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

**Declaration by Judge Blaise Tchikaya**

**The Matter of**
***Tembo Hussein v. Tanzania***
**Application No. 001/2018**
**26 June 2025**

1. I disagree with the operative part of the decision in *Tembo Hussein v. Tanzania* rendered on 26 June 2025.[1]

2. My disagreement stems from the overly hasty and, in my opinion, hazy perception of the concept of "default by a party"[2] in the instant case and the consequences that the Court should draw from it. I also disapprove of the echo that the Court gives the death penalty.[3] In the *Tembo Hussein* case, the Court has once again,[4] confirmed its previous decisions.[5]

3. Indeed, this opinion stems fundamentally from my rejection of arguments underlying the two main aspects of the present decision, namely, the death penalty and the failure to participate in the proceedings,[6] which drove deliberations in the instant case. It should be noted that the Court, fearing a "judgment by default", wrote to the Respondent State to this effect.

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[1] AfCHPR, *Tembo Hussein*, 26 June 2025.
[2] Rules of Procedure of the Court (1 September 2020), Rule 63.
[3] In my view, as far as the death penalty is concerned, it must be said at the outset that there was not sufficient evidence to call for a different domestic verdict, in accordance with the law, in this case. The operative part of the judgment rejects only the mandatory nature given by domestic courts to the death penalty as a punishment for certain offences and upholds the death penalty as it stands.
[4] AfCHPR, *Ally Rajabu and others*, 28 November 2019: This decision enshrines the position that the African Court has consistently defended, namely that "By implication, the death sentence is permissible as an exception to the right to life under Article 4 as long as it is not imposed arbitrarily". See *Individual Opinion,* Tchikaya (B.), under the same judgment. See also AfCHPR, *Marthine Christian Msuguri* v. Tanzania; *Igola Iguna v. Tanzania*; *Ghati Mwita v. Tanzania*, 1 December 2022. Another case is *Thomas Mgira v. Tanzania* (Application No. 003/2019). In all these cases, the Court decided in the same way. Only its mandatory nature makes the death penalty contrary to law.
[5] *Mr Tembo*, the Applicant, was arrested on 26 September 2006 in *Masumbwe*, in the *Shinyanga* region of Tanzania, and charged with murder. He allegedly used a machete to inflict multiple injuries on his victim. On 11 October 2013, he was found guilty and sentenced to death by hanging by the High Court sitting in Tabora. He appealed. See also the judgments in *John Lazaro v. Tanzania*; *Makungu Misalaba v. Tanzania*; *Chrizant John v. Tanzania* delivered on 7 November 2023.
[6] AfCHPR, *Tembo Hussein*, 26 June 2025, cited above, §§ 16 *et seq*.

4. On 20 March 2019, the Court granted the Respondent State's request in part, extending by four (4) months the time-limit for filing a response to the Application. The Respondent State was also reminded of the provisions of Rule 63 of the Rules pertaining to decisions by default.[7]

5. In addition to this, and at the request of the Respondent State, the Court reopened pleadings and postponed its deliberations until 26 August 2024. This extension of the time-limit for filing preliminary processes is due to the Court's assessment of the involvement of the parties in the proceedings, in particular the Respondent State. In this *Tembo* case, the proceedings before the Court were "unduly" prolonged from 19 February 2018 to 26 June 2025, that is, for almost 7 years. That the Respondent State obtained the reopening of the proceedings only served to lengthen the proceedings without any probative legal interest. Apart from the Respondent State's arguments, which were already known to the Court, *Tembo Hussein*, the death row inmate, did not respond.

6. I will therefore, first, **(I)** show that the Court should jettison the internalistic regime of default decisions in order to protect human rights more effectively**.** Next, **(II)** on the question of the death penalty, there is a clear need to enhance the protection of the right to life by reaffirming that the judicial application of the death penalty is manifestly contrary to international law**.**

### *I. The internalistic approach to "default" is irrelevant*

7. Whether by non-appearance, failure to produce documents or pleadings, or partial participation in proceedings, default in international human rights cases cannot be subject to a simple logic applicable in domestic law. The *Tembo* decision was subject to this logic, but the effect was to delay the Court's decision.

8. In defense of deliberations in the *Tembo Hussein case*, it should be noted that, in a way the provisions of Rule 63 of the Rules of Court of 1 September 2020 constitute heresy in international human rights law. These provisions, entitled "Judgments in default", tend to sanction the judgment that results from the presumed overall or

[7] Rule 55 of the Rules of Procedure, 2 June 2010.

specific failure of the Respondent State, rather than its failure to appear. The wording of the Court's Rules seems to take the view that any absence on the part of the State leads to a judgment in default.

9. The default judgment regime is set out in detail in Rule 63 of the Rules.[8] This regime should be amended and simplified. Default judgment is well known in legal language as it is common to national laws. It is to be found in the Code of Civil Procedure in Europe,[9] and has been adopted by African countries, particularly French-speaking ones.

10. Legal doctrine considers that a judgment in default covers two situations: failure to appear and failure to file pleadings. In the second scenario, the Respondent State, whether represented or not at the hearing, remains silent and does not support its case or does not perform all the necessary procedural acts. Failure to appear is less easy to define.[10] It is the case, however, in *Tembo Hussein*, the decision under discussion, the Respondent State took major procedural steps.

11. Hence the decision to reopen the pleadings on 28 October 2024. The Court issued an order reopening pleadings and transmitted the Respondent State's Response to the Applicant for his Reply.[11]

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[8] Rule 63 Decision by default: "1. Where a party fails to appear or to present its case within the time-limit fixed, the Court may, at the request of the other party or of its own motion, give a decision by default after having ascertained that the defaulting party has beeń duly notified of the application and of all other relevant documents in the proceedings. 2. The Court may, on a reasoned application by the defaulting party, and within a period not exceeding one year from the notification of the decision, set aside a decision rendered by default in accordance with paragraph 1 of this Article. 3. Before considering the application to set aside the said decision, the Court shall notify the other party of the application to set aside the decision and allow it a period of thirty (30) days in which to submit its written observations".

[9] Article 472 of the French Code of Civil Procedure states that: "If the defendant does not appear, the case shall nevertheless be decided on its merits. The judge shall grant the claim only insofar as he considers it to be in order, admissible and well-founded".

[10] Eisemann (P. M.). Les effets de la non-comparution devant la Cour internationale de Justice, *AFDI*, 1973, p. 356; Guyomar (G.), *Le Défaut des Parties à un différend devant les Juridictions Internationales*. Étude de droit international public positif. LGDJ, 1960. pp. 242.see also the Comments under : ICJ, *Corfu Channel, Determination of the Amount of Reparations*, Judgment, CM. Recueil, 1949, pp. 244 ; Lévy (D.), *RGDIP*, 1961, p. 744 ); ICJ, *Anglo-Iranian Oil Co, Provisional Measures*, Order of 5 July 1951 CM. Recueil, 1951, pp. 89 (M. Fartache (M.), *RGDIP*, 1953, p. 584); Lavile (J.-F.), *JDI*, 1953, p. 706); *Nottebohm, preliminary objection*, judgment, CM. Recueil, 1953, p. 111; Bastid (S.), *RCDI* 1956, p. 607; Grawitz (M.), *AFDI* 1955, p. 262; Visscher (P. de), *RGDIP* 1956, p. 238.

[11] AfCHPR, Order on Reopening of Pleadings, *Tembo v. Tanzania*, 28 October 2024.

12. In international human rights law, default judgment procedure, insofar as it involves total or partial absence of a party to the proceedings giving rise to the judgment, cannot be applied mechanically or automatically. The defaulting party cannot be given more rights than it has. It is the Respondent State that is required to appear in a human rights trial. When a respondent state ratifies a treaty and allegedly violates the rights instituted therein, it is presumed to be guilty.[12] In human rights proceedings, the Respondent State is deemed to have accepted the proceedings *a priori* and to have already organized the modalities for conducting same.

13. The issue is also delicate in general international litigation. The 1945 Committee of Jurists drafting Article 53 of the Statute of the International Court of Justice does not use the term “judgment in default”.[13] In 1949, Albania challenged the jurisdiction of the ICJ to assess the amount of compensation in *the Corfu Channel case.*[14] It did not file any processes and, for the first time, the Court applied the procedure of non-appearance provided for in Article 53 of its Statute. Nevertheless, it delivered its judgment in the *Corfu Channel case, Assessment of the Amount of Compensation* of 1949.

14. The Statute of the International Court of Justice can be read on this point:

> **"** 1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favor of its claim.

[12]For Professor Alain Pellet in particular, international law reduces the protection of fundamental human rights to a state issue. In short, the individual can only validly defend his or her rights, even if they are fundamental, when he or she refers to the State, when he or she uses mechanisms set up by the State. Developments in "Le projet d'articles de la C.D.I. sur la protection diplomatique : une codification pour (ou presque) rien", Kohen (M. G) (ed.), *La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international* - Liber Amicorum *Lucius Caflisch*, Brill, Leiden, 2007, p. 1133. v. by the same author: "La mise en œuvre des normes internationales des droits de l'homme - Souveraineté du droit' contre souveraineté de l’État ?", CEDIN, *La France et les droits de l'Homme*, Montchrestien, Paris 1990, pp. 101-140.

[13]In 1949, Albania challenged the jurisdiction of the I.C.J. to determine the amount of reparations *in the Corfu Channel case*. It did not take any procedural steps and, for the first time, the Court applied the procedure of non-appearance provided for in Article 53 of its Statute. It delivered its judgment; ICJ, *United Kingdom of Great Britain and Northern Ireland v. Albania*, *Corfu Channel, Determination of the Amount of Reparations*, Judgment, Reports, 1949, pp. 244.

[14] ICJ, *Corfu Channel*, *United Kingdom of Northern Ireland v. Albania*, Determination of the Amount of Reparations, 15 December 1949*, [*1949*] ECR* 244.

> 2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law".

15. One notes that these provisions relate only to the Court's jurisdiction and the merits of its findings. When applied to human rights litigation, this approach seems reasonable. In a human rights case, it is assumed that the two parties are unequal in terms of status.

16. If the provisions of the Court's Rules were to apply, the Respondent State could have requested the Court:

> "Within a period not exceeding one year from the date of notification of the judgment, set aside a judgment entered in default […]".[15]

17. The result would be an undeniable loss of diligence in human rights protection and, therefore, lack of effectiveness. The obligation to act promptly is a component of the litigation procedure that seeks to protect human rights.[16]

18. In its section judgment, *Wałęsa v. Poland*, 23 November 2023, the European Court held that:

> " In view of the foregoing, and given the rapid and continued increase in the number of applications concerning the independence of the judiciary in Poland and alleging, in particular, a breach of the right to an "independent and impartial tribunal established by law", the Court therefore concludes that the present case is suitable for the "application of the pilot-judgment procedure".[17]

19. The European Court refused to back down in the face of the Respondent State's failure to cooperate. It took the initiative.

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[15] Rule 63 of the Rules of Procedure of the African Court
[16] See Célérité de la procédure, see Sudre (F.), Andriantsimbazovina (J.), *Gonzalez* (G.), Gouttenoire *(*A.), Marchadier (F.), Milano (L.), Schahmaneche (A.), Szymczak (D.), *Grands arrêts de la Cour européenne de droits de l'homme,* PUF, 2022, p. 406 et seq.
[17] ECHR, *Case of Wałęsa v. Poland*, 2023, §§ 326-32 and operative paragraphs 6-7.

20. The Court could undoubtedly, when it deems fit, use the words of the Rules of the Inter-American Court of Human Rights, which are more appropriate to human rights. Article 29 on the procedure in the event of failure to appear or in the event of inaction simply states that:

> "(1) When the Commission; the victims, alleged victims, or their representatives; the Respondent State; or, if applicable, the petitioning State fail to appear in or pursue a matter, the Court shall, on its own motion, take the measures necessary to conduct the proceedings to their completion".[18]

21. These provisions are careful not to constitute or reconstitute rights accruing to the defaulting Respondent State involved in the proceedings and presumed to have violated the rights in question. This is the meaning of Article 53 of the Rules of the International Court of Justice cited above.

22. The African Court could, when it suits it, take up the spirit and even the letter of Article 44 c of the Rules of the European Court, which states:

> **"**1. Where a party fails to adduce evidence or provide information requested by the Court or to divulge relevant information of its own motion or otherwise fails to participate effectively in the proceedings, the Court may draw such inferences as it deems appropriate.
>
> 2. Failure or refusal by a respondent Contracting Party to participate effectively in the proceedings shall not, in itself, be a reason for the Chamber to discontinue the examination of the application."[19]

23. The provisions of the Rules of the African Court seem to be conducive to decisions by default. For its part, international practice is very circumspect. A reading

[18] The next paragraph reads as follows: "2. When victims, alleged victims, or their representatives; the respondent State; or, if applicable, the petitioning State enter a case at a later stage in the proceedings, they shall participate in the proceedings at that stage.".

[19] Article 44 c of the Rules of the European Court of Human Rights, Article 44A on "Obligation to cooperate with the Court" must be added to it. It reads: "The parties have a duty to cooperate fully in the conduct of the proceedings and, in particular, to take such action within their power as the Court considers necessary for the proper administration of justice. This duty shall also apply to a Contracting Party not party to the proceedings where such cooperation is necessary".

of the Rules of other international courts bears witness to this. It should be emphasized that stating that a judgment has been rendered by default confers on the said judgment a special status, particularly with regard to the defaulting party. It is for this reason that default is very rarely granted to the Tribunal in international arbitration cases. [20]

24. In domestic law, on the other hand, the default procedure is normally used. The tradition of domestic law that has prevailed here is difficult to accept. It is difficult to accept that once proceedings have begun, one of the parties, such as the State, could change its mind in the middle of the proceedings. This would paralyze the proceedings and undermine the Court's authority. Such a situation would be legally absurd.

25. We can thus understand the concern of the Consultative Committee of Jurists of the League of Nations, which drafted the Statute of the Permanent Court International Justice, which is totally absent in the present situation. The rapporteur of the Consultative Committee of Jurists, Mr de La Pradelle, raised the possibility that many domestic systems would accept the pleadings of the litigant without evidence. Referencing the special nature of litigants - States - he emphasized that a conviction against them is particularly serious when they deny the Court the right to judge them. As a result, he proposed a system acceptable to the susceptibilities of state sovereignty, namely, a system in which the condemnation of the defaulting State was assorted with all the guarantees. [21]

26. The *Tembo Hussein case* illustrates the two reasons why the Court should not hesitate to amend Rule 63 of its Rules: 1) The question of the possible non-participation of the State in proceedings cannot arise in matters of human rights, as the proceedings are governed upstream and downstream by the State. The consensual nature of international litigation is not at fault. It is reinforced by the principle of prior exhaustion of local remedies.[22] This principle refers in part to the procedures

[20]Bastid (S.), L'arbitrage international, *Jurisclasseur de Droit international*. Fasc. 249, 20.
[21]P.C.I.J., *Advisory Committee of Jurists, Procès-verbaux des séances du Comité*, 16 juin - 24 juillet 1920, with annexes, The Hague, Van Langenhuysen Frères, 1920, pp. 739-740; Eisemann (P. M.), Les effets de la non-comparution devant la Cour internationale de Justice, *Op. cit.* p. 355.
[22] Principle recognized and introducing an obligation and considered as a customary rule of international law. See I.C.J., *Interhandel Case* (*Switzerland* v. *United States of America*), Preliminary Objections of 21 March 1959, *I.C.J. Reports 1959*, p. 27: “The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law”. See also the arbitral decisions confirming the customary nature of the rule, notably *in Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war* (*Finland* v. *Great*

that take place in the domestic system. 2) In reality, as in *the Tembo Hussein case,* the State participates *mutatis mutandis* in the Court's procedure.

27. Participation in the procedure can be understood as follows. First, in accordance with Rule 35(3) of the Rules of 2 June 2010, on 24 June 2019 the Application was transmitted to all States Parties to the Protocol and to all other entities listed in Rule 42(4) of the Rules. No further action was taken by the Respondent State.

28. Next, the judgment states:

> "On 21 January 2019, the Respondent State requested the Court for a six months' extension of time to file its Response. On 20 March 2019, the Court granted an extension of time of four months within which the Respondent State was to file its Response to the Application".[23]

29. Moreover, the judgment clearly states that:

> "The Respondent State requested the Court for a six- months' extension of time to file its Response […] The Court granted an extension of time of four months within which the Respondent State was to file its Response to the Application […] However, the Respondent State did not file any Response.[24]

30. In this *Tembo Hussein* case, the State actually participated in the proceedings. Participation may in fact take different forms and various acts. The first of these acts is, as the Respondent State did in this case, the appointment of its Representative in the proceedings.[25] Next, the attitude of the Respondent State in human rights proceedings may vary according to the importance it attaches to the dispute. It may consider individually - wrongly no doubt - that the Court has sufficient evidence to decide on the merits.

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*Britain*), 9 May 1934, R.S.A., vol. III, p. 1479, and the *Ambatielos Award* case (*Greece* v*. United Kingdom*), 6 March 1956, R.S.A., vol. XII, p. 83.

[23] AfCHPR, Judgment, *Tembo Hussein*, § 9

[24] *Idem.*, § 9 and 12.

[25] The Respondent State was represented by Dr. Boniphace Nalija Luhende, Solicitor General.

31. The Court's current Rules appear to draw inspiration from the 2016 case of the *Banjul Commission v. Libya*, in which it examined comprehensively whether the requirements for default were met:

> "42. Not only had all the pleadings been served on the Respondent, but the latter, while it sent the Court two Notes Verbale in response to the Order of 15 March 2013, consistently failed to present its defence, despite the extension of the deadline accorded.
> 43. The Court will therefore proceed to examine compliance with the other requirements of Rule 55 of its Rules to satisfy itself that it has jurisdiction and that the application is admissible".[26]

32. The *Lameck Bazil v. Tanzania* decision of 2024 famously presents the difficulty highlighted. The Court does not draw a sufficient inference from the defect. In that case, it stated, in § 16 :

> "The Respondent State was granted 60 days to file its Response. However, it failed to do so. The Registry also sent reminders to the Respondent State on 9 July 2020, 23 February 2021, 28 July 2021 and 10 August 2022 granting it each time 30 days to file its Response but it failed to do so. The Court thus finds that the Respondent State has defaulted in defending the case". [27]

33. In the light of these factors, it can be said that the provisions of Rule 63 of the Rules of the Court need to be amended to make it consistent with that of the other two international human rights courts. It follows that the internalist regime introduced by the Rules of Court is not relevant. It is not acceptable in human rights law for a party, after having participated in the entire procedure and, having refused to assert its rights, to be allowed to overturn the Court's final decision, and for the Court itself to afford it the opportunity to do so.

34. The expected amendments and adjustments that the Court could make to its Rules would concern Rule 63(2) and (3), which state that:

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[26] AfCHPR, *African Commission on Human and Peoples' Rights v. Libya* Judgment, 3 June 2016, § 42 and 43.
[27] AfCHPR, *Lameck Bazil v. Tanzania,* 13 November 2024.

> "The Court may […] within a period not exceeding one year from the date of notification of the decision, set aside a decision entered in default […]".

35. These provisions therefore imply that any violations found, or remedies ordered, by the Court will be wiped out as a result of the impugned lacuna. This is a worrying state of affairs. The Court, which seeks to protect rights that are often particularly precarious, should not be stricter in procedure.[28] The Court should reconsider this point.

36. Furthermore, in the *Tembo case,* the Court confirmed its position on the death penalty. I deem it necessary to reiterate my displeasure at this sanction, which is contrary to international human rights law.

### *II. The death penalty, a sanction contrary to international human rights law*

37. The death penalty is contrary to international law and human rights.[29]

38. As mentioned in previous articles, this criminal sanction has been denounced in all spheres of social collectivization.[30] In his day, the French essayist and thinker Victor Hugo described the death penalty as "a barbaric amputation"".[31]

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[28] To this end, an Agreement of the European system secures the rights of parties participating in proceedings before the Commission or the Court. It reads: "(...) European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights", Strasbourg, 5 March 1996. This underlines the need to participate in proceedings before the European Court. This requirement can be transposed to the African Court on Human and Peoples' Rights.

[29] See *The Convention on the Rights of the Child*, with 196 States parties, which entered into force on 2 September 1990; the *International Covenant on Civil and* Political *Rights*, with 171 States parties and 6 signatory States, which entered into force on 23 March 1976; the First Optional Protocol to the *International Covenant on Civil and Political Rights*; the Second Optional Protocol to the *International Covenant on Civil and* Political *Rights*, aiming at the abolition of the death penalty, adopted and proclaimed by the General Assembly in its resolution 44/128 of 15 December 1989; See also the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty* adopted by the General Assembly of the Organization of American States on 8 June 1990; *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, Strasbourg, 28 April 1983; Protocol No. 13 to the *Convention for the Protection of Human Rights and Fundamental Freedoms* of the Council of Europe, 3 May 2002.

[30] 144 countries have abolished the death penalty in law or practice. Today, 112 states have abolished the death penalty in all circumstances, but 55 countries still practice it. This clearly shows the global abolitionist trend.

[31] Hugo (V.), *Claude Gueux*, Biblock, ed. publique, 1834, p. 54.

39. Once again, the African Court was faced with a case involving the death penalty. It did so again in 2024, when it ruled on the same penalty *in Jeshi v. Tanzania.*[32] In the said case, the Court referred *suo motu* to the mandatory death penalty, without the applicant having had to denounce it in his pleadings. The Court did not refer to the death penalty as an infringement of the law for which the Respondent State was responsible. At best, the Applicant prayed the Court to:

> "Restore justice where it was overlooked and quash both the conviction and the sentence imposed upon him and set him at liberty".[33]

40. The Court went further in exercising its powers in this area.[34] It held that:

> "The Respondent State violated the Applicant's right to life under Article 4 of the Charter, in relation to the mandatory imposition of the death penalty".

41. The Court noted in its reasoning that *Mr Tembo* did not comment on the right to life. However, the Court noted that he was sentenced to the mandatory death penalty, which took away the judge's discretion. There was therefore a breach of fairness contrary to international jurisprudence and Article 4 of the Charter. The Court thus maintains its previous jurisprudence [35] and does not repudiate the death penalty as an unacceptable punishment.

42. On the one hand, the Court held that the Respondent State violated the Applicant's right to life, protected by Article 4 of the Charter, insofar as it sentenced him to the mandatory death penalty.

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[32]Declaration, Judge Tchikaya (B.) in *Romward William v. Tanzania*; *Deogratius Nicholaus Jeshi v. Tanzania*; *Crospery Gabriel and Ernest Mutakyawa* v. *Tanzania,* 13 February 2024, in which I expressed the hope that "This case law from 2024 represents the death throes of an inhumane and anachronistic sanction: the death penalty"

[33] AfCHPR, *Tembo Hussein judgment*, 26 June 2025, § 17.

[34] Its powers are explicitly extended by the Protocol, the first paragraph of Article 27 of which states that "Where it considers that there has been a violation of a human or peoples' right, the Court shall order all appropriate measures to remedy the situation, including the payment of just compensation or the making of reparation". The Court is therefore empowered to rule on any violation that may result from a case brought before it.

[35] AfCHPR, *Ally Rajabu and others v. Tanzania*, 28 November 2019; *Amini Juma v. Tanzania,* 30 September 2021; *Gozbert Henerico v. Tanzania,* AfCHPR, 10 January 2022; *Dominick Damian v. Tanzania*, 4 June 2024; *Nzigiyimana Zabron v. Tanzania*, 4 June 2024.

43. On the other hand, the Court has held that:

> "Hanging a person is one of such methods and it is therefore inherently degrading. [36] [...]Furthermore, having found that the mandatory imposition of the death sentence violates the right to life due to its arbitrary nature, this Court finds the method of implementation of that sentence, that is, hanging, inevitably encroaches upon the dignity of a person in respect of the prohibition of torture and cruel, inhuman and degrading treatment ".[37]

44. The Court failed to assert an *obligation erga omnes*[38] to the extent that it rendered a decision that was contrary to modern international law. This international obligation must be recalled.

45. It should be remembered that my Declaration seeks to highlight the fact of the Court basing its rejection of the death penalty based on the mandatory nature of the sentence. This rejection derives meaning from international human rights law, not from the domestic law of States. This is why the Court sees it only as a curtailment of the domestic judge's freedom of appreciation. The death penalty has become contrary to international rules and fundamental rights and freedoms. It is contrary to the right to life and human dignity.

46. Article 2(1) of the European Convention for the Protection of Human Rights stipulates that "No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law". Although the regime applicable to the death penalty still varies in

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[36] *Rajabu and Others v. Tanzania* (merits and reparations), *supra*, §§ 118 and 119.
[37] *Juma v. Tanzania* (judgment)*, supra,* § 136.
[38] On 11 February 2019, the Court had first issued a *proprio motu* interim measures order enjoining the respondent State to stay the execution of the death sentence imposed on the Applicant, pending the decision on the Application initiating proceedings. v. AfCHPR, *Tembo Hussein Judgment*, 5 June 2024, § 10; see Bonafé (B. I.), La violation d'obligations envers la communauté internationale dans son ensemble et la compétence juridictionnelle de la Cour internationale de Justice, in, Cannizzaro (E.), *The Present and Future of Jus Cogens,* Sapienza Università Ed. Piazzale, 2015, pp. 145 et seq. v. C.I.J., *Case concerning South West Africa*, Ethiopia and Liberia v. South Africa, ICJ, Advisory Opinion, Preliminary Objections and 2nd Phase, 11 July 1950, 21 December 1962 and 18 July 1966; see also I.C.J., *Barcelona Traction Light and Power Company*, Belgium v. Spain, ICJ, Preliminary Objections and 2nd Phase, 11 July 1950, 21 December 1962 and 18 July 1966. Spain, ICJ, Preliminary Objections, 24 July 1964, ECR 1964, p. 6, and Merits, 5 February 1970, ECR 1970, p. 3.

certain domestic systems,[39] the jurisprudence of the European Court has led to the abolition of the death penalty. [40]

47. This should be of profound legal importance in the field of human rights. This appreciation of human rights cannot vary depending on an applicant's socio-political community. International abolition has now been achieved. While it may vary from one area to another,[41] it is well established. It already engenders universal *erga omnes* rights that do not necessarily require unanimous agreement by States. Only the latter will affirm the abolition or international invalidity of the death penalty as the process is now legally well under way.

48. The International Court of Justice has explicitly admitted the existence of *erga omnes* obligations. It has also recognized that any State to which an obligation *erga omnes partes* is addressed has an interest in bringing proceedings. Any State is sufficiently qualified to bring proceedings against a State that has violated this obligation. The case between Belgium and Senegal[42] again emphasized that :

> "Any State Party to the Convention against Torture may invoke the responsibility of another State Party in order to establish the latter"s alleged failure to fulfil its obligations *erga omnes partes* (...) and to put an end to such failure".[43]

49. We would gain by admitting the nature of the positive obligations incumbent on States. International obligations suggest that States refrain from causing the death of persons over whom they have personal jurisdiction from the point of view of international law. This right also suggests that they take the necessary measures to protect the lives of people under their jurisdiction. This positive obligation has two parts:

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[39] Although many countries in the world have not abolished the death penalty, they do not carry it out.
[40] The death penalty is retained in a third of OAS member states. However, none of them has carried out executions for more than ten years. The United States is the only OAS country that carries out executions.
[41]The world coalition organized a panel on the 30th anniversary of the American Protocol on the abolition of the death penalty in 2020. Of the 35 member states of the OAS, 13 have ratified the American Protocol, 8 countries that are abolitionist in law have not ratified it (Bolivia, Canada, Colombia, El Salvador, Guatemala, Haiti, Peru and Suriname) and 14 still retain the death penalty.
[42]ICJ, *Questions concerning the obligation to prosecute or extradite,* Belgium v. Senegal, 20 July 2012
[43] See also ICJ, *Barcelona Traction Light and Power Company*, Belgium v. Spain, Preliminary Objections. Spain, Preliminary Objections, 24 July 1964, ECR 1964, p. 6, and Merits, 5 February 1970, ECR 1970, p. 3.

the first part recommends a regulatory framework favorable to life, and the second part is practical, requiring the State to take preventive measures.

50. The protection of life should be subject to the highest rules of international law, such as *Jus cogens*[44] . The International Court of Justice has already argued along these lines[45] . Consider the decision of 3 February 2006, *Case concerning Armed Activities on the Territory of the Congo, DRC v. Rwanda* under the Convention on the Prevention and Punishment of the Crime of Genocide and in 2012 in ICJ, *State Jurisdictional Immunities*, *Germany v. Italy*, Greece (intervener*),* judgment of 3 February 2012[46]. It follows that a State cannot disregard these rules, which are internationally binding on it under its domestic law. Nor can the African Court, under the terms of its reasoning, apply the domestic rule to reduce its scrutiny of national human rights regimes, unless it establishes a national margin of appreciation. It should be noted that even before the adoption of the Vienna Convention on the Law of Treaties, the Japanese judge Kotaro Tanaka in *the South West Africa Case* (*Ethiopia v. South Africa*)*[47]* , stated as early as 1966:

> "If one is justified in introducing into international law an *ius cogens* (a question recently studied by the International Law Commission), a kind of imperative law as opposed to *jus dispositivum*, which may be modified by agreement between States, there is no doubt that the law relating to the protection of human rights may be considered to be *jus cogens*".

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[44] It cannot be ruled out that the protection of life comes under the *jus cogens* ("binding law", or peremptory norms) of the principles of rights deemed to be universal and superior, which are peremptory norms of international law. This is defined by the *Vienna Convention* of 23 May 1969, Article 53 of which states: " 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. ".

[45] Judge Cançado Trindade considered that *jus cogens* belongs rather to the general principles of law: see Cançado Trindade, *International Law for Humankind*, p. 335 et seq.

[46] Laval (Pierre-Fr.). L'arrêt de la Cour internationale de Justice dans l'affaire des *Immunités juridictionnelles de l'Etat,* Allemagne c. Italie; Grèce intervenant, *AFDI*, 2012. pp. 147: Paragraph 89 of the judgment stated in particular that: "In an appendix to its report, this working group referred, by way of supplement, to certain developments concerning claims "in the event of death or personal injury resulting from acts committed by a State in violation of human rights norms having the character of jus cogens, and specified that this question should not be neglected (...)". See also Virally (M.), Réflexions sur le "jus cogens", *AFDI*,1966, p. 5; De Verdross (Alf.), Forbidden Treaties in International Law, *AJIL* 3, 1937, p. 571; Brownlie (I.), *Principles of Public International Law*, Oxford University Press, 2008, p. 500. For the identification of general norms of law, *see* Dupuy (P.-Marie), "Le juge et la règle générale" *RGDIP* 93 (1989): 569-597, p. 570 et seq.

[47] Dissenting opinion of Judge Tanaka*, International Status of South West Africa*, p. 298.

51. *Mr Tembo Hussein* had seized the Court at the time:

> "He was on death-row at Uyui Central Prison, Tabora, having been tried, convicted and sentenced to death by hanging for the offence of murder".

52. In § 78 of the judgment, while acknowledging the infringement of the right to life, the Court adopts a barely credible line of reasoning when it states:

> "(…) in accordance with the 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 (...)".[48]

53. The Court cannot find itself between international illegality and the supposed legality of contrary local practices. The Court finds itself a grey or undefined area. It should rule on the law and therefore invalidate any sanction that is contrary to life. Life being, in fact or in law, the indispensable prerequisite[49]

54. In 1973, in one of his articles analyzing international law, Alain Pellet drew the truculent conclusion that:

> "International law is sometimes violated, but that does not mean that there are no standards. Just as it cannot be claimed that criminal law does not exist because murders, robberies and rapes are frequent and often go unpunished, it cannot be denied that international law exists because it is not always respected". [50]

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[48] AfCHPR, *Rajabu and Others v. Tanzania* (merits and reparations), *supra*, § 118.

[49] See the comments in IACtHR, *Velasquez Rodrigez v. Honduras*, Preliminary objections, 26 June 1987; merits, 29 July 1988; see the comments in Cohen-Jonathan (G.), *RGDIP*, 1990, pp. 145-465; Cerna (Ch.), *AFDI*, 1996, pp. 715-732; Frumer (Ph.), *RBDIP*, 1995/2, p. 515; Hennebel (L.) et Tigroudja (J.), RTDH *(Revue trimestrielle des droits de l'Homme*), 2005, no. 66, pp. 277-329; Tigroudja (H.), *AFDI*, 2006. pp. 617-640. Just as the Inter-American Convention did not provide for the offence of disappearance, Article 4 of the African Charter does not provide a legal regime for the death penalty. The Inter-American Court consistently replied that enforced disappearance is a complex and continuous offence. See also: Human Rights Committee, *Case of Rawle Kennedy v. Trinidad and Tobago*, Communication No. 845/1999, 2 November 1999, § 7.2; IADH Court, *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, judgment, 21 June 2002, Series C, no. 94, § 103: "The Court finds that the Offences Against the Person Act of 1925 of Trinidad and Tobago automatically and generically mandates the application of the death penalty for murder and disregards the fact that murder may have varying degrees of seriousness".

[50] Pellet (A.), Le droit international public, *in Le droit aujourd'hui*, Ouvrage collectif publié sous la direction du Professeur Rouvier, C.P.E.L., 1973, pp. 304-331.

55. The *Tembo Hussein* judgment provides an eloquent illustration.

Blaise Tchikaya, Judge of the Court

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