mohamed Abubakari v. Tanzania* (reparations), § 20; *Alex Thomas v. Tanzania* (reparations), § 12; *Wilfred Onyango and Others v. Tanzania* (reparations), § 16; *Ingabire Victoire Umuhoza v. Rwanda* (reparations), § 20; *Lucien Ikili v. Tanzania* (merits and reparations), § 118.

<sup>22</sup> *Mohamed Abubakari v. Tanzania* (reparations), § 21; *Alex Thomas v. Tanzania* (reparations), § 13; *Ingabire Victoire Umuhoza v. Rwanda* (reparations), § 20.

provide evidence to justify his/her prayers.<sup>23</sup> Exceptions to this rule include moral prejudice, which need not be proven.

112. In the present case, the Court has found that the Respondent State violated the rights to equal protection before the law, and to have one's cause heard as well as the right to a remedy guaranteed under Articles 3(2), 7(1) and Article 7(1)(a) as read jointly with Article 1 of the Charter respectively.

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113. The Applicant prays the Court to order pecuniary reparations for the loss suffered as a result of the confiscation; and compensation for the hardship suffered by the Applicant and other dependants of the deceased. In his written submissions, the Applicant provides a list of the deceased's dependants who are his nine (9) children as follows: Margaret Munthali, Samuel Munthali, Elliot Munthali, Davie Mwamvani Munthali, Harold Mbalanda Munthali (the Applicant), Mwanjezga Munthali, Yawelera Munthali, Eniferg Munthali, and Fikani Munthali.

114. The Respondent State prays the Court to dismiss the claims of the Applicant and declare that he is not entitled to any compensation. According to the Respondent State, the National Compensation Tribunal was not created with the intention to provide compensation understood as 'damages' in ordinary courts or "heal the wounds" completely but only to acknowledge the injury and make a token relief. The Respondent State does not challenge the list of dependants supplied by the Applicant.

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<sup>23</sup> *Tanganyika Law Society, the Legal and Human Rights Centre v. United Republic of Tanzania*, Application 009/2011, *Reverend Christopher R. Mtikila v. United Republic of Tanzania*, 011/2011 (Consolidated Applications) (reparations) (13 June 2014) 1 AfCLR 72, § 40; *Lohé Issa Konaté v. Burkina Faso* (reparations) (3 June 2016) 1 AfCLR 346, § 15; *Mohamed Abubakari v. Tanzania* (reparations), § 22; *Alex Thomas v. Tanzania* (reparations), § 14; *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v. Burkina Faso* (reparations) (5 June 2015) 1 AfCLR 258, § 24.

115. In light of these prayers and subsequent submissions made by both Parties during the public hearing, the Court finds it preliminary to restate some main considerations which will apply in the present determination on reparations. These considerations are drawn not only from written pleadings but also agreements reached by the Parties during the public hearing.
116. Firstly, both the National Compensation Tribunal, the High Court and representatives of the Respondent State have acknowledged that confiscation done by virtue of the Forfeiture Act during the pre-1994 constitutional dispensation was unlawful and must be remedied. It is also established that the deceased was wrongly subjected to such forfeiture, for which reparation is warranted. The list of properties involved in the present claim is that which was supplied by the Applicant as Item No. 13 on file. The said list complements that featuring in the Valuation dated 17 March 1976 drawn by Licensed Valuer Howard J. Downs upon the request of the Attorney General of the Respondent State.
117. Secondly, following the implementation of the High Court Order dated 21 October 2005, the immovable properties, namely lands and houses, were returned to the deceased. During the public hearing, the Applicant reiterated that i.) the immovable properties recovered were in dilapidated conditions; and ii.) some of them were even destroyed. The Respondent State does not dispute these statements.
118. Thirdly, the movable properties can no longer be traced; the deceased lost the related documents while he was being expelled during the confiscation; the ownership titles could not be recovered from competent Government offices since the Respondent State did not at the time have any registration procedure for movable properties.
119. Finally, in respect of the assessment of quantum, the Tribunal's Rules of Procedure and determination by the Supreme Court of Appeal establish a

threshold of Malawi Kwacha Ten Million (MWK 10,000,000) for compensation to be granted by the Tribunal.

120. The Court notes that the Applicant makes claims for material loss regarding the confiscated properties, and asks for moral damages for hardship suffered by dependants. The Court will examine the claims bearing in mind these factors.

#### **A. Material loss**

121. The Applicant claims that, at the time of filing the present Application, the total value of the loss was estimated at One Million One Hundred Four Thousand Five Hundred Thirty-Nine Dollars and Eighty-Seven Cent (US\$ 1 104 539.87). However, he avers that the assessment conducted by the deceased in 1995 was done in Malawian Kwacha and was of the value of Ten Million Two Hundred Eighty-Five Thousand Two Hundred Fifty-Four Malawian Kwacha and Ninety-Seven Cent (MWK 10,285,254.97).
122. The Respondent States avers that, irrespective of the amount of loss, the Tribunal had no capacity to compensate a victim with more than Ten Million Kwacha (MKW 10, 000, 000). It is the submission of the Respondent State that, even if the Tribunal had completed its processes, the compensation would not have exceeded that amount.

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123. The Court notes that, as established earlier in this Judgment, claims for reparation should cover only compensation but not restitution of the movable properties which could not be traced. The same claims will also be considered in light of loss ensuing from the deterioration of immovable properties returned in a dilapidated state.

124. The Court observes that two main issues are in dispute between the Parties as to the assessment of material loss. These are: i.) the contents and accuracy of the list adduced by the Applicant; and ii.) the monetary value of the properties involved.
125. Regarding the first issue, the Court notes that the Respondent State challenges the accuracy of the list adduced by the Applicant without however submitting its own list. The Court considers that, as the authority which enacted and enforced the Forfeiture Act, the Respondent State bore the responsibility to keep an accurate list of items that were seized in implementation of that legislation. In any event, the accuracy of the list becomes irrelevant when the Parties agree that the properties involved in the claim made under the present Application are worth no more than a total of Ten Million Kwacha (MKW 10, 000, 000) as at the time of seizure.
126. With respect to the second issue, the Court restates the Parties' agreement on the value of Ten Million Kwacha (MKW 10, 000, 000) of the properties involved. However, this value is premised on a valuation dating back at the time of seizure of the properties in 1976, or at least as at the time of valuation by the deceased which is in 1995. The question that arises at this juncture is then whether, as the Applicant prays, the amount as initially evaluated should, due to exchange and currency appreciation over time, be reevaluated up to the amount of One Million One Hundred Four Thousand Five Hundred Thirty-Nine Dollars and Eighty-Seven Cent (US\$ 1 104 539.87). The Applicant submits that the figure is arrived at by referring to the official exchange rate between the Malawi Kwacha and the United States Dollar.
127. Be that as it may be, in light of the earlier cited provisions of the Article 27(1) of the Protocol, it is only logical that limitations in terms of the type of remedy and ceiling of quantum of reparation are applicable within the framework of the Tribunal and not to ordinary courts of the Respondent State let alone to this



Court. This point is corroborated by provisions of the Tribunal's Act, and the Constitution of the Respondent State.

128. The Court is cognizant of the fact that material properties appreciate over time and so should the monetary value attached to them. This notwithstanding, none of the Parties is able to supply the Court with the most accurate such updated valuation which would have been provided by a jointly appointed valuer. Given the significant length of time that has elapsed since the events occurred, any expertise procedure would have proved time costly and delayed justice. In the Court's view, assessment which is closest to accurate would be one that is pegged on inflation.
129. In arriving at a figure that meets the need of justice, the Court cannot ignore the subjective circumstances of this Application. The deceased was a wealthy businessman involved in industrial fishing whose products he exported in Africa and overseas but died destitute. As earlier established, material damage for which reparation is sought includes not only all movable properties but also deterioration of houses that were returned. Bearing this in mind, the business for which they served had a potential of growth over time had the movable properties not been confiscated.
130. Finally, the Court notes that, based on inflation as earlier decided, the amount of Ten Million Two Hundred Eighty-Five Thousand Two Hundred Fifty-Four Malawian Kwacha and Ninety-Seven Cent (MWK 10,285,254.97) was worth Four Hundred Ninety-Three Million Six Hundred Ninety-Two Thousand One Hundred and Ninety-Two Malawian Kwacha (MKW 493,692,192) as at the time the Application was filed in 2017 (i.e. based on the rate of USD1 equals MKW725 according to which the initial amount had increased by Forty-Eight (48) times). If the assessment was to be done as at the time of reparation, which would be as at the date of the present Judgment, the initial amount stated above would be worth Six Hundred Seventy-Eight Million Eight Hundred Twenty-Six Thousand Seven Hundred Sixty-Four Malawian Kwacha (MKW

678,826,764) to date (i.e. based on the rate of USD1 equals MWK1,000.17 according to which the initial amount would increase by Sixty-Six (66) times).

131. In deciding the quantum of damages to award in the instant case, the Court takes into account all the parameters elaborated earlier, but also the general context of the establishment by the Respondent State of the National Compensation Tribunal with a view, not to necessarily address the prejudice fully, but to attempt to alleviate the suffering of the victims.
132. Against these considerations, and in the interest of justice, the Court awards the Applicant and other dependants of the deceased the amount of Two Hundred Million Malawian Kwacha (MKW200,000,000) for material prejudice on account of the movable properties and loss incurred from the deterioration of houses returned in a dilapidated state.

## **B. Moral prejudice**

133. The Applicant prays the Court to grant moral damages to him and the eight (8) other dependants of the deceased for the hardship suffered due to the actions of the Respondent State. The Applicant does not put any figure to the prejudice.
134. The Respondent, in its written submissions, avers that the issue of reparation does not arise given that the matter should not be admitted in the first place. However, during the public hearing, the Respondent State acknowledged that the deceased was wronged as part of the unlawful actions that occurred under the pre-1994 dispensation. It also agreed that national mechanisms were established in recognition of Government's duty to grant reparation.

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135. The Court recalls that, as established in its case-law, moral prejudice is presumed in cases of human rights violations, and quantum of damages in this respect is assessed based on equity, taking into account the circumstances of the case.<sup>24</sup> The Court has adopted the practice of granting a lump sum in such instances.<sup>25</sup>
136. The Court notes that, as earlier established, the Respondent State violated the rights to equal protection before the law, to have one's cause heard and to a remedy.
137. The Court notes that the deceased was survived by his nine (9) children who are: Margaret Munthali, Samuel Munthali, Elliot Munthali, Davie Mwamvani Munthali, Harold Mbalanda Munthali (the Applicant), Mwanjezga Munthali, Yawelera Munthali, Eniferg Munthali, and Fikani Munthali. It is worth recalling that the deceased was the breadwinner of his family. He was subjected to forfeiture in 1976 and died in 2010 after recovering just part of his properties only in 2008, most of them in a dilapidated state. His wife died a month earlier. As has also emerged from the public hearing, all the movable properties which mainly consist of boats and other materials supporting the deceased's business could not be recovered thus causing him and his family to face economic hardship.
138. Close relationship between the deceased and the claimants is established based on the list of dependants provided in the written submissions of the Applicant, which he reiterated during the public hearing. The Respondent State did not challenge the said list. The Applicant and other dependants of the deceased have also, upon the demise of the deceased in November 2010, inherited the properties recovered through a High Court order appointing the

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<sup>24</sup> *Norbert Zongo and Others v. Burkina Faso* (reparations), § 55; and *Ingabire Victoire Umuhoza v. Rwanda* (reparations), § 59.

<sup>25</sup> *Lucien Ikili Rashidi v. Tanzania* (merits and reparations), § 119; *Minani Evarist v. United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 402, § 18; and *Armand Guehi v. Tanzania* (merits and reparations), § 177.

Applicant as the Administrator of the deceased's estate. As such prejudice has necessarily ensued from the continued failure to provide compensation since 2010, and the uncertainty as to whether they will ever recover the property or be compensated for the loss.

139. In light of these considerations, the Court considers that damages are warranted. In applying fairness, the Court grants the Applicant and other dependants of the deceased the token amount of One Million Malawi Kwacha (MKW 1, 000, 000) each as moral damages.

## IX. COSTS

140. Rule 32(2) of the Rules provides that, “[u]nless otherwise decided by the Court, each Party shall bear its own costs.”

141. The Applicant prays the Court to make an order for costs.

142. The Respondent State on its part prays the Court to order that the Applicant should bear the costs.

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143. The Court notes that, in line with its earlier judgments, reparation may include payment of legal fees and other expenses incurred in the course of both domestic and international proceedings.<sup>26</sup> The Applicant must provide justification for the amounts claimed.<sup>27</sup>

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<sup>26</sup> *Norbert Zongo and Others v. Burkina Faso* (reparations), §§ 79-93 and *Reverend Christopher R. Mtikila v. Tanzania* (reparations), § 39; *Alex Thomas v. Tanzania* (reparations), § 77; and *Mohamed Abubakari v. Tanzania* (reparations), § 81.

<sup>27</sup> *Norbert Zongo and Others v. Burkina Faso* (reparations), § 81 and *Reverend Christopher R. Mtikila v. Tanzania* (reparations), § 40; *Alex Thomas v. Tanzania* (reparations), § 77; and *Mohamed Abubakari v. Tanzania* (reparations), § 81.

144. In this case, the Applicant does not put any figure to the costs claimed, nor does he provide justification or evidence for the same. The prayers is consequently dismissed.

145. The Court consequently rules that each party bears its own costs as there is no compelling reason for it to depart from the applicable Rules.

## **X. OPERATIVE PART**

146. For these reasons,

THE COURT,

*Unanimously:*

*On jurisdiction*

- i. *Declares* that it has jurisdiction.

*On admissibility*

- ii. *Dismisses* the objections to the admissibility of the Application;
- iii. *Declares* that the Application is admissible.

*On the merits*

- iv. *Holds* that the Respondent State has violated the right to equal protection before the law guaranteed under Article 3(2) of the Charter;
- v. *Holds* that the Respondent State has violated the right to have one's cause heard protected under Article 7(1) of the Charter;
- vi. *Holds* that the Respondent State has violated the right to a remedy guaranteed under Article 7(1)(a) as read jointly with Article 1 of the Charter.

*On reparations*

- vii. *Grants* the Applicant's prayer for reparation for material loss as a result of the failure to make compensation for the loss suffered as a result of the confiscation; and *awards* the Applicant and other dependants of the deceased the sum of Two Hundred Million Malawian Kwacha (MKW 200,000,000);
- viii. *Grants* the prayer for reparation for moral prejudice suffered by the Applicant and other dependants of the deceased who are Margaret Munthali, Samuel Munthali, Elliot Munthali, Davie Mwamvani Munthali, Harold Mbalanda Munthali (the Applicant), Mwanjezga Munthali, Yawelera Munthali, Eniferg Munthali, and Fikani Munthali for the hardship suffered due to the continued failure of the Respondent State to return the deceased's properties and compensate him for the loss suffered as a result of the confiscation; and *awards* them the amount of One Million Malawi Kwacha (MKW 1, 000, 000) each as moral damages;
- ix. *Orders* the Respondent State to pay the amounts indicated under (vii) and (viii) above free from taxes effective one year from the date of notification of this Judgment, failing which it will pay interest on arrears calculated on the basis of the applicable rate of the Reserve Bank of Malawi throughout the period of delayed payment until the amount is fully paid.


*On implementation and reporting*

- x. *Orders* the Respondent State to submit to this Court, within six (6) months from the date of notification of the present Judgment, a report on the measures being taken to implement the orders set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

*On costs*


- xi. *Does not grant* the prayer on costs;
- xii. *Decides* that each party shall bear its own costs.


**Signed:**

Imani D. ABOUD, President; 


Blaise TCHIKAYA, Vice-President; 


Ben KIOKO, Judge; 


Rafaâ BEN ACHOUR, Judge; 

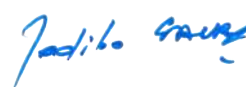
Suzanne MENGUE, Judge; 


M-Thérèse MUKAMULISA, Judge; 

Chafika BENSAOULA, Judge; 

Stella I. ANUKAM, Judge; 

Dumisa B. NTSEBEZA, Judge; 

Modibo SACKO, Judge; and 

Robert ENO, Registrar. 

Done at Arusha, this Twenty Third Day of June in the year Two Thousand and Twenty-Two, in English and French, the English text being authoritative

