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**AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS**
**COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES**

# IN THE MATTER OF

# EMMANUEL YUSUFU NORIEGA

# V.

# UNITED REPUBLIC OF TANZANIA

## APPLICATION NO. 013/2018

## JUDGMENT

**26 JUNE 2025**

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
The Registrar
LE GREFFIER
ARUSHA TANZANIA
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

**TABLE OF CONTENTS**

**The Court composed of**: Modibo SACKO, President; Chafika BENSAOULA Vice President; Rafaâ BEN ACHOUR, Suzanne MENGUE, Tujilane R. CHIZUMILA, Blaise TCHIKAYA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Dennis D. ADJEI, Duncan GASWAGA – 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"),[1] Justice Imani D. ABOUD, Judge of the Court and a national of Tanzania, did not hear the Application.

In the Matter of:

Emmanuel YUSUFU NORIEGA

*Represented by:*

Pan African Lawyers Union (PALU)

Versus

UNITED REPUBLIC OF TANZANIA

*Represented by:*

i. Mr. Boniphace Nalija LUHENDE, Solicitor General, Office of the Solicitor General; and
ii. Ms. Sarah Duncan MWAIPOPO, Deputy Solicitor General, Office of the Solicitor General.

After deliberation,

[1] Rule 8(2), Rules of Court, 2 June 2010.

*Renders this Judgment:*

## I. THE PARTIES

1. Emmanuel Yusufu Noriega (hereinafter referred to as "the Applicant"), is a Tanzanian national, who at the time of filing this Application, was awaiting the execution of the death sentence at Maweni Prison, in Tanga, the United Republic of Tanzania, following his conviction for murder. The Applicant alleges violation of his right to a fair trial in relation to proceedings before domestic courts.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, on 29 March 2010, the Respondent State deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration"), through which it accepted the jurisdiction of the Court to receive applications from Individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited, with the African Union Commission, an instrument withdrawing the said Declaration. The Court has held that this withdrawal has no bearing on pending cases and new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period of one year after its deposit.[2]

[2] *Andrew Ambrose Cheusi v. United Republic of Tanzania* (judgment) (26 June 2020) 4 AfCLR 219, §§ 37-39.

## II. SUBJECT OF THE APPLICATION

### A. Facts of the matter

3. It emerges, from the record, that the Applicant murdered Ismail Omary Mkangwa, whom he suspected of practising witchcraft and for allegedly killing his father on 3 November 1995 at Ilagala Village, Kigoma. In the proceedings before domestic courts, the Applicant alleged that he was intoxicated and under the influence of drugs, having smoked "bhangi",[3] when he attacked the deceased and severed his head from his body.

4. The Applicant was arrested for murder, by the police, on 4 November 1995, tried, convicted and sentenced to death on 18 March 2005 by the High Court of Tanzania sitting at Tabora in Criminal Case No. 34 of 1997.

5. Dissatisfied with the decision of the High Court, the Applicant appealed to the Court of Appeal of Tanzania sitting at Dar es Salaam in Criminal Appeal No. 152 of 2005, which dismissed the appeal in its entirety for lack of merit on 27 October 2009.

6. The Applicant then applied to the Court of Appeal for a review of its judgment, in Criminal Appeal No. 9 of 2014, which was dismissed for lack of merit on 18 August 2017.

### B. Alleged violations

7. The Applicant alleges violation of the following rights:

    a. The right to equality before the law and the right to equal protection of the law without discrimination, as guaranteed under Article 3(1) and (2) of the Charter;
    b. The right to dignity inherent in a human being and to the recognition of his legal status as provided under Article 5 of the Charter;

[3] Marijuana plant.

c. The right to a fair trial as protected under Article 7(1)(a), (c) and (d) of the Charter.

## III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

8. The Application was filed at the Court on 21 May 2018 and served on the Respondent State on 16 July 2018, which was given 60 days to file its Response.

9. On 26 July 2018, the Applicant requested for free legal aid under the Court's Legal Aid Scheme. The Court granted the request on 6 February 2019 and appointed the Pan African Lawyers Union (PALU) to represent the Applicant.

10. The Parties filed their pleadings on the merits and reparations after several extensions of time granted by the Court.

11. Pleadings were closed on 11 November 2021 and the Parties were duly notified.

## IV. PRAYERS OF THE PARTIES

12. The Applicant prays the Court to:

i. Declare the Application admissible and grant his request for provisional measures;
ii. Dismiss the Respondent State's preliminary objections;
iii. Grant him free legal aid;
iv. Order the restoration of his rights;
v. Order for reparations, should the Court establish a violation;
vi. Release him from prison;
vii. Refrain from executing the death penalty against him, pending the determination of this Application; and

viii. Order the Respondent State to report on the measures taken to implement its orders.

13. The Respondent State prays the Court to:

i. Declare that the Court is not vested with jurisdiction to adjudicate the Application;
ii. Declare that the Application is inadmissible;
iii. Dismiss the Application;
iv. Declare that the Respondent State has not violated the Applicants rights under Articles 3(1) and (2), 5, and 7(1)(a), (c) and (d) of the Charter.
v. Dismiss the Application with costs; and
vi. Make any other orders that the Court deems fit.

## V. JURISDICTION

14. 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.

15. The Court further observes that pursuant to Rule 49(1) of the Rules, it "shall conduct a preliminary examination of its jurisdiction […] in accordance with the Charter, the Protocol and these Rules."[4]

16. In view of the foregoing, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

[4] Rule 39(1), Rules of Court, 2 June 2010.

17. In the present Application, the Court notes that the Respondent State raises an objection to its material jurisdiction. The Court will thus first consider the said objection before examining other aspects of its jurisdiction, if necessary.

## A. Objection to material jurisdiction

18. The Respondent State submits that the Court, which is not an appellate criminal court, is not vested with jurisdiction to entertain this Application after its Court of Appeal has decisively concluded the matter. It avers that the Applicant, as an afterthought, is raising for the first time the claim that the Justice of the Peace failed to inquire into the circumstances of how the Applicant sustained the wounds on his hands when he was brought before the Justice of Peace by a police officer, whereas, he had the opportunity to raise it before the High Court and the Court of Appeal of Tanzania but opted to not do so in the course of the domestic proceedings.

*

19. The Applicant in his rejoinder contends that this Court has taken a position on the issue at hand on more than one occasion and held that pursuant to Article 3(1) of the Protocol and Rule 26(1)(a) of the Rules its material jurisdiction extends to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and other relevant human rights instruments ratified by the state concerned. Citing the case of *Peter Joseph Chacha v. Tanzania*, the Applicant submits that the Court exercises its jurisdiction over an application as long as its subject matter involves alleged violations of rights protected by the Charter or any other international human rights instruments ratified by a Respondent State.

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20. The Court observes that, as opposed to the Respondent State's submission, the objection raised relates to this Court being called to sit as a

court of first instance to consider matters which were never raised before the municipal courts.

21. In this regard, the Court recalls that Article 3 of the Protocol grants it jurisdiction to consider any application filed before it provided that the Applicant alleges the violation of rights guaranteed in the Charter, the Protocol or any other human rights instruments ratified by the Respondent State.[5] In the present Application, the Applicant alleges violations of Articles 3, 5 and 7 of the Charter. It can therefore not be said that by considering this Application, the Court would be sitting as a court of first instance.

22. Regarding the objection that it is not an appellate criminal court, the Court recalls, its established jurisprudence, "that it is not an appellate body with respect to decisions of national courts.[6] However "... this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned."[7] As such, this Court would not be sitting as an appellate court in the present Application, if it were to examine the Applicant's allegations.

23. In light of the above, the Court dismisses the Respondent State's objection and consequently finds that it has material jurisdiction to hear this Application.

## B. Other aspects of jurisdiction

24. The Court notes that the Respondent State does not contest its personal, temporal and territorial jurisdiction, and nothing on the record shows that it

[5] *Daud Sumano Kilagela v. United Republic of Tanzania*, ACtHPR, Application No. 017/2018, Judgment of 3 September 2024 (merits and reparations), § 7.
[6] *Ernest Francis Mtingwi v. Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, § 14.
[7] *Kenedy Ivan v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 48, § 26; *Armand Guehi v. United Republic of* Tanzania (merits and reparations) (7 December 2018) 2 AfCLR 247, § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35.

lacks jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules,[8] the Court must satisfy itself that all aspects of its jurisdiction are met.

25. In relation to its personal jurisdiction, the Court recalls its jurisprudence that the withdrawal of the Declaration does not apply retroactively and only takes effect 12 months after the notice of such withdrawal has been deposited, in this case, on 22 November 2020.[9] Having been filed before the said date, the present Application is thus not affected by the withdrawal. Consequently, the Court holds that it has personal jurisdiction.

26. Regarding its temporal jurisdiction, the Court observes that the alleged violations are based on proceedings arising from the decisions of the domestic courts that is, the High Court judgment of 18 March 2005, Court of Appeal judgment of 27 October 2009, and the review decision of the Court of Appeal of 18 August 2017. The proceedings before the Court of Appeal were conducted after the Respondent State had ratified the Protocol. Furthermore, the Applicant remains incarcerated, serving a death sentence that he claims resulted from an unfair trial.[10] Consequently, the Court holds that the alleged violations are continuing in nature, thus conferring it with temporal jurisdiction to scrutinize the related claims.[11]

27. With regard to its territorial jurisdiction, the Court holds that it has territorial jurisdiction, as the alleged violations occurred in the territory of the Respondent State.

28. In light of all the above, the Court holds that it has jurisdiction to determine the present Application.

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[8] Rule 39(1) of Rules of Court, 2 June 2010.
[9] *Cheusi v. Tanzania* (judgment), *supra*, §§ 37-39.
[10] *Tanganyika Law Society and Legal and Human Rights Centre v. United Republic of Tanzania* (merits) (14 June 2013) 1 AfCLR 34, § 84; *African Commission on Human and Peoples' Rights v. Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, § 65; *Ivan v. Tanzania* (merits and reparations), *supra,* § 29.
[11] *Norbert Zongo and Others v. Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197, § 68; and *Igola Iguna v. United Republic of Tanzania,* ACtHPR*,* Application No. 020/2017, Judgment of 1 December 2022 (merits and reparations), § 18.

## VI. ADMISSIBILITY

29. 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".

30. In line with Rule 50(1) of the Rules, "the Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules."

31. The Court notes that Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

> 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 African 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 this procedure is unduly prolonged;
> f. Are submitted 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; 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 Constitutive Act of African Union or the provisions of the Charter.

32. The Respondent State does not raise any objection to the admissibility of the Application and only calls upon the Court to declare it inadmissible. The Court will, therefore, consider whether the Application has met all admissibility requirements as restated earlier.

33. From the records on file, the Court notes that the Applicant has clearly been identified by name, in fulfilment of Rule 50(2)(a) of the Rules.

34. The Court notes that the claims made by the Applicant seek to protect his rights guaranteed under the Charter. It further notes that one of the objectives of the Constitutive Act of the African Union as stated in Article 3(h) thereof is the promotion and protection of human and peoples' rights. Furthermore, nothing on file indicates that the Application is incompatible with the Constitutive Act of the African Union. The Application therefore fulfils the requirement set out in Rule 50(2)(b) of the Rules.

35. The language used in the Application is not disparaging or insulting to the Respondent State or its institutions, in fulfilment of Rule 50(2)(c) of the Rules.

36. The Court further notes that the Application is not based exclusively on news disseminated through mass media as it is founded on legal documents, in fulfilment of Rule 50(2)(d) of the Rules.

37. The requirement under Rule 50(2)(e) that local remedies should be exhausted has also been met since the Court of Appeal, which is the highest judicial body of the Respondent State examined the matter and, on 27 October 2009, dismissed the Applicant's appeal in its entirety for lack of merit.

38. With regard to the condition of filing an application within a reasonable time after exhaustion of local remedies, the Court notes that Article 56(6) of the Charter does not specify any time frame within which an application must be filed before this Court. Rule 50(2)(f) of the Rules, which in substance

restates Article 56(6) of the Charter, only 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 seised with the matter."

39. The Court notes in this respect, that the reckoning of time within which to assess reasonableness in filing the present Application should in principle be the date when the Court of Appeal rendered its judgment on review that is on 18 August 2017. However, in the instant case, the actual starting date for computing the time is 29 March 2010, that is, when the Respondent State filed its Declaration because that is when individuals could seise the Court with claims against the Respondent State.

40. The Court also observes that the period between 2007 and 2013 constituted the formative years of its operation. As the Court has previously held, during the stated period, that members of the general public, let alone persons in the situation of the Applicant in the present case, could not be presumed to have had sufficient awareness of the existence of the Court.[12] Consequently, the period to be assessed in the present case, is that between 2013, when the public would not be expected to have become aware of the Court and 2018, the year when this Application was filed, which is a period of five years. The issue for consideration therefore, is whether such a period of time is reasonable within the meaning of Article 56(6) of the Charter.

41. The Court recalls its jurisprudence, that: "… the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."[13] Some of the circumstances that the Court has taken into consideration include: lack of

[12] *Sadick Marwa v. United Republic of Tanzania* (merits and reparations) (2 December 2021) 5 AfCLR 728, § 52.
[13] *Norbert Zongo and Others v. Burkina Faso* (merits) (24 June 2014), § 92. See also *Alex Thomas v. Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 73.

awareness of the existence of the Court,[14] incarceration and being on death-row.[15]

42. The Court notes that in the present Application, the Applicant being incarcerated on death row was secluded from the general population. Such a circumstance without any doubt caused him to be cut off from possible information flow and to be restricted in his movements which this Court has held in previous similar instances could cause delays in filing applications.[16] The Court notes that these extenuating factors mitigate in his favour.

43. In view of these circumstances, the Court finds that the period of five years that it took the Applicant to file the present Application, was reasonable within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.

44. Concerning the admissibility requirement specified in Article 56(7) of the Charter, the Court notes that the Application does not concern a case which has already been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, or the provisions of the Charter. The Court, thus, finds that the Application complies with Rule 50(2)(g) of the Rules.

45. As a consequence of the foregoing, the Court finds that all the admissibility conditions of Rule 50(2) of the Rules are met and declares the Application admissible.

[14] *Amir Ramadhani v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 50; *Christopher Jonas v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 54.
[15] *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 56; *Werema Wangoko Werema and Others v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520, § 49; *Alfred Agbes Woyome v. Republic of Ghana* (merits and reparations) (28 June 2019) 3 AfCLR 235, §§ 83-86.
[16] *Thomas v. Tanzania* (merits), *supra*, § 73; *Jonas v. Tanzania* (merits), *supra*, § 54; *Ramadhani v. Tanzania* (merits), *supra*, § 83.

## VII. MERITS

46. The Court observes that in his Application, the Applicant alleges violation of the following:

    i. The right to equality before the law and the right to equal protection of the law without discrimination, as guaranteed under Article 3 of the Charter;
    ii. The right to dignity inherent in a human being and to the recognition of his legal status as provided under Article 5 of the Charter;
    iii. The right to a fair trial as protected under Article 7 of the Charter.

47. Although the issue is not expressly raised in this Application, this Court notes, from the record, that the Applicant was mandatorily sentenced to death for the offence of murder**,** which under the Respondent State's law is executed by hanging.[17] Given that it has previously adjudicated on this issue, the Court will, therefore, make a determination as to whether a finding in this respect is warranted in the present Application in addition to the allegations expressly made by the Applicant. The Court will thus consider the allegations specifically raised by the Applicant and thereafter the right to life in relation to the imposition of mandatory death penalty and the right to dignity in respect of executing the death penalty by hanging in light of the provisions of Articles 4 and 5 of the Charter respectively.

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

48. The Applicant avers that the Respondent State violated his right to equality before the law and equal protection of the law as guaranteed under Article 3 of the Charter.

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[17] See *Deogratius Nicolaus Jeshi v. United Republic of Tanzania*, ACtHPR, Application No. 017/2016, Judgment of 13 February 2024 (merits and reparations), §§ 109-112.

49. The Respondent State submits generally, that it has not violated the Applicant's right provided under Article 3 of the Charter.

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50. The Court notes that 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.

51. The Court observes that although the Applicant alleges violation of his right and entitlement to be treated equally before the law and to equal protection of the law he did not substantiate this allegation. Nevertheless, the Court recalls that the general principle is that the burden of proof of human rights violation lies with s/he who alleges.[18] It has also held that, when making a claim in relation to Article 3 of the Charter, the Applicant has to demonstrate how the Respondent State's conduct infringed upon his rights of equal protection before the law to justify the violation of this provision.[19]

52. It follows from these provisions that Article 3 guarantees the right for every person to enjoy equal protection both in the law and in the course of its application without any discrimination. As such, violation of the right to an equal protection of the law would be established in instances where an Applicant is treated differently from an accused person in the same situation as his.

53. The Court observes that, in the present Application, although the Applicant alleges violation of his right and entitlement to be treated equally before the law and to equal protection of the law, he does not substantiate this allegation. The Court further notes that there is no evidence on the record that the Applicant was not afforded equality before the law or was treated differently from other persons who were in a similar situation as him.

[18] *Thomas v. Tanzania* (merits), *supra,* § 492; *Jeshi v. Tanzania* (merits and reparations), *supra,* § 24.
[19] *Thomas v. Tanzania* (merits), *supra,* § 140.

54. In the circumstances, the Court holds that the Respondent State did not violate the Applicant's right to treated equally before the law and to equal protection of the law as guaranteed under Article 3 of the Charter.

## B. Alleged violation of the right to dignity

55. The Court will now consider the two claims which the Applicant alleges violated his right to dignity, namely: (i) the failure of the Court Magistrate (Justice of the Peace) to order investigations into the alleged cruel, inhumane; and degrading treatment resulting from the beatings administered by the police authorities and (ii) the allegation that he was beaten and brutalised by the police authorities.

### i. Allegation that the Justice of the Peace failed to order investigations into the Applicant's alleged cruel, inhumane, and degrading treatment

56. The Applicant avers that when he was presented before the Magistrate Court , the "Justice of the Peace" observed his wounds but failed in his duty to inquire into the circumstances of how he sustained the wounds and to order that he be taken for medical treatment before recording his statement.

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57. The Respondent State in response to this claim, avers that the duty of the Justice of the Peace is to record the statement of confession from the accused person and not to inquire into any other matter. The Respondent State further avers that the Applicant was "physically assessed and some wounds were noted on his body; although he did not tell the Justice of Peace how he got the wounds on his body. The Applicant had the duty to inform the Justice of Peace how he got the wounds on his body; but choose not to." The Respondent State surmises that this was a mere afterthought by the Applicant that this Court should not entertain, since, the Applicant had an opportunity to raise it before the High Court and Court of Appeal during the trial.

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58. Article 5 of the Charter provides that "[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

59. The Court observes that this allegation relates to the Justice of the Peace's failure to conduct an investigation into how the Applicant sustained the wounds. It further observes that upon conducting a physical examination, the Magistrate observed wounds on the mouth and abdomen of the Applicant[20] but did not inquire from the Applicant how he sustained them and also did not refer him for medical examination. The only action that the Magistrate took was to report his findings but did not go further to order an investigation into how the wounds were sustained by the Applicant.

60. This Court has previously held that once *prima facie* evidence had been established of ill treatment on an accused person, the burden automatically shifts to the Respondent State to prove the contrary.[21] Moreover, this Court has also held that within the Respondent State's judicial system, judicial officers being part of the domestic judicial proceedings, bear a duty to provide the accused with adequate protection upon being arrested as suspected criminals, to conduct investigations into how they sustained the injuries and, finally, to bring the culprits to book.[22]

61. Given that the Justice of the Peace failed to order prompt investigations into the alleged abuse, the Court considers that the Respondent State failed in its duty to investigate allegations of abusive cruel, inhumane and degrading

[20] High Court Judgment pages 32-34 and the Extra Judicial Statement, Exhibit 000056.
[21] *Habyalimana Augustino and Muburu Abdulkarim v. United Republic of Tanzania*, ACtHPR, Application No. 015/2016, Judgment of 3 September 2024 (merits and reparations), § 141.
[22] *Ibid,* § 24.

treatment, provided for under Article 5 of the Charter, due to the inactions of its agent, the Justice of the Peace.

**ii. Allegation that the Applicant was brutalised by the police authorities**

62. The record of proceedings reveals that the Applicant reported that when he was taken to the Court to record a statement, he did not know the difference between the "Justice of the Peace" and the police authorities. In fact, the Applicant confessed that he had unintentionally killed the deceased while in a state of anger and after having smoked *"bhangi".* He further states that the wound which the Justice of the Peace saw on his mouth was inflicted by the policeman, when he confessed to him that he had committed the murder under the influence of drugs.[23]

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63. The Respondent State avers that the Applicant was "physically assessed and some wounds were noted on his body; although he did not tell the Justice of Peace how he got the wounds on his body".

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64. The Court recalls its jurisprudence on the definition of torture set out in Article 1 of the United Nations Convention Against Torture (CAT), which it endorsed in *Alex Thomas v. United Republic of Tanzania*,[24] that:

> For purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or

[23] Record of Proceedings before the High Court, page 22, paragraph 2.
[24] *Thomas v. Tanzania* (merits)*, supra,* § 144.

> suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions…

65. Furthermore, Article 12 of the CAT provides that:

> Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

66. The Court finds it relevant to refer to the African Commission's *Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa,*[25] which states that torture can take various forms and determining whether a right was breached will depend on the circumstances of each cause.[26]

67. The Court further recalls its case-law that the prohibition of cruel, inhuman and degrading treatment under Article 5 of the Charter is absolute.[27]

68. In the present Application, the allegation being examined relates to the the Applicant's beating by the police authorities during his arrest after his confession. From the record of domestic proceedings, the Court notes that the Justice of the Peace conducted a physical examination of the Applicant before he recorded the Applicant's statement and observed that there were wounds on his mouth.

69. The Court, based on these considerations, is of the view that the beating of the Applicant by the police authorities in the circumstances constitutes cruel, inhuman and degrading treatment prohibited under Article 5 of the Charter.

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[25] The Guidelines commonly known as the *Robben Island Guidelines* were adopted in 2008. See also Communication 288/04 *Gabriel Shumba v. Zimbabwe*, Decision of 2 May 2012, §§ 142 to 166.
[26] *Guehi v. Tanzania* (merits and reparations), *supra,* § 131.
[27] See *Huri-Laws v. Nigeria* Communication 225/98 (2000) AHRLR 273 (ACHPR 2000) para 41; *Guehi v. Tanzania*, *supra,* § 131.

70. In light of the above, this Court holds that the Respondent State violated the Applicant's right to dignity and not be subjected to cruel, inhuman and degrading treatment protected under Article 5 of the Charter regarding the beating of the Applicant by the police authorities and the failure of the Justice of Peace to order investigations into the alleged abuse and police brutalisation .

## C. Alleged violation of the right to a fair trial

71. Under the alleged violation of the right to fair trial, the Applicant makes the following claims:

i. The violation of the right to effective legal representation as provided under Article 7(1)(c) of the Charter;
ii. The violation of the right to be tried within a reasonable time by an impartial court or tribunal, as guaranteed under Article 7(1)(d) of the Charter; and
iii. The failure of the court assessors to examine the witnesses as guaranteed under Article 7(1)(a) of the Charter.

72. The Court will proceed to examine these claims respectively.

### i. On the alleged failure to provide the Applicant with effective legal representation

73. The Applicant alleges that the Respondent State did not provide him with a defence counsel of his choice. Furthermore, that it was inappropriate and unethical for the Respondent State to appoint counsel Kabuguzi who represented the prosecution during the preliminary hearing against him to also represent him during his trial at the Court of Appeal.

74. The Applicant avers that by abandoning two of his grounds for appeal, his Advocate caused a miscarriage of justice leading to a violation of his right to a fair trial.

*

75. The Respondent State on its part submits that the Applicant was represented throughout his trial before the High Court and Court of Appeal. He was provided with free legal aid by the State before the High Court and represented by Advocate Kayaga, and that during his appeal, he was represented by Advocate Kabuguzi. The Respondent State avers that it was an afterthought by the Applicant to claim before this Court that he was not accorded a counsel of his choice, a claim he did not raise during the trial proceedings.

76. The Respondent State concurs with the Applicant regarding his claim that Advocate Kabuguzi, did represent the State during the preliminary hearing as a State Attorney on 11 December 1998, in accordance with the Tanzania Penal Code and Criminal Procedural Laws and furthermore, during his appeal at the Court of Appeal. The Respondent State contends that despite this irregularity, there was no miscarriage of justice.

77. The Respondent States avers, that at all material times during the proceedings at the trial and on appeal the Applicant did neither raise this issue nor object to the appointed counsel on his representation. According to the Respondent State, the Applicant accepted the representation and did not at any particular time refuse to cooperate with the appointed counsel. It is the Respondent State's contention that this allegation should therefore be dismissed as it is devoid of merit.

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78. Article 7(1)(c) of the Charter provides that:

> 1. Every individual shall have the right to have his cause heard. This comprises: …
>
> (c) The right to defence, including the right to be defended by counsel of his choice.

79. The Court has held that Article 7(1)(c) of the Charter, as read together with Article 14(3)(d) of the International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR"), guarantees anyone charged with a criminal offence the right to be automatically assigned a counsel free of charge where he cannot afford to hire a lawyer, whenever the interests of justice so require.[28] As such, the right to free legal assistance is derived from a joint reading of these two provisions as a part of the general right to a fair trial.[29]

80. The Court recalls its decision in *African Commission on Human and People's Rights v. Libya* that *"every accused has a right to be effectively defended by a lawyer, which is the heart of the notion of a fair trial"*.[30] The Court has also previously considered the issue of effective representation in *Evodius Rutechura v. United Republic of Tanzania*[31] where it held that the right to free legal assistance comprises of the right to be defended by counsel. However, the Court emphasizes that the right to be defended by counsel of one's choice is not absolute when counsel is provided through a free legal assistance scheme.[32] In such a case, the important consideration is whether the accused is provided with effective legal representation rather than whether he or she is allowed to be represented by a lawyer of their own choosing.[33]

81. The Court considers that, "effective assistance of counsel" comprises two aspects.[34] First, defence counsel should not be restricted in the exercise of representing his client. Second, counsel should not deprive a client of

[28] *Thomas v. Tanzania* (merits)*, supra,* § 124.
[29] *Reuben Juma and Gawani Nkende v. United Republic of Tanzania*, ACtHPR, Consolidated Application No. 015/2017 & 011/2018, Judgment of 5 September 2023 (merits and reparations), § 24.
[30] *African commission on Human and Peoples' Rights v. Libya* (2016) 1 AfCLR 153, §§ 93-97.
[31] *Evodius Rutechura v. United Republic of Tanzania* (merits and reparations) (26 February 2021) 5 AfCLR 7, § 73.
[32] *Gozbert Henerico v. United Republic of Tanzania,* ACtHPR, Application No. 056/2016, Judgment of 10 January 2022 (merits and reparations), §, 106; and *Evodius v. Tanzania* (merits and reparations), *supra*, § 73.
[33] *Evodius v. Tanzania, ibid,*; and *Henerico v. Tanzania, ibid*.
[34] *Henerico v. Tanzania, ibid*, § 107.

effective assistance by failing to provide competent representation that is adequate to ensure a fair trial or, more broadly, a just outcome.[35]

82. In the instant case, with regard to the first aspect, that the "defence counsel should not be restricted in the exercise of representing his client", the Court notes that the Applicant was represented by two different counsel , once during the preliminary hearing and then during the appeal process before the Court of Appeal. The Court observes that nothing on the record shows that the Respondent State impeded the counsel from accessing the Applicant and consulting him on the preparation of his defence, neither was counsel denied adequate time and facilities to enable the Applicant to prepare his defence.

83. With regard to the second aspect "that counsel should not deprive a client of effective assistance by failing to provide competent representation that is adequate to ensure a fair trial or, more broadly, a just outcome", the Court notes that the Applicant makes two claims. The first one being that his counsel at the Court of Appeal abandoned two grounds of appeal out of three and the second one being that Advocate Kabuguzi, who represented the prosecution during the preliminary hearing is the same advocate who represented the Applicant during his appeal, before the Court of Appeal, inevitably violating his right to a fair trial and leading to a miscarriage of justice.

84. With regard to the claim that the Applicant's counsel during the appeal proceedings, presented only one ground of appeal while discarding two other grounds,[36] the Court observes that the sole ground which was retained is that the trial judge grossly erred in law and fact when he held that the offence of murder had been thoroughly proven by the prosecution beyond

[35] *Henerico v. Tanzania, ibid.*

[36] Page 2, paragraph 2 of the Applicants Notice of Motion for review from the judgement of the Court of Appeal of Tanzania dated 15 April 2014. It states that "he was denied the right to a fair trial as the honourable court failed to scientifically and clinically satisfy itself before determining the defence of intoxication, which he raised" and "That this Application should be supported by the Affidavit of the Applicant sworn on the 15 day of April 2014".

a reasonable doubt. The Court further notes that in support of the appeal the learned counsel for the appellant narrated the manner in which the appellant caused the death of the deceased by cutting him with a "*panga*" until the head was completely separated from the rest of the body, and the utterance he made thereafter that "*nimeua na nitaua sana leo*".[37] The counsel for the appellant also alleged that his client was a drunkard and used to smoke "bhangi".

85. The Court notes that counsel for the appellant, argued that such conduct was inconsistent with a person who is sane, therefore, in the circumstances, the appellant was entitled to the defence of intoxication under section 14(2)(b) of the Penal Code. Similarly, counsel averred that the trial judge should have made a special finding under section 219(2) of the Respondent State's Criminal Procedure Act, that the appellant killed the deceased but for reason of insanity he was not guilty of murder and should have acquitted him. On the other hand, the Respondent State averred that the Applicant had "malice aforethought" and precisely knew what he was doing, therefore the defence of intoxication should be rejected.

86. In considering this claim the Court recalls its jurisprudence that a Respondent State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes. As such, the quality of the defence provided is essentially a matter between the client and his representative and the State should intervene only where the lawyer's manifest failure to provide effective representation is brought to its attention.[38] Furthermore, this Court has held that allegations relating to counsel not raising or objecting to certain evidentiary issues in relation to his/her clients defence, should not, in these circumstances, be imputed to the Respondent State.[39] More importantly, there is nothing on the record to demonstrate that the Applicant informed the domestic courts of the alleged

[37] Meaning, I have killed and will kill a lot today.
[38] ECHR, *Strickland v. Washington*, 466 U.S. 668 336; 686 (1984), 336; *Lafler v. Cooper*, 566. No 10-209 slip. op. (2012) (erroneous advice during plea bargaining).
[39] *Henerico v. Tanzania* (merits and reparations), *supra*, § 113.

shortcomings in his counsel's conduct in relation to his defence in this regard.

87. As emerges from the record of the appeal proceedings[40] that the Applicant reported that Advocate Method R.G. Kabuguzi, who represented the prosecution during the preliminary hearing also represented the Applicant during his appeal, before the Court of Appeal. With regard to effective legal representation by an advocate under a Respondent State's legal aid scheme, this Court has held that it is not sufficient for a State to simply provide free legal assistance. States must also ensure that lawyers provide robust representation at all stages of the legal process starting from the arrest of the individual for whom such representation is being provided.[41]

88. In the instant case, the Court notes that the records on file reveal that Advocate Method R.G. Kabuguzi represented both the Respondent State and the Applicant at the preliminary hearing and during the Court of Appeal trial respectively. This led the Court of Appeal to refer to his conduct as "*inappropriate and unethical*".[42] The Court of Appeal in its judgement observed that "Before us the appellant is represented by Mr. Method R.G. Kabuguzi, learned counsel. He also appeared for him at a certain stage in the trial court. When the preliminary hearing was conducted on 11th December 1998. Mr. Kabuguzi, learned Advocate was a State Attorney then, working with the Office of the Attorney General. He appeared in Court to prosecute the case on behalf of the Republic. His appearance before us to prosecute the appeal on behalf of the appellant is inappropriate and it is not ethical. Advocates should refrain from such practice." Nevertheless, in spite of this observation, the Court of Appeal proceeded to hear the appeal on both sides on the basis that it did not prejudice the Applicant.

89. In examining the issue at hand, this Court finds it relevant to refer to *The Bangalore Principles and Guidelines on the Right to A Fair Trial and Legal*

[40] Record of proceedings, Court of Appeal Judgement and Court of Appeal decision on Review.
[41] *Habyalimana v. Tanzania* (merits and reparations), *supra,* § 99.
[42] Judgement of 27 October 2019, page 5 and Court of Appeal's decision on review, page 7.

*Assistance in Africa* (Bangalore Principles)[43] which provides that "Lawyers, in protecting the rights of their clients … shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession". The Court is of the view that Counsel for the Applicant in the present Application did not meet the standard of the Bangalore Principles in this regard.

90. Having found so, this Court observes that the Court of Appeal, should not only have reprimanded the Advocate but ordered that the Applicant be provided with another Advocate to represent him. This would have addressed the Applicant's concern about the bias by the Court of Appeal as justice should not only have been done but be seen to be done.

91. In view of the above, the Court finds that the Respondent State violated the Applicant's right to effective legal representation protected under Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR due to the failure to sanction counsel representing the Applicant for what it considered to be inappropriate and unethical behaviour, and for its failure to provide the Applicant with different free legal representation.

**ii. On the alleged failure to try the Applicant within a reasonable time**

92. The Applicant alleges that the trial process was unduly prolonged **t**hus violating his right to be tried within a reasonable time by an impartial court or tribunal under Article 7(1)(d) of the Charter.

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93. In response, the Respondent State avers that proceedings in the Applicant's case were not unduly prolonged as the relevant procedure was observed under the Tanzania laws. The Respondent State further contends that because of the nature of the offence committed by the Applicant, it had to

[43] https://achpr.au.int/index.php/en/node/879, Paragraph I(i).

conduct thorough investigations and evaluations to satisfy itself that there was no doubt about the conviction and sentence to be meted against the Applicant.

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94. Article 7(1)(d) of the Charter provides that:

> Every individual shall have the right to have his cause heard. This comprises the right to be tried within a reasonable time ….

95. The Courts recalls its established jurisprudence as exemplified in *Wilfred Onyango Nganyi and Others v. United Republic of Tanzania,* that the right to be tried within a reasonable time is an important aspect of fair trial. There is no standard period that is considered as reasonable time for a court to dispose of the matter.[44] The Court further held that the right to a fair trial also includes the principle that judicial proceedings should be finalised within a reasonable time.[45] Delays caused by the lack of due diligence on the part of national authorities would amount to a violation of the right to be tried within a reasonable time.

96. In determining the right to be tried within a reasonable time, the Court has adopted a case-by-case approach whereby it considered, among others, factors such as the complexity of the case, the conduct of the parties, and that of the judicial authorities who must exercise due diligence especially where the Applicant faces severe penalties.[46]

97. With regard to complexity of the case, the Court has considered factors such as the number of witnesses who testified, availability of evidence, the level

[44] *Wilfred Onyango Nganyi and Others v. United Republic of Tanzania* (merits) (18 March 2016), 1 AfCLR 507, § 127; and *Benedicto Daniel Mallya v. United Republic of Tanzania* (merits and reparations) (26 September 2019) 3 AfCLR 482, § 48.
[45] *Cheusi v. Tanzania* (judgment), *supra*, § 116.
[46] *Marthine Christian Msuguri v. United Republic of Tanzania,* ACtHPR, Application No. 052/2016, Judgment of 1 December 2022 (merits and reparations), § 83; *Cheusi v. Tanzania* (judgment), *supra*, § 117; *Guehi v. Tanzania* (merits and reparations), *supra,* § 501.

and extent of the investigations, and whether specialised evidence such as DNA samples were required.[47]

98. In this present case the Court notes that the police investigations did not require extensive investigation because the accused in his statement confessed to killing the deceased, while angry, intoxicated and under the influence of smoking drugs, a defense he reiterates before this Court.[48] Furthermore, the Applicant's statement was corroborated by five prosecution witnesses and all evidence availed before the committal proceedings. This case did not involve collecting specialized forms of evidence such as DNA tests.[49] In its assessment, this Court has also held that the conduct of the parties can be attributed to prolonging the procedures at the domestic level. However, in this case, there is nothing on record to suggest that the Applicant did not fully collaborate with the State, neither did he ask for countless adjournments. The Respondent State does not provide justification for the duration of time but instead, generically submits that the Applicant's case was heard within a reasonable time. Therefore, the delay, cannot be said to be attributed to complex nature of the case.

99. Regarding the second factor, which is the conduct of the parties, the Court notes that there is nothing on the record to show that the delay was due to the Applicant's conduct. The question therefore, is whether the Respondent State observed due diligence in respect of the proceedings before its courts.

100. With regard to due diligence, the Court notes from the record of proceedings that the Applicant was arrested on 4 November 1995, his statement was recorded by the Police and Justice of the Peace at the Magistrate Court on 6 November 1995. He was committed by the District Magistrate on 29 April 1997 and the preliminary hearings before the High Court began on 11

[47] *Dominick Damian v. United Republic of Tanzania,* ACtHPR*,* Application No. 048/2016, Judgment of 4 June 2024 (merits and reparation), § 58.
[48] Police Statement, see page 35(000053) of the proceedings of the High Court, Primary court magistrate, see page 32(000056) of the proceedings of the High Court.
[49] *Damian v. Tanzania* (merits and reparations), *supra,* § 58.

December 1998 and ended on 25 September 2003.[50] The trial at the High Court began on 5 November 2003 and ended on 12 March 2005[51] and the High Court rendered its judgment on 18 March 2005 and the Applicant then filed a Notice of Appeal to the Court of Appeal on the same day 18 March 2005. The Court of Appeal considered the appeal on 20 and 29 October 2009[52] by rendering its decision on 27 October 2009. On 15 April 2014, the Applicant applied for a review of the decision of the Court of Appeal, which rendered its decision on 18 August 2017 by dismissing the Application for lack of merit.

101. The Court observes that from the date of his arrest on 4 November 1995 to the commencement of the High Court trial on 11 December 1998, a period of three years, one month and seven days had elapsed, while from the date of the arrest on 4 November 1995 to the finalization of the trial by the Court of Appeal when it rendered its decision from the appeal of the High Court on 27 October 2009, a period of 13 years, 11 months and 23 days had elapsed. The duration of the trial before the domestic courts lasted a total period of ten years, ten months and 16 days from the commencement of the trial before the High Court on 11 December 1998 to the delivery of the decision of the Court of Appeal from the High Court decision 27 October 2009.

102. In assessing whether the Respondent State observed due diligence, this Court notes that pursuant to Section 32(2) of the Criminal Procedure Act (CPA), an accused must be brought before a court as soon as practicable when the offence is punishable by death.[53] Further, Section 244, as read

[50] See page 3 and 5 of the Court proceedings.
[51] See page 6 and 60 of the Court proceedings.
[52] Page 1 of the Court of Appeal Judgment, Criminal Session No 34 of 1997 at Tabora dated 18 March 2005.
[53] Section 32(1) – Where any person has been taken into custody without a warrant for an offence other than an offence punishable with death, the officer in charge of the police station to which he is brought may, in any case, and shall if it does not appear practicable to bring him before an appropriate court within twenty four hours after he was so taken into custody, inquire into the case and, unless the offence appears to that officer to be of a serious nature, release the person on his executing a bond with or without sureties, for a reasonable amount to appear before a court at a time and place to be named in the bond; but where he is retained in custody, he shall be brought before a court as soon as practicable.

together with Section 245 of the CPA, provides that committal proceedings should be held as soon as practicable.[54] Finally, Section 248(1) of the CPA provides that proceedings may be adjourned, from time to time by warrant, and the accused person be remanded for a reasonable time, not exceeding 15 days at any one time.[55]

103. This Court also notes that the Respondent State's High Court is empowered, pursuant to Sections 260(1),[56] and 284(1)[57] of the CPA, to postpone the trial of any accused person to the subsequent session where there is sufficient cause for the delay, including the absence of witnesses. However, the same provisions stipulate that the delay should be "reasonable".

104. In the light foregoing, and in the circumstance of this case the Court finds that the period of ten years, ten months and 16 days, which was the duration of the trial before the domestic courts from the commencement of the trial

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Section 32(2) – Where any person has been taken into custody without a warrant for an offence punishable with death, he shall be brought before a court as soon as practicable.
Section 32(3) – Where any person is arrested under a warrant of arrest, he shall be brought before a court as soon as practicable.

[54] Section 244 – Whenever any charge has been brought against any person of an offence not triable by a subordinate court or as to which the court is advised by the Director of Public Prosecutions in writing or otherwise that it is not suitable to be disposed of upon summary trial, committal proceedings shall be held according to the provisions hereinafter contained by a subordinate court of competent jurisdiction.
Section 245(1) – After a person is arrested or upon the completion of investigations and the arrest of any person in respect of the commission of an offence triable by the High Court, the person arrested shall be brought within the period prescribed under section 32 of this Act before a subordinate court of competent jurisdiction within whose local limits the arrest was made, together with the charge upon which it is proposed to prosecute him, for him to be dealt with according to law, subject to this Act.

[55] Section 248(1) – Where for any reasonable cause, to be recorded in the proceedings, the court considers it necessary or advisable to adjourn the proceedings it may, from time to time by warrant, remand the accused person for a reasonable time, not exceeding fifteen days at any one time, to a prison or any other place of security.
Section 248(2) – Where the remand is for not more than three days, the court may, by word of mouth, order the officer or person in whose custody the accused person is, or any other fit officer or person, to continue to keep the accused person in his custody and to bring him up at the time appointed for the commencement or continuance of the inquiry.

[56] Section 260(1) It shall be lawful for the High Court upon the application of the prosecutor or the accused person, if the court considers that there is sufficient cause for the delay, to postpone the trial of any accused person to the next session of the court held in the district or at some other convenient place, or to a subsequent session.

[57] 284(1) Where, from the absence of witnesses or any other reasonable cause to be recorded in the proceedings, the court considers it necessary or advisable to postpone the commencement of or to adjourn any trial, the court may from time to time postpone or adjourn the trial on such terms as it thinks fit for such time as it considers reasonable and may, by warrant, remand the accused person to a prison or other place of security.

before the High Court on 11 December 1998 to the delivery of the decision of the Court of Appeal from the High Court decision 27 October 2009 is unreasonable to process and finalise the case.

105. As a consequence, the Court finds that the Respondent State violated the Applicant's right to be tried within a reasonable time as guaranteed by Article 7(1)(d) of the Charter due to the lengthy period of time that the domestic proceedings lasted.

**iii. On the alleged failure of the court assessors to examine the witnesses**

106. The Applicant alleges that during the trial the court assessors did not adhere to mandatory requirements of Section 177 of the Evidence Act, which necessitated them to cross examine the witnesses and that this resulted into an unfair judgment being rendered.

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107. The Respondent State avers that this allegation is not clear since the Applicant has not demonstrated how the assessors failed to adhere to the provisions of Section 177 of Evidence Act.

108. The Respondent State further avers "that the foregoing provision does not mandatorily require the assessors to put questions to the witnesses. However, during the trial of the Applicant the assessors had an opportunity to cross-examine witnesses[58] and gave their final opinion(s) to the court as required by the law".[59]

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109. The Court notes that pursuant to Article 7(1)(d) of the Charter, every accused individual has the right to be tried by an impartial court or tribunal.

[58] See pages 8, 9, 13, 14 and 19 of the High Court Proceedings.
[59] See paragraph 4 (viii) of the Respondent States Response to the Application.

110. The Court observes that the concept of impartiality is an important component of the right to a fair trial. It signifies the absence of actual or perceived bias, or prejudice and requires that judicial officers "must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties".[60]

111. The Court recalls its position in *Makungu Misalaba v. United Republic of Tanzania,* that the obligation of impartiality owed by judges extends to assessor bias, or the appearance thereof, which has the potential to cast doubt on the accuracy of the judges' factual findings and the overall credibility of the courts.[61]

112. The Court notes that section 177 of the Respondent State's Evidence Act provides that:

> In cases tried with assessors, the assessors may put any questions to the witness, through or by leave of the court, which the court itself might put and which it considers proper.

113. From the above provision, the Court observes that the assessors are permitted to put questions which the trial court considers proper to the witnesses either through or with leave of the court.

114. The Court further recalls its earlier decisions, where it noted that in the Respondent State's legal system, the role of assessors is limited to asking questions to obtain some clarifications and they "are not statutorily mandated to cross-examine witnesses".[62]

115. The Court observes from the record of proceedings that three assessors were assigned to the case at the High Court and they questioned each

[60] *XYZ v. Republic of Benin* (judgment) (27 November 2020) 4 AfCLR 83, §§ 81-82.
[61] *Makungu Misalaba v. United Republic of Tanzania,* ACtHPR, Application No. 033/2016, Judgment of 7 November 2023 (merits and reparations), § 95.
[62] *Misalaba v. Tanzania, ibid*, § 96; *Damian v. Tanzania*, *supra*, § 111.

witness.[63] Furthermore, there is nothing on record to demonstrate that the questioning of witnesses by the assessors was improper and prejudicial to the outcome of the decision reached.

116. The Court, therefore, finds that the Applicant has failed to demonstrate how the court appointed assessors did not discharge their duty as provided under the Respondent State's laws.

117. Consequently, the Court dismisses this allegation and finds that the Respondent State did not violate the Applicant's right to be tried by an impartial court protected by Article 7(1)(d) of the Charter regarding the questioning of witnesses by the assessors.

## D. Violation of the right to life

118. As earlier stated in this judgment the Applicant does not make any allegation of the breach of the right to life. However, it emerges from the record that the Applicant was mandatorily sentenced to death under a law that this Court has previously held does not allow the judicial officer discretion to impose a different punishment. In the circumstances of the present Application, the Court reiterates its jurisprudence that the imposition of the mandatory death penalty is a violation of the right to life under Article 4 of the Charter.[64]

119. The Court, therefore, holds that the Respondent State violated the Applicant's right to life protected under Article 4 of the Charter by imposing the mandatory death penalty on the Applicant.

[63] Exhibit 000089.
[64] *Ally Rajabu and Others v. United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 539, §§ 104-114*; Amini Juma v. United Republic of Tanzania* (judgment) (30 September 2021) 5 AfCLR 431, §§ 120-131.

## E. Violation of the right to dignity through imposition of the mandatory death penalty by hanging

120. The Court observes that the Applicant only raised the violation of the right to dignity arising from the brutalisation by the police authorities and not with respect to the mandatory imposition of the death penalty by hanging. However, in *Ally Rajabu and Others v. United Republic of Tanzania*, the Court observed that many methods used to implement the death penalty have the potential of amounting to torture, as well as cruel, inhuman and degrading treatment given the amount of suffering and pain involved. It has also held that hanging a person is one of such methods that is inherently degrading.[65] The Court further recalls its position in the matter of *Amini Juma v. United Republic of Tanzania* where it held that the execution of the death penalty by hanging encroaches upon the dignity of a person in respect of the prohibition of torture and cruel, inhuman and degrading treatment.[66]

121. The Court reiterates its position that in accordance with the very rationale for prohibiting methods of execution that amount to torture or cruel, inhuman and degrading treatment, the prescription should be that methods of execution must exclude suffering or involve the least suffering possible in cases where the death penalty is permissible.[67]

122. Having found that the mandatory imposition of the death sentence violates the right to life due to its obligatory nature, the Court holds that, as the method of implementation of that sentence, that is, by hanging, inevitably encroaches upon dignity in respect of the prohibition of torture and cruel, inhuman and degrading treatment.[68]

123. Given the above, the Court finds that the Respondent State violated the Applicant's right to dignity and not to be subjected to cruel, inhuman or

[65] *Rajabu and Others v. Tanzania* (merits and reparations), *supra,* §§ 118-119.
[66] *Juma v. Tanzania* (judgment)*, supra,* § 136.
[67] *Rajabu and Others v. Tanzania* (merits and reparations), *supra,* § 118.
[68] *Ibid,* §§ 119-120.

degrading punishment and treatment guaranteed under Article 5 of the Charter regarding the imposition of the death sentence by hanging.

## VIII. REPARATIONS

124. The Applicant prays the Court to grant him and members of his family reparations in line with Article 27 of the Protocol and Rule 34(5) of the Rules to remedy violations of their fundamental rights. In particular the Applicant prays the Court for:

i. An amount of TSH 30,000,000 (Thirty Million Tanzanian Shillings) to the Applicant for moral prejudice;
ii. An amount of TSH 20,000,000 (Twenty Million Tanzanian Shillings) payable to his mother Zipporah Michael;
iii. An amount of TSH 10,000,000 (Ten Million Tanzanian Shillings) payable to his brother Vumilia Yusuph;
iv. An Amount of TSH 10,000,000 (Ten Million Tanzanian Shillings) payable to his brother Edibili Yusuph;
v. An order of setting aside the death sentence imposed to the Applicant and his removal from the death sentence;
vi. Immediate restoration of the Applicant's Liberty by release from prison;
vii. An amount to be determined by the Court which it considers just to the Applicant for material prejudice suffered;
viii. An Order that the above-mentioned amounts are paid tax free within three months of notification of judgment on reparations;
ix. An amount to be determined by this honourable court which it considers just to Emmanuel Yusuf Noriega for material prejudice suffered;
x. An order that the Respondent reports to the Court within six months of date of notification of the Judgment on merits and reparations and every six months thereafter, until such a time all orders have been complied with;
xi. An order that the Respondent publishes the Judgment on merits and reparations within three months of notification in both English and Kiswahili for a period of not less than one year, on official website of the judiciary and ministry of constitutional affairs;

xii. Any other orders the Court shall deem necessary; and

xiii. The Court Applies principle of proportionality when considering the award for compensation to be granted to the Applicant.

125. The Respondent State did not respond to the Applicant's submission on reparations.

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126. The Court recalls Article 27(1) of the Protocol which 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 the fair compensation or reparation.

127. The Court considers that, as it has consistently held, for reparations to be granted, the Respondent State should first be internationally responsible of the wrongful act and causation should be established between the wrongful act and the alleged prejudice.[69] Furthermore, and where granted, reparation should cover the full damage suffered. The Applicant also bears the onus of justifying the claims made.[70]

128. In the present Application, the Court has found that the Respondent State violated the Applicant's rights to life, to dignity and to a fair trial as guaranteed under Articles 4, 5 and 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR as well as 7(1)(d) of the Charter, respectively. The Court, therefore, finds that the Respondent State's responsibility has been established. The Applicant is, therefore, entitled to reparations commensurate with the extent of the established violations.

[69] *XYZ v. Republic of Benin* (judgment) (27 November 2020) 4 AfCLR 49, § 158 and *Sébastien Germain Ajavon v. Republic of Benin* (reparations) (28 November 2019) 3 AfCLR 196, § 17.
[70] *Norbert Zongo and Others v. Burkina Faso* (reparations) (5 June 2015) 1 AfCLR 258, §§ 20-31; and *Reverend Christopher R. Mtikila v. United Republic of Tanzania* (reparations) (13 June 2014) 1 AfCLR 72, §§ 27-29.

## A. Pecuniary reparations

### i. Material prejudice

129. In the instant case, the Applicant simply prays the Court to grant reparation in such amount as the Court deems fit. He does not indicate the nature of the material prejudice that he has suffered and how this is linked with the violation of his rights as established by the Court in this judgment. In any event, the Applicant does not support his prayers with proof of the loss incurred.

130. In the circumstances, the Court, therefore, does not grant reparation for material prejudice to the Applicant.

### ii. Moral prejudice

131. The Applicant prays for the Court to order the Respondent State to pay reparations to the Applicant as a direct victim stating that there are violations under Article 7 and 14 of the Charter that the Applicant has suffered. The Applicant further claims reparations for indirect victims who were his dependants being the Applicant's mother and three brothers. The Applicant claims a total amount of Tanzanian Shillings Thirty Million (TZS 30,000,000) for moral prejudice to himself and a total amount of Tanzanian Shillings Fifty Million (TZS 50,000,000) for indirect victims.

132. The Applicant also submits that he has suffered severe hardships as his health has deteriorated following his imprisonment owing to the prison condition. He claims that as a consequence he has suffered from a broken arm, deteriorating eyesight, haemorrhoids, anal fissures and skin disease. He further avers that he has lost his social status in the community and that, being the sole provider, he has been unable to provide for his family since his imprisonment.

133. The Applicant further avers that being held on death row for this period of incarceration is a traumatic experience as it causes him to experience anxiety, dread, fear and psychological anguish.

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134. The Court recalls that in human rights cases, moral prejudice is presumed once violations are established. The assessment of quantum in cases of moral prejudice must be done in fairness and taking into account the circumstances of the case.[71] The practice of the Court, in such instances, is to award lump sums for moral loss.[72]

135. The Court notes that, moral prejudice is that which results from the suffering, anguish and changes in the living conditions for the victim and his family.[73] As established in this judgment, the Applicant suffered several violations which inherently involve moral prejudice. These include the violation of the right to a fair trial, imposition of the mandatory death penalty, detention on death row, all of them compounded by overall inhuman and degrading circumstances. The Court further observes that in the instant Application, while the death sentence has not been carried out, the Applicant has inevitably suffered prejudice from the established violations.

136. Consequently, the Court awards the Applicant the sum of Tanzanian Shillings One Million (TZS 1,000,000) as reparation for the moral prejudice sustained as a result of the violations established.

137. Regarding the prayer for reparations for his indirect victims, the Court notes that the Applicant has failed to adduce documentary proof to show filiation

[71] *Juma v. Tanzania* (judgment), *supra,* § 144; *Viking and Another v. Tanzania* (reparations), *supra,* § 41 and *Umuhoza v. Rwanda* (reparations), *supra,* § 59.
[72] *Zongo and Others v. Burkina Faso* (reparations), *supra*, §§ 61-62 and *Guehi v. Tanzania* (merits and reparations), *supra,* § 177.
[73] *Mtikila v. Tanzania* (reparations), *supra,* § 34; *Cheusi v. Tanzania* (judgment), *supra,* § 150 and *Viking and Another v. Tanzania* (reparations), *supra,* § 38.

such as marriage or birth certificates for his dependants or any equivalent proof.[74] The Court thus dismisses the prayer of the Applicant in this regard.

## B. Non-pecuniary reparations

### i. Amendment of the law to protect life and dignity

138. The Applicant submits that the Court should consider physical and mental well-being, should he remain incarcerated and the difficulty of having a re-trial.

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139. The Respondent State did not specifically address this prayer.

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140. In the present Judgment, the Court has found that the Respondent State violated the Applicant's right to life and to dignity, guaranteed under Articles 4 and 5 of the Charter, in relation to the mandatory imposition of the death penalty and its execution by hanging.

141. The Court recalls its position in previous judgments dealing with the mandatory imposition of the death penalty where it has ordered the Respondent State to undertake all necessary measures to remove from its Penal Code the provision for the mandatory imposition of the death sentence.[75] The Court notes that to date it has issued several identical orders for the removal of the mandatory death penalty which were delivered

[74] *Abubakari v. Tanzania* (reparations), § 60; *Alex Thomas v. United Republic of Tanzania* (reparations) (4 July 2019), 3 AfCLR 287, § 50; *Wilfred Onyango Nganyi and 9 others v. United Republic of Tanzania* (reparations) (4 July 2019) 3 AfCLR 308, § 71; *Zongo and Others v. Burkina Faso* (reparations), § 54; *Lucien Ikili Rashidi v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 13, § 135; and *Léon Mugesera v. Republic of Rwanda* (judgment) (27 November 2020) 4 AfCLR 834, § 148.

[75] *Ghati Mwita v. United Republic of Tanzania,* ACtHPR, Application No. 012/2019, Judgment of 1 December 2022 (merits and reparations), § 166; *Msuguri v. Tanzania* (merits and reparations), *supra*, § 128; *Henerico v. Tanzania* (merits and reparations), *supra*, § 207 and *Juma v. Tanzania* (judgment), *supra*, § 170.

in 2019, 2021, 2022 and 2023; yet, as at the date of the present judgment, the Court does not have any information to the effect that the Respondent State has implemented the said orders.

142. The Court notes that in the present judgment it has found that the mandatory imposition of the death penalty violates the right to life guaranteed under Article 4 of the Charter and therefore holds that the said sentence ought to be removed from the laws of the Respondent State within six months of the notification of the present Judgment.

143. Similarly, in its previous judgments,[76] this Court has held that a finding of violation of the right to dignity owing to the use of hanging as a method of execution of the death penalty warranted an order that the said method be removed from the books of the Respondent State. In light of its finding in this Judgment, the Court orders the Respondent State to take all necessary measures to remove "hanging" from its laws as the method of execution of the death sentence, within six months of the notification of the present Judgment.

**ii. Release and rehearing**

144. The Applicant submits that the restoration of his liberty is the most feasible way in which adequate reparation could be said to have been granted, given the harrowing circumstance of imprisonment identified earlier and the moral prejudice that ensued therefrom.

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145. The Respondent State did not specifically address this prayer.

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[76] *Jeshi v. Tanzania (*merits and reparations)*, supra*, §§ 111, 112, 118; *Romward William v. United Republic of Tanzania*, ACtHPR, Application No. 030/2016, Judgment of 13 February 2024 (merits and reparations), § 94.

146. With regard to the Applicant's prayer of restoration of liberty, the Court recalls its jurisprudence in the case of *Gozbert Henerico v. United Republic of Tanzania* where it held that:

> The Court can only order a release if an Applicant sufficiently demonstrates or if the Court by itself establishes from its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and that his continued detention would occasion a miscarriage of justice.[77]

147. In the instant case, the Court notes that the violations did not impact on the Applicant's guilt and conviction. The sentencing is affected only to the extent of the mandatory nature of the death penalty and its execution by hanging.[78]

148. In the light foregoing, the Court holds that the order for release of the Applicant is not warranted. Consequently, the prayer is dismissed.

149. Having dismissed the prayer for release, and in light of its findings and orders relating to the mandatory imposition of the death sentence, this Court considers that an alternative measure is warranted to give effect to the said findings and orders. The Court, therefore, orders the Respondent State to take all necessary measures, within one year of the notification of this judgment, for the rehearing of the case on the sentencing of the Applicant through a procedure that does not allow the mandatory imposition of the death sentence, and which upholds the discretion of the judicial officer.[79]

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[77] *Henerico v. Tanzania* (merits and reparations), *supra*, § 202; *Mgosi Mwita Makungu v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 550, § 84; *Minani Evarist v. United Republic of Tanzania* (merits and reparations) (21 September 2018) 2 AfCLR 402, § 82 and *Juma v. Tanzania* (judgment), *supra*, § 165.

[78] *Nzigiyimana Zabron v. United Republic of Tanzania,* Application 051/2016, ACtHPR, Judgment of 4 June 2024 (merits and reparations) § 55.

[79] *Rajabu and Others v. Tanzania*, supra, § 171 (xvi); *Juma v. Tanzania*, *supra*, § 174 (xvii); *Henerico v. Tanzania*, *supra*, § 217 (xvi); *Mwita v. Tanzania*, *supra*, § 184 (xviii).

### iii. Publication of the Judgment

150. The Applicant prays the Court to order that the Respondent State publishes the present Judgment on the merits and reparations within three months of notification in both English and Kiswahili for a period of not less than one year, on official website of the judiciary and ministry of constitutional affairs.

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151. The Respondent State did not specifically address this prayer.

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152. The Court observes that, in the present Application, the violation of the right to life by the provision on the mandatory imposition of the death penalty goes beyond the individual case of the Applicant. The same applies to execution of the said sentence by hanging. The Court notes that threats to life associated with the mandatory imposition of the death penalty and its execution by hanging remain alive in the Respondent State, and, as noted above, the Court has no information that its previous decisions in this respect have been implemented. The Court thus finds it appropriate to order publication of this judgment within a period of three months from the date of notification on the websites of the Judiciary, and the Ministry for Constitutional and Legal Affairs, and to ensure that the Judgment remains accessible for at least one year after the date of such publication.

### iv. Implementation and reporting

153. The Applicant prays the Court to order that the Respondent reports to the Court within six months of date of notification of the judgment on merits and reparations and every six months thereafter, until such a time all orders have been complied with.

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154. The Respondent State did not specifically address this prayer.

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155. The justification provided earlier in respect of the Court's decision to order publication of the judgment is equally applicable in respect of implementation and reporting. The Court notes that reporting on implementation of its judgments has now been established in its practices. Specifically in relation to the time within which to report, the Court notes that in its previous judgments the Respondent State was directed to implement the decisions within one year of issuance of the same.[80] In subsequent judgments, the Court has granted the Respondent State a period of six months to implement the same order.[81]

156. The Court holds, therefore, that the Respondent State is under an obligation to report on the steps taken to implement this judgment within six months from the date of notification of this judgment.

## IX. COSTS

157. Although the Applicant does not make an express prayer in respect of costs, he prays the Court to grant any other orders it shall deem necessary.

158. The Respondent State on its part prays the Court to dismiss the Application with costs.

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159. Pursuant to Rule 32(2) of the Rules that "unless otherwise decided by the Court, each party shall bear its own costs, if any."

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[80] *Crospery Gabriel and Another v. United Republic of Tanzania*, ACtHPR, Application No. 050/2016, Judgment of 13 February 2024 (merits and reparations), §§ 142-146; *Rajabu v. Tanzania* (merits and reparations), *supra*, § 171 and *Henerico v. Tanzania* (merits and reparations), *supra*, § 203.
[81] *Damian v. Tanzania*, *supra*; *Zabron v. Tanzania, supra; Crospery Gabriel v. Tanzania*, *ibid; William v. Tanzania*, *supra*; *Jeshi v. Tanzania*, *supra*.

160. In the instant case, the Court notes that proceedings before it are free of charge. Furthermore, none of the Parties provide evidence to support their prayer as to costs. In the circumstances, this Court does not find any justification to depart from the above provisions, and therefore rules that each Party shall bear its own costs.

## X. OPERATIVE PART

161. For these reasons:

THE COURT,

*Unanimously*

*On jurisdiction*

i. *Dismisses* the objection to its material jurisdiction;
ii. *Declares* that it has jurisdiction.

*On admissibility*

iii. *Declares* that the Application is admissible.

*On merits*

iv. *Holds* the Respondent State did not violate the Applicant's right to equality and equal protection of the law as guaranteed under Article 3 of the Charter;
v. *Holds* the Respondent State did not violate the Applicant's right to a fair trial regarding the failure of the court assessors to examine the witnesses as guaranteed under Article 7(1) of the Charter;
vi. *Holds* that the Respondent State violated the right to dignity and not to be subjected to cruel, inhuman or degrading punishment

and treatment guaranteed under Article 5 of the Charter in relation to its agent, the *Justice of the Peace's* failure to order prompt investigations into the alleged abuse and police brutalisation;

vii. *Holds* that the Respondent State violated the Applicant's right to a fair trial by failing to provide the Applicant with effective free legal assistance as guaranteed under Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR;

*By a majority of seven (7) Judges for and three (3) Judges against, Justices Chafika BENSAOULA*, *Stella I. ANUKAM and Dennis D. ADJEI partially dissenting,*

viii. *Holds* that the Respondent State has violated the Applicants right to a fair trial by failing to try him within a reasonable time as guaranteed under Article 7(1)(d) of the Charter;

*By a majority of eight (8) Judges for and two (2) Judges against, Justices Blaise TCHIKAYA* and *Dumisa B. NTSEBEZA dissenting,*

ix. *Holds* that the Respondent State violated the Applicant's right to life protected under Article 4 of the Charter in relation to the mandatory imposition of the death penalty by failing to allow the judicial officers discretion to take into account the nature of the offence and the circumstances of the offender;

x. *Holds* that the Respondent State violated the right to dignity and not to be subjected to cruel, inhuman or degrading punishment and treatment guaranteed under Article 5 of the Charter in relation to the imposition of the death penalty by hanging.

*Unanimously,*

*On reparations*

*Pecuniary reparations*

xi. *Grants* the Applicant's prayer for reparations in respect of the moral prejudice as a result of the violation established and awards him the sum of Tanzanian Shilling One Million (TZS 1,000,000);

xii. *Orders* the Respondent State to pay the sum awarded under (xi) above, free from tax, as fair compensation within six months from the date of notification of this Judgment, failing which it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment until the amount is fully paid.

*Non-pecuniary reparations*

xiii. *Does* not grant the Applicant's prayer for release;

xiv. *Orders* the Respondent State to revoke the death sentence imposed on the Applicant and to remove him from death row;

xv. *Orders* the Respondent State to take all necessary measures, within six months from the notification of this Judgment to remove the mandatory imposition of the death penalty from its laws;

xvi. *Orders* the Respondent State to take all necessary measures, within six months from the notification of this Judgment to remove "hanging" from its laws as a method of execution of the death penalty;

xvii. *Orders* the Respondent State to take all necessary measures, within one year of the notification of this judgment, for the rehearing of the case on the sentencing of the Applicant through a procedure that does not allow the mandatory imposition of the death sentence and upholds the discretion of the judicial officer;

xviii. *Orders* the Respondent State to publish this judgment, within a period of three months from the date of notification, on the websites of the Judiciary, and the Ministry for Constitutional and Legal Affairs, and ensure that the text of the judgment is accessible for at least one year after the date of publication.

*On costs*

xix. *Orders* each Party to bear its own costs.

**Signed:**

Modibo SACKO, President;

Chafika BENSAOULA, Vice President;

Rafaâ BEN ACHOUR, Judge;

Suzanne MENGUE, Judge;

Tujilane R. CHIZUMILA, Judge;

Blaise TCHIKAYA, Judge;

Stella I. ANUKAM, Judge;

Dumisa B. NTSEBEZA, Judge;

Dennis D. ADJEI, Judge;

Duncan GASWAGA, Judge;

and Robert ENO, Registrar.

In accordance with Article 28(7) of the Protocol and Rule 70(3) of the Rules, the Separate Opinion of Justice Rafaâ BEN ACHOUR, the Partially Joint Dissenting

Opinion of Justices Chafika BENSAOULA, Stella I. ANUKAM and Dennis D. ADJEI and the Declarations of Justices Blaise TCHIKAYA and Dumisa B. NTSEBEZA are appended to this Judgment.

Done at Arusha this Twenty-Sixth Day of June in the Year Two Thousand and Twenty-Five in English and French, the English text being authoritative.