



African Court
on Human and Peoples' Rights

Arusha, Tanzania

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JUDGMENT SUMMARY

BERNARD ANBATAAYELA MORNAH

V.

**REPUBLIC OF BENIN,
BURKINA FASO,
REPUBLIC OF COTE D'IVOIRE,
REPUBLIC OF GHANA,
REPUBLIC OF MALI,
REPUBLIC OF MALAWI,
REPUBLIC OF TANZANIA,
REPUBLIC OF TUNISIA**

**SAHRAWI ARAB DEMOCRATIC REPUBLIC AND REPUBLIC OF MAURITIUS
(INTERVENING)**

**APPLICATION N° 028/2018
JUDGMENT ON MERITS AND REPARATIONS**

22 SEPTEMBER 2022

A DECISION OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

Arusha, 22 September 2022: The African Court on Human and Peoples' Rights (the Court), today, delivered a Judgment in the case of *Bernard Mornah v. Republic of Benin and 7 Others*.

Mr. Bernard Mornah (the Applicant) is a national of the Republic of Ghana, and he brought this Application against eight (8) State Parties to the Protocol, that is, the Republic of Benin, Burkina

Faso, Republic of Cote d'Ivoire, Republic of Ghana, Republic of Mali, Republic of Malawi, Republic of Tanzania, Republic Of Tunisia (the Respondent States).

The Applicant alleged that the Respondent States have violated their international obligations under the African Charter on Human and Peoples' Rights (the Charter) and the Constitutive Act of the AU by failing to safeguard the sovereignty, independence and territorial integrity of the Sahrawi Arab Democratic Republic (SADR) and by admitting Morocco to the AU without any conditions requesting it to end its occupation of the SADR's territory. The Applicant specifically averred that the admission of Morocco to the African Union is inconsistent with, inter alia, Articles 3, 4 and 23 the Constitutive Act and Articles 1 2, 7,13, 19, 20, 21, 22, 23 and 24 of the Charter.

The Respondent States objected to the Court's material, personal, territorial and temporal jurisdiction.

With regard to its material jurisdiction, the Court identified and addressed four objections.

The first objection is that the application raised issues of political and diplomatic nature against the principles of state sovereignty and non-intervention. On this point, the Court observed that an application may raise issues of a political or diplomatic nature or may seek reliefs that may require political decisions or diplomatic solutions. However, the Court held that as long as the application contains allegations of human rights violations, it has the competence to consider and examine such allegations. Relating to the issue of sovereignty, the Court noted that once States have willingly ceded their consent to the jurisdiction of an international tribunal, they cannot raise sovereignty as a defence or justification to preclude the tribunal from exercising its jurisdiction.

The second issue was whether the application is based mainly or only on the Constitutive Act of the African Union and the admission of Morocco to the AU. The Court noted that the application was not exclusively based on the AU's decision to admit Morocco but also on the alleged general behaviour or attitude of the Respondent States towards the suffering of the people of SADR. Furthermore, the Court noted that the Application also contains allegations of violations of the Charter and other human rights instruments ratified by the Respondent States which, pursuant to Article 3 of the Protocol, the Court is empowered to interpret and apply.

The Court then addressed the third issue of whether the Application is like a request for advisory opinion. The Court noted that although the Application mentions Article 4 of the Protocol, the application was clearly directed against the Respondent States and it is evident from the Applicant's submissions that he did not intend to request for an advisory opinion.

As regards the fourth issue, that is, whether the AU Assembly has transferred the SADR's matter to the United Nations, the Court referred to the relevant AU Assembly's decision in question and found that the AU did not decide to disengage itself but rather expressed its commitment to a permanent political solution of the problem. The Court further made a distinction between the political process within the AU and the judicial proceedings initiated by the Applicant and held that the political process within the AU and the UN does not oust its competence to consider the matter.

In conclusion, the Court dismissed the Respondent States' objections and found that it had material jurisdiction to examine the application.

The Court then addressed the objections to its personal jurisdiction. The Court observed that its personal jurisdiction is governed by Article 5 and 34(6) of the Protocol with regard to applications filed by individuals or Non-Governmental Organisations. Pursuant to these provisions, the Court noted that it assumes jurisdiction over a particular matter filed by an individual where the State is a party to the Charter or any other human rights instrument; to the Protocol and deposited a Declaration allowing individuals to have direct access to the Court. In the instant Application, the Court noted that all the Respondent States were parties to the Charter and the Protocol and have deposited the Declaration required under Article 34(6) of the Protocol.

All the same, the Court noted that some of the Respondent States had withdrawn their Declaration. Yet, it held that the withdrawal of a Declaration deposited pursuant to Article 34(6) of the Protocol did not have any retroactive effect and bearing on matters filed before it prior to the withdrawal of the Declarations.

On the Respondent States' objection to the Applicant's *locus standi*, based on his alleged lack of interest in the matter or his status as not being a victim of the alleged violations, the Court held that the Protocol does not require individuals or NGOs to demonstrate a personal interest in an Application in order to access the Court, especially in the case of public interest litigation.

Concerning its temporal jurisdiction, the Court held that it has temporal jurisdiction as all the Respondent States, except Tunisia became a Party to the Charter and the Protocol, and deposited the Declaration under Article 34(6) of the Protocol prior to the date when Morocco officially filed its request to join the AU, that is, on 22 September 2016, the date from which the Applicant claims the violations by the Respondent State commenced. With respect to Tunisia, the Court noted that it became a party to the Charter on 21 October 1986 and to the Protocol on 21 August 2007 but deposited its Declaration under Article 34 (6) of the Protocol on 2 June 2017,

that is, after Morocco's admission processes was completed. However, the Court observed that the human rights alleged to have been violated as a result of such omission are continuing in nature given that the people of Western Sahara are still living under Morocco's occupation and thus, held that it had temporal jurisdiction.

As regards its territorial jurisdiction, the Court noted that it is the alleged conduct of the Respondent States, that is, their failure to protect the sovereignty, territorial integrity and independence of the SADR that is said to have engendered the violations of the rights of the people Western Sahara. The Court nevertheless maintained that, strictly speaking, the actual violations were committed not in the territories of the Respondent States. According to the Court, it is the Respondent States' purported omission that has had an extraterritorial effect, that is, the continued violation of the rights and freedoms of the people of SADR. Accordingly, considering the nature of the right to self-determination, whose scope of application is not limited by territory, the Court held that it had territorial jurisdiction.

Having established that it had material, personal, temporal, and territorial jurisdiction, the Court concluded that it was competent to examine the Application.

On the admissibility of the Application, the Respondent States raised several objections relating to the requirements that the identity of the Applicant must be disclosed; that the Application must comply with the Constitutive Act and the Charter, must not be based on news disseminated through the mass media, must be filed after exhaustion of local remedies, must be filed within a reasonable time and must not raise any matter or issue previously settled by the parties in accordance with the principles of the UN Charter, the Constitutive Act or any legal instrument of the Union, as enshrined under Rule 50 (2) (a)-(b) and (d)-(g) of the Rules, respectively.

With regard to the first condition, the Court noted that the Applicant has identified himself by name and accordingly held that the identity of the Applicant is sufficiently disclosed as required under Rule 50(2)(a) of the Rules.

In relation to the second condition of admissibility, the Court noted that in line with Rule 50(2)(b) of the Rules, the instant Application, having been filed with a view to protecting the rights and freedoms of the people of the SADR, is compatible with the objective and principles of the Union. The Court also stressed that the mere fact that an application invokes provisions of the Constitutive Act does not necessarily render the application incompatible with the Act or the Charter.

Concerning the third condition, the Court noted that the term “exclusively” in Rule 50(2)(d) of its Rules makes it clear that what is prohibited is the complete reliance of an application on news obtained from the media. Furthermore, the Court emphasised that there are facts, whether or not reported in the media, that an applicant may rely on in his or her application or that the Court itself should take judicial notice. In the instant case, the Court noted that the Applicant substantially relied on the various resolutions and decisions of organs of the UN and decisions of the AU. It stressed that the decisions and resolutions and the realities on which they were based are facts that the Court also takes judicial notice and were not mere media reports. Accordingly, the Court held that the Application cannot be said to be exclusively based on news disseminated through the media.

As regards the fourth condition, the Court recalled that Rule 50(2)(e) of the Rules provides that an application filed before it must fulfil the requirement of exhaustion of local remedies.

Considering that the Application was directed against several Respondent States, and that the reliefs sought demanded their individual and/or collective action, the Court found it unreasonable to require the Applicant to sue all the Respondent States either in his country, which is barred by sovereign immunity, or before their respective domestic remedies. The Court noted that this would not only be cumbersome but also occasion foreseeable undue prolongation resulting from the multiplicity of the Respondent States. Consequently, the Court held that the instant Application should be deemed to have met the requirement of exhaustion of local remedies.

On the fifth condition that an application must be filed within a reasonable time, the Court noted that Rule 50(2)(f) of its Rules requires an Application to be filed within: “a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter”. The Court noted that given the continuing nature of the Respondent States’ alleged failure to safeguard the independence and territorial integrity of the SADR and as a result, the violation of the rights and freedoms of its people, the date to compute reasonableness is immaterial. According to the Court, the alleged breach of the Respondent States’ obligation under the Charter renews itself every day and hence, an application may be filed at any time as long as the Respondent States do not take actions to discharge their obligations. Accordingly, the Court held that the Application was filed within a reasonable time and complies with the requirement of Rule 50(2)(f) of the Rules.

With regard to the six condition that an application shall “not raise any matter or issues previously settled by the parties, the Court noted that the examination of compliance with this provision

required it to ascertain that an application has not been settled “in accordance with the principles” of the UN Charter or the Constitutive Act or the provisions of the Charter. The Court recalled that a matter is considered as “settled” within the meaning of Rule 50(2)(g) of its Rules only if three cumulative conditions are fulfilled: (i) the identity of the parties is the same; (ii) the issues for determination are identical or substantially similar as ones before the Court; and (iii) there already exists a decision on the substance or merits. In other words, there must be a final resolution of the matter.

In the instant case, the Court took note of the Respondent States’ objections that the matter was already settled by the Advisory Opinion of the ICJ on Western Sahara of 16 October 1975 and the African Union Assembly’s decision during the Nouakchott Summit of July 2018. The Court also indicated that in both the ICJ’s Advisory proceedings and the AU Assembly meetings of Nouakchott, the instant Parties, including the Applicant, were not involved in the process nor were the reliefs sought in the instant Application addressed. In view of this, the Court held that the matter cannot be considered to have been ‘settled’ and thus, the Application was compatible with the admissibility condition specified under Rule 50(2)(g) of the Rules.

Concerning the condition of admissibility that an application must not contain insulting or disparaging language, even if the Respondent States did not raise any objection in this regard, the Court nevertheless considered same and observed that the Application did not contain any language or remarks that could be considered as offensive or insulting. Thus, the Court held that the Application was consistent with the requirements of Rule 50(2)(c) of the Rules.

Having found that all the admissibility requirements are met, the Court declared that the Application was admissible within the terms of Rule 50 (2) of the Rules.

After having established that it had jurisdiction and the Application was admissible, the Court proceeded to examine the violations alleged by the Applicant.

The Court first pointed out that at the core of the Application lied the Applicant’s allegation that the admission of Morocco to the AU was not opposed by Respondent States in spite of their individual and collective obligation to defend the sovereignty of Western Sahara. The Court noted that, on this basis, the Applicant alleged violations of several rights of the people of Western Sahara, including the right to non-discrimination, the right to a fair trial, the right to participation in political activities of one’s own country; the right to equality of all peoples, the right to self-determination; the right to right to dispose of natural resources, the right to development, the right to peace and the right to satisfactory environment.

However, considering the facts of the case and the submissions of the parties, the Court was of the view that the Application was essentially and firmly linked to the right to self-determination, particularly, the right of the people of SADR to obtain assistance in their struggle for freedom from foreign occupation. Although the other rights were autonomous by their nature, the Court observed that their violation basically flows from the alleged denial of the right to self-determination of the people of Western Sahara. In this particular circumstance, the Court therefore deemed it unnecessary to deal with them and thus, limited its determination to the alleged violation of the right to self-determination of the people of the SADR and the putative responsibility of the Respondent States with regard to such violation.

The Court further observed that the Respondent States were in no way alleged to have collectively or individually engaged in actions to conquer or annex the territory of the SADR. Rather, the Applicant's assertion was that in conducting their international affairs, particularly, while voting to admit Morocco to the AU, the Respondent States did not take into account their obligation to support and protect the people of Western Sahara against violations resulting from Morocco's occupation.

Accordingly, the Court stated that, in the application of Article 20 of the Charter, which relates to the right to self-determination, the conduct of the Respondent States with regard to the SADR should be distinguished from that of Morocco, which the Applicant alleged to have directly violated the rights of the people of SADR through occupation. It was therefore the view of the Court that the conduct of the Respondent States should be determined in the light of their obligation arising from Article 20(3) of the Charter, which provides that "All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural".

The Court then found it pertinent that such determination of the Respondent States' responsibility should consider the nature of the right to self-determination in general, and its unique place and relevance in the African continent and to the African society, in particular.

In this regard, the Court observed that the notion of self-determination has strong resonance with Africa and carries a special and deep meaning to its people. The Court noted that for this reason, African States have consistently exhibited unwavering commitment to the right to self-determination by supporting or sponsoring resolutions adopted within the AU, the United Nations and other regional and international fora. According to the Court, it is this fact that also underpinned Article 20 of the Charter, which weaves the right to self-determination into the *right*

to existence of peoples, something that denotes a wholesale entitlement or right to survival as people.

Furthermore, the Court underlined that the obligations resulting from the right to self-determination are owed by States not only towards those who are under their jurisdiction but also to all other peoples who are not able to exercise or have been deprived of their right to self-determination. It is in line with this that Article 20 of the Charter confers the right to get assistance from “*all peoples*” without geographical or temporal limitations.

The Court also observed that the right to self-determination is essentially related to peoples’ right to ownership over a particular territory and their political status over that territory. In this regard, the Court indicated that both the UN and the AU recognise the situation of SADR as one of occupation and consider its territory as one of those territories whose decolonisation process is not yet fully complete. As a result, it recalled that both organisations have consistently called for Morocco and SADR to engage in direct negotiations in good faith with a view to conducting a referendum to ensure the right to self-determination of the people of Western Sahara.

The Court further stressed that the continued occupation of the SADR by Morocco is incompatible with the right to self-determination of the people of SADR as enshrined in Article 20 of the Charter. However, the Court observed that the responsibility of the Respondent States in this respect would be engaged only if three cumulative conditions are proven to have existed: *an act or omission violating international law*, that is, *an internationally wrongful act*; *the act must be attributed to the Respondent States (attribution)*; and *the act must cause a damage or loss (causal link)*.

Applying these conditions, the Court reiterated that the right to self-determination under Article 20 of the Charter imposes an international obligation on all State Parties to take positive measures to ensure the realisation of the right, including by giving assistance to oppressed peoples in their struggle for freedom and refraining from engaging in actions that are incompatible with the nature or full enjoyment of the right. The Court noted that, in view of the fact that part of the SADR’s territory was still under occupation by Morocco, there was no question that State Parties to the Charter have an obligation, individually and collectively, towards the people of SADR to protect their right to self-determination, particularly, by providing assistance in their struggle for freedom and by not recognising Morocco’s occupation and any human rights violation that might have resulted from such occupation.

However, the Court observed that, although both the Applicant and the SADR assert that the fact of admission in and of itself is not the basis of their Application, the conduct of the Respondent States that they are complaining about is basically related to the said admission.

The Court accordingly noted that in order to establish the internationally wrongful act of the Respondent States, it had to examine the overall context of the decision to admit Morocco as a member to the AU and the role of the Respondent States in the process.

After examining the facts before it, it was the position of the Court that, there was no evidence before it showing the manner in which the Respondent States voted in this regard.

In view of the foregoing, the Court held that the Respondent States did not, individually or collectively, violate the right to self-determination of the people of the SADR guaranteed under Article 20 of the Charter.

With regard to the alleged human rights violations directly ensuing from Morocco's occupation, the Court found it unnecessary to examine or pronounce itself on them, as Morocco was not a party to this case. As far as the responsibility of Respondent States' for these alleged violations is concerned, the Court noted that there was neither evidence to attribute these violations to them nor a causal link between the complained conduct of the Respondent States and such violations.

Having held that the Respondent States did not violate the rights of the people of SADR, the Court nevertheless reiterated that the Respondent States, and indeed, all State Parties to the Charter and the Protocol, as well as all Member States of the AU, have the responsibility under international law, to find a permanent solution to the occupation and to ensure the enjoyment of the right to self-determination of the people of Western Sahara and not to do anything that would give recognition to such occupation as lawful or impede their enjoyment of this right.

On reparations, having found no violations by the Respondent States, the Court concluded that the issue of reparations did not arise.

On costs, the Court decided that each Party shall bear its own costs.

Further Information

Further information about this case, including the full text of the decision of the African Court, may be found on the website at: <https://www.african-court.org/cpmt/details-case/0282018>

For any other queries, please contact the Registry by email: registrar@african-court.org

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