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

Declaration of Judge Blaise Tchikaya

The Matter of

Emmanuel Yusufu Noriega v. Tanzania,

Application No. 013/2018

26 June 2025

1. The Court's decision in the matter of *Emmanuel Yusufu Noriega v. Tanzania*[1], rendered on 26 June 2025, has drawn my now well-known dissent. The *Yusufu Noriega* decision follows many others[2] which questionably and regrettably uphold the application of the death penalty. Notwithstanding the criminal act for which he was convicted, Mr. *Yusufu* contended that his right to a fair trial was violated in the domestic proceedings that led to his death sentence.

2. As I have emphasized since 2019,[3] these decisions run counter to advances made in international law. I have opined that:

> "Despite advances in international criminal law, the judgment on *Rajabu and others* seems to retrogress. It pays little attention to the praetorian powers of the Human Rights judge to advance the protection of the right to life".

3. The aforementioned decisions are concerned only with the freedom of the judge in regard to the mandatory death penalty. They do not address the now-established legal invalidity of the death penalty at the international

[1] AfCHPR, *Emmanuel Yusufu Noriega v. Tanzania* (Application No. 013/2018) 26 June 2025: Alleging that he was intoxicated and under the influence of drugs, having smoked *"bhangi," Mr. Emmanuel Noriega Yusufu* beheaded his victim, Ismail Omary Mkangwa, whom he suspected of practicing witchcraft and of having caused the death of his father, on 3 November 1995, in the village of Ilagala (Kigoma).
[2] Opinions under AfCHPR, *Ally Rajabu and Others v. Tanzania*, 28 November 2019, §§ 104-114; *Amini Juma v. Tanzania*, §§ 120-131 and *Gozbert Henerico v. United Republic of Tanzania,* AfCHPR, 10 January 2022, § 160.
[3] AfCHPR *Ally Rajabu and others v. Tanzania*, 28 November 2019, § 24.

level. Let us recall that it is to the Court's credit that it addressed the issue of the death penalty in the present case on its own initiative.[4] This initiative, we would argue, remains unsuccessful, as the Court reiterates its approach on the death penalty, in the following words:

> "The Respondent State violated the Applicant's right to life, protected by Article 4 of the Charter, by imposing the mandatory death penalty on the Applicant".

4. It has been said that this approach by the Court remains flawed. It does not sufficiently denounce the death penalty in the human rights sphere. The approach aims to protect the freedom of the judge to impose the non-mandatory death penalty. The Court's position remains as unsupportive of preserving life as it is of abolishing the death penalty.

5. The *Emmanuel Yusufu Noriega* judgment provides another opportunity to reflect on the unity of the legal regime governing the death penalty across the world. The question of abolition is not solely a matter for the domestic jurisdiction of States, as we have opined.[5] Human rights cannot be the exclusive preserve of States.

6. When a clear trend emerges, as is the case with the abolition of the death penalty, a valid legal exception cannot be made by a few States that do not adhere to the trend. This is unacceptable, even in the name of their sovereignty. An individual position is no longer defensible.

7. The judgment handed down on 2 March 2010 in *Al-Saadoon and Mufdhi v. the* United *Kingdom and Northern Ireland*[6] case by the ECHR underlined

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[4] In § 47 of the Judgment the Court holds that "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 … and the violation of 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"*.*

[5] AfCHPR, *Thomas Mgira v. Tanzania; Umalo Mussa v. Tanzania*, 13 June 2023. v. Partially Dissenting Opinion.

[6] ECHR, *Al-Saadoon and Mufdhi v. the United Kingdom and Northern Ireland*, 2 March 2010: "Against such a consistent background, it can be said that capital punishment in peacetime has come to be

the international illegality of the death penalty in all circumstances. It emerges from that judgment that there is no such thing as a lenient death penalty. This punishment constitutes a deprivation of life; an annihilation of the human being.

8. It should even be said, regrettably, that in *Yusufu*, the Court did not address the death penalty. Yet the case relates to the death penalty. The Court, following its thinking, only finds regrettable the lack of autonomy imposed on the judge. The issue of the death penalty is marginalized.

9. The use of the concept of *jus cogens*, as I pointed out in the Opinion in the matter of *Tembo Hussein*, demonstrates how serious a blow the use of the death penalty deals international human rights law .[7] Undoubtedly, the protection of life may require the application of the highest rules of international law, such as *jus cogens*[8]. The International Court of Justice's decision can be found in its ICJ decision *Jurisdictional Immunities of the State,* Germany v. Italy, Greece (Judgment of 3 February 2012).[9]

10. These rules are internationally binding on subjects of law, such as States and their agents. Even before the adoption of the 1969 Vienna Convention on the Law of Treaties, Japanese Judge Kotaro Tanaka, in *the South West Africa Case* (Ethiopia v. South Africa)[10], stated as early as 1966 that:

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regarded as an unacceptable ... form of punishment that is no longer permissible under Article 2." § 119.

[7] Bellal (A.), *Immunities and serious violations of human rights: towards a structural evolution of the international legal order?* Brussels, Bruylant, 2011, pp. 43 et seq.; L. Caflisch, "*Immunity from jurisdiction and respect for human rights*", in L. Boisson de Chazournes, *The international legal order, a system in search of equity and universality,* Liber amicorum Georges Abi-Saab, The Hague, Nijhoff, 2001, pp. 651-676, spec. pp. 651-653.

[8] The protection of life is a matter of *jus cogens* (the "hard law" or peremptory norms of international law). These norms are defined by the Vienna Convention of 23 May 1969 in its Article 53: "For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

[9] ICJ, *Jurisdictional Immunities of the State*, Germany v. Italy, Greece, 3 February 2012, §§ 95 et seq.; see also Nesi (G.), The Quest for a 'Full' Execution of the ICJ Judgment in Germany v. Italy, *Journal of International Criminal Justice,* 2013, §§185-198, spec. §§. 187 et seq.; see also the comments: Pellet (A.), "The adaptation of international law to the changing needs of international society", RCADI, §§. 9-47, on the Court's "judicial policy".

[10] Dissenting Opinion of Judge Tanaka, *International Status of South West Africa*, § 298.

> "…surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*".

11. At least three elements underscore the relevance of the application of *jus cogens*. These can be succinctly presented as follows: the first element reinforces and completes the prohibitive regime of the taking of life established in 1948 with the Universal Declaration of Human Rights[11]. The second element relates to the *erga omnes* scope of this regime, which henceforth excludes no subject of international law or the very development of this law[12]. Finally, the third element concerns the immediacy of this law, within the very meaning of Article 53 of the Vienna Convention, which speaks about:

> "… a peremptory norm of general international law (…) from which no derogation is permitted (…)".

12. Whatever the philosophical or moral option adopted, the protection of life is immediate. Legal regimes for the protection of life should take precedence, even if ordinary human rights law refuses to prioritize the rights it upholds.

Blaise Tchikaya, *Judge at the Court*

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

[11] Universal Declaration of Human Rights (10 December 1948), Article 3: "Everyone has the right to life, liberty and security of person."
[12] Wyler (É.), Some reflections on the typology of obligations in international law, with particular reference to the law of treaties and the law of responsibility, AFDI, 2019. §§25-49.