

**Report of judgments,
advisory opinions and
other decisions of
the African Court on Human and Peoples' Rights**

**African Court Law Report
Volume 1 (2006-2016)**



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***Report of judgments, advisory opinions and other decisions of
the African Court on Human and Peoples' Rights***

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Table of contents

Editorial.....	v
User Guide	vi
Table of Cases	vii
Alphabetical Table of Cases.....	xii
Subject Index.....	xvi
Instruments Cited	xxviii
Cases Cited	lxi
Contentious Matters	1
Advisory Proceedings.....	720

Editorial

This is the first volume of the Reports of judgments, advisory opinions and other decisions of the African Court on Human and Peoples' Rights. This volume covers decisions from 2009, the year the Court delivered its first judgment, up to 2016. However, the years of coverage as indicated on the cover is 2006-2016, in recognition of the fact that 2006 was the year the Court was established with the election of the first judges and the holding of its First Ordinary Session.

The volume includes all the Judgments, including Separate and Dissenting Opinions, Advisory Opinions, Rulings, Decisions, Procedural Orders and Orders for Provisional Measures adopted by the Court during the period under review. Even though, as in current practice of the Court, decisions on lack of jurisdiction due to the Respondent not having filed an Article 34(6) Declaration would be administratively handled by the Registry without a judicial decision, all such early decisions are included in the present Report. The rationale is to provide the readers, especially researchers, with a comprehensive practice of the Court over its first decade of adjudication.

Each case has a headnote setting out a brief summary of the case followed by keywords indicating the paragraphs of the case in which the Court discusses the issue. A subject index at the start of the report indicates which cases discuss a particular issue. This index is divided into sections on general principles and procedure, and substantive issues.

User Guide

This first volume of the African Court Law Report includes 67 decisions of the African Court on Human and Peoples' Rights. Decisions in respect of the same case are sorted chronologically and grouped together, for example, procedural decisions, orders for provisional measures, merits judgments and reparations judgments. A table of cases setting out the sequence of the decisions in the Report is followed by an alphabetical table of cases. The report also includes a subject index, divided into sections on procedure and substantive rights. This is followed by lists of instruments cited and cases cited. These lists show which of the decisions include reference, in the main judgment, to specific articles in international instruments and case law from international courts and quasi-judicial bodies.

Each case includes a chapeau with a brief summary of the case together with keywords and paragraph numbers where the issue is discussed by the Court or in a separate opinion.

The year before AfCLR in the case citation denotes the year of the decision, the number before AfCLR the volume number (1), while the number after AfCLR indicates the page number in this Report.

Table of Cases

CONTENTIOUS MATTERS

Michelot Yogogombaye v Senegal, Application 001/2008

Judgment (jurisdiction), 15 December 2009 (2009) 1 AfCLR 1

African Commission on Human and Peoples' Rights v Libya, Application 004/2011

Order (provisional measures), 25 March 2011 (2011) 1 AfCLR 17

Order (striking out), 15 March 2013 (2013) 1 AfCLR 21

Soufiane Ababou v Algeria, Application 002/2011

Decision (jurisdiction), 16 June 2011 (2011) 1 AfCLR 24

Daniel Amare and Mulugeta Amare v Mozambique and Mozambique Airlines, Application 005/2011

Decision (jurisdiction), 16 June 2011 (2011) 1 AfCLR 26

Association Juristes d'Afrique pour la Bonne Gouvernance v Côte d'Ivoire, Application 006/2011

Decision (jurisdiction), 16 June 2011 (2011) 1 AfCLR 28

Youssef Ababou v Morocco, Application 007/2011

Decision (jurisdiction), 2 September 2011 (2011) 1 AfCLR 30

Tanganyika Law Society, the Legal and Human Rights Centre v Tanzania, Application 009/2011; Reverend Christopher R. Mtikila v Tanzania, Application 011/2011 (Consolidated Applications)

Decision (joinder), 22 September 2011 (2011) 1 AfCLR 32

Judgment, 14 June 2013 (2013) 1 AfCLR 34

Ruling on reparations, 13 June 2014 (2014) 1 AfCLR 72

Ekollo Moundi Alexandre v Cameroon and Nigeria, Application 008/2011

Decision (jurisdiction), 23 September 2011 (2011) 1 AfCLR 86

Efoua Mbozo'o Samule v The Pan African Parliament, Application 010/2011

Decision (jurisdiction), 30 September 2011 (2011) 1 AfCLR 95

Convention Nationale des Syndicats du Secteur Education (CONASYSED) v Gabon, Application 012/2011

Decision (jurisdiction), 15 December 2011 (2011) 1 AfCLR 100

Delta International Investments SA, Mr AGL de Lange and Mrs de Lange v South Africa, Application 002/2012

Decision (jurisdiction), 30 March 2012 (2012) 1 AfCLR 103

Emmanuel Joseph Uko and Others v South Africa, Application 004/2012

Decision (jurisdiction), 30 March 2012 (2012) 1 AfCLR 107

Amir Adam Timan v Sudan, Application 005/2012

Decision (jurisdiction), 30 March 2012 (2012) 1 AfCLR 111

Baghdadi Ali Mahmoudi v Tunisia, Application 007/2012

Decision (jurisdiction), 26 June 2012 (2012) 1 AfCLR 114

Femi Falana v African Union, Application 001/2011

Judgment (jurisdiction), 26 June 2012 (2012) 1 AfCLR 118

African Commission on Human and Peoples' Rights v Libya, Application 002/2013

Order (provisional measures), 15 March 2013 (2013) 1 AfCLR 145

Order (provisional measures 2), 10 August 2015 (2015) 1 AfCLR 150

Judgment, 3 June 2016 (2016) 1 AfCLR 153

Atabong Denis Atemnkeng v African Union, Application 014/2011

Judgment, 15 March 2013 (2016) 1 AfCLR 182

Ernest Francis Mtingwi v Malawi, Application 001/2013

Decision (jurisdiction), 15 March 2013 (2016) 1 AfCLR 190

African Commission on Human and Peoples' Rights v Kenya, Application 006/2012

Order (provisional measures), 15 March 2013 (2013) 1 AfCLR 193

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso, Application 013/2011

Order (preliminary objections), 21 June 2013 (2013) 1 AfCLR 197

Judgment, 28 March 2014 (2014) 1 AfCLR 219

Judgment on reparations, 5 June 2015 (2015) 1 AfCLR 258

Urban Mkandawire v Malawi, Application 003/2011

Judgment (admissibility), 21 June 2013 (2013) 1 AfCLR 283

Ruling (review and interpretation), 28 March 2014 (2014) 1 AfCLR 299

Lohé Issa Konaté v Burkina Faso, Application 004/2013

Order of provisional measures, 4 October 2013 (2013) 1 AfCLR 310

Judgment, 5 December 2014 (2014) 1 AfCLR 314

Judgment on reparations, 3 June 2016 (2016) 1 AfCLR 346

Karata Ernest and Others v Tanzania, Application 001/2012

Order (procedure), 27 September 2013 (2013) 1 AfCLR 356

Frank David Omary and Others v Tanzania, Application 001/2012

Ruling (admissibility), 28 March 2014 (2014) 1 AfCLR 358

Judgment (review), 3 June 2016 (2016) 1 AfCLR 383

Peter Joseph Chacha v Tanzania, Application 003/2012

Judgment (admissibility), 28 March 2014 (2014) 1 AfCLR 398

Chrysanthe Rutabingwa v Rwanda, Application 003/2013

Order (striking out), 14 May 2014 (2014) 1 AfCLR 462

Alex Thomas v Tanzania, Application 005/2013

Judgment (merits), 20 November 2015 (2015) 1 AfCLR 465

Femi Falana v African Commission on Human and Peoples' Rights, Application 019/2015

Order (jurisdiction), 20 November 2015 (2015) 1 AfCLR 499

Wilfred Onyango Nganyi and 9 Others v Tanzania, Application 006/2013

Judgment (merits), 18 March 2016 (2016) 1 AfCLR 507

Ingabire Victoire Umuhoza v Rwanda, Application 003/2014

Order (procedure), 18 March 2016 (2016) 1 AfCLR 553

Order (procedure), 3 June 2016 (2016) 1 AfCLR 562

Ruling (jurisdiction), 3 June 2016 (2016) 1 AfCLR 540

Armand Guehi v Tanzania, Application 001/2015

Order (provisional measures), 18 March 2016 (2016) 1 AfCLR 587

Ally Rajabu and Others v Tanzania, Application 007/2015

Order (provisional measures), 18 March 2016 (2016) 1 AfCLR 590

John Lazaro v Tanzania, Application 003/2016

Order (provisional measures), 18 March 2016 (2016) 1 AfCLR 593

Evodius Rutechura v Tanzania, Application 004/2016

Order (provisional measures), 18 March 2016 (2016) 1 AfCLR 596

Mohamed Abubakari v Tanzania, Application 007/2013

Judgment (merits), 3 June 2016 (2016) 1 AfCLR 599

Habiyalimana Augustino and Mburo Abdulkarim v Tanzania, Application 015/2016

Order (provisional measures), 3 June 2016 (2016) 1 AfCLR 646

Deogratius Nicholas Jeshi v Tanzania, Application 017/2016

Order (provisional measures), 3 June 2016 (2016) 1 AfCLR 649

Cosma Faustin v Tanzania, Application 018/2016

Order (provisional measures), 3 June 2016 (2016) 1 AfCLR 652

Joseph Mukwano v Tanzania, Application 021/2016

Order (provisional measures), 3 June 2016 (2016) 1 AfCLR 655

Amini Juma v Tanzania, Application 024/2016

Order (provisional measures), 3 June 2016 (2016) 1 AfCLR 658

Syndicat des Anciens Travailleurs du Groupe de Laboratoire Australian Laboratory Services, ALS-Bamako (Morila) v Mali, Application 002/2015

Decision, 5 September 2016 (2016) 1 AfCLR 661

Oscar Josiah v Tanzania, Application 053/2016

Order (provisional measures), 18 November (2016) 1 AfCLR 665

Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire, Application 001/2014

Judgment (merits), 18 November 2016 (2016) 1 AfCLR 668

Dominick Damian v Tanzania, Application 048/2016

Order (provisional measures), 18 November 2016 (2016) 1 AfCLR 699

Chrizant John v Tanzania, Application 049/2016

Order (provisional measures), 18 November 2016 (2016) 1 AfCLR 702

Crospery Gabriel and Ernest Mutakyawa v Tanzania, Application 050/2016

Order (provisional measures), 18 November 2016 (2016) 1 AfCLR 705

Nzigiyimana Zabron v Tanzania, Application 051/2016

Order (provisional measures), 18 November 2016 (2016) 1 AfCLR 708

Marthine Christian Msuguri v Tanzania, Application 052/2016

Order (provisional measures), 18 November 2016 (2016) 1 AfCLR 711

Gozbert Henerico v Tanzania, Application 056/2016

Order (provisional measures), 18 November 2016 (2016) 1 AfCLR 714

Mulokozi Anatory v Tanzania, Application 057/2016

Order (provisional measures), 18 November 2016 (2016) 1 AfCLR 717

ADVISORY PROCEEDINGS

Request for Advisory Opinion by Libya (represented by advocate Marcel Ceccaldi), Application 002/2011

Order (striking out), 30 March 2012 (2012) 1 AfCLR 720

Request for Advisory Opinion by Socio-economic Rights & Accountability Project, Application 001/2012

Order (striking out), 15 March 2013 (2012) 1 AfCLR 721

Request for Advisory Opinion by Pan African Lawyers' Union and Southern African Litigation Centre, Application 002/2012

Order (jurisdiction), 15 March 2013 (2013) 1 AfCLR 723

Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child, Application 002/2013

Advisory Opinion, 5 December 2014 (2014) 1 AfCLR 725

Request for Advisory Opinion by the Coalition for the International Criminal Court, the Legal Defence & Assistance Project (LEDAP), the Civil Resource Development & Documentation Center (CIRDDOC) and the Women Advocates Documentation Center (WARDC), Application 001/2015

Order, 5 June 2015 (2015) 1 AfCLR 743

Advisory Opinion, 29 November 2015 (2015) 1 AfCLR 746

Alphabetical Table of Cases

- Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (merits) (2016) 1 AfCLR 668
- African Commission on Human and Peoples' Rights v Kenya (provisional measures) (2013) 1 AfCLR 193
- African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153
- African Commission on Human and Peoples' Rights v Libya (provisional measures) (2011) 1 AfCLR 17
- African Commission on Human and Peoples' Rights v Libya (provisional measures) (2013) 1 AfCLR 145
- African Commission on Human and Peoples' Rights v Libya (order) (2013) 1 AfCLR 21
- African Commission on Human and Peoples' Rights v Libya (provisional measures 2) (2015) 1 AfCLR 150
- Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465
- Ally Rajabu and Others v Tanzania (provisional measures) (2016) 1 AfCLR 590
- Amini Juma v Tanzania (provisional measures) (2016) 1 AfCLR 658
- Amir Adam Timan v Sudan (jurisdiction) (2012) 1 AfCLR 111
- Armand Guehi v Tanzania (provisional measures) (2016) 1 AfCLR 587
- Association Juristes d'Afrique pour la Bonne Gouvernance v Côte d'Ivoire (jurisdiction) (2011) 1 AfCLR 28
- Atabong Denis Atemnkeng v African Union (jurisdiction) (2013) 1 AfCLR 182
- Baghdadi Ali Mahmoudi v Tunisia (jurisdiction) (2012) 1 AfCLR 114
- Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (merits) (2014) 1 AfCLR 219
- Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (preliminary objections) (2013) 1 AfCLR 197
- Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258
- Chrizant John v Tanzania (provisional measures) (2016) 1 AfCLR 702
- Chrysanthe Rutabingwa v Rwanda (striking out) (2014) 1 AfCLR 462

Cosma Faustin v Tanzania (provisional measures) (2016) 1 AfCLR 652
 Crospery Gabriel and Ernest Mutakyawa v Tanzania (provisional measures) (2016) 1 AfCLR 705
 Daniel Amare and Mulugeta Amare v Mozambique and Mozambique Airlines (jurisdiction) (2011) 1 AfCLR 26
 Delta International Investments SA, Mr AGL de Lange and Mrs de Lange v South Africa (2012) 1 AfCLR 103
 Deogratus Nicholaus Jeshi v Tanzania (provisional measures) (2016) 1 AfCLR 649
 Dominick Damian v Tanzania (provisional measures) (2016) 1 AfCLR 699
 Efova Mbozo'o Samule v The Pan African Parliament (jurisdiction) (2011) 1 AfCLR 95
 Ekollo Moundi Alexandre v Cameroon and Nigeria (jurisdiction) (2011) 1 AfCLR 86
 Emmanuel Joseph Uko and Others v South Africa (jurisdiction) (2012) 1 AfCLR 107
 Ernest Francis Mtingwi v Malawi (jurisdiction) (2013) 1 AfCLR 190
 Evodius Rutechura v Tanzania (provisional measures) (2016) 1 AfCLR 596
 Femi Falana v African Commission on Human and Peoples' Rights (jurisdiction) (2015) 1 AfCLR 499
 Femi Falana v African Union (jurisdiction) (2012) 1 AfCLR 118
 Frank David Omary and Others v Tanzania (admissibility) (2014) 1 AfCLR 358
 Frank David Omary and Others v Tanzania (review) (2016) 1 AfCLR 383
 Gozbert Henerico v Tanzania (provisional measures) (2016) 1 AfCLR 714
 Habiyalimana Augustino and Mburo Abdukarim v Tanzania (provisional measures) (2016) 1 AfCLR 646
 Ingabire Victoire Umuhoza v Rwanda (jurisdiction) (2016) 1 AfCLR 540
 Ingabire Victoire Umuhoza v Rwanda (procedure) (2016) 1 AfCLR 553
 Ingabire Victoire Umuhoza v Rwanda (procedure) (2016) 1 AfCLR 562
 John Lazaro v Tanzania (provisional measures) (2016) 1 AfCLR 593
 Joseph Mukwano v Tanzania (provisional measures) (2016) 1 AfCLR 655
 Karata Ernest and others v Tanzania (procedure) (2013) 1 AfCLR 356
 Lohé Issa Konaté v Burkina Faso (merits) (2014) 1 AfCLR 314
 Lohé Issa Konaté v Burkina Faso (provisional measures) (2013) 1 AfCLR 310
 Lohé Issa Konaté v Burkina Faso (reparations) (2016) 1 AfCLR 346
 Marthine Christain Msuguri v Tanzania (provisional measures) (2016) 1 AfCLR 711

Michelot Yogogombaye v Senegal (jurisdiction) (2009) 1 AfCLR 1
Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599
Mulokozi Anatory v Tanzania (provisional measures) (2016) 1 AfCLR 717
Convention Nationale des Syndicats du Secteur Education (CONASYSED)
v Gabon (jurisdiction) (2012) 1 AfCLR 100
Oscar Josiah v Tanzania (provisional measures) (2016) 1 AfCLR 665
Nzigiyimana Zabron v Tanzania (provisional measures) (2016) 1 AfCLR 708
Peter Joseph Chacha v Tanzania (admissibility) (2014) 1 AfCLR 398
Request for Advisory Opinion by Libya (striking out) (2012) 1 AfCLR 720
Request for Advisory Opinion by Socio-economic Rights & Accountability
Project (striking out) (2013) 1 AfCLR 721
Request for Advisory Opinion by the African Committee of Experts on the
Rights and Welfare of the Child (Advisory Opinion) (2014) 1 AfCLR 725
Request for Advisory Opinion by the Coalition for the International Criminal
Court, the Legal Defence & Assistance Project (LEDAP), the Civil
Resource Development & Documentation Center (CIRDDOC) and the
Women Advocates Documentation Center (WARDC) (jurisdiction) (2015)
1 AfCLR 743
Request for Advisory Opinion by the Coalition for the International Criminal
Court, the Legal Defence & Assistance Project (LEDAP), the Civil
Resource Development & Documentation Center (CIRDDOC) and the
Women Advocates Documentation Center (WARDC) (jurisdiction) (2015)
1 AfCLR 746
Request for Advisory Opinion by the Pan African Lawyers' Union and
Southern African Litigation Centre (jurisdiction) (2013) 1 AfCLR 723
Reverend Christopher R. Mtikila v Tanzania (reparations) (2014) 1 AfCLR 72
Soufiane Ababou v Algeria (jurisdiction) (2011) 1 AfCLR 24
Syndicat des Anciens Travailleurs du Group de Laboratoire Australian
Laboratory Services, ALS-BAMAKO (Morila) v Mali (admissibility) (2016)
1 AfCLR 661
Tanganyika Law Society, Legal and Human Rights Centre and Reverend
Christopher R Mtikila v Tanzania (joinder) (2011) 1 AfCLR 32
Tanganyika Law Society, Legal and Human Rights Centre and Reverend
Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34
Urban Mkandawire v Malawi (admissibility) (2013) 1 AfCLR 283
Urban Mkandawire v Malawi (review and interpretation) (2014) 1 AfCLR 299
Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR
507
Youssef Ababou v Morocco (jurisdiction) (2011) 1 AfCLR 30

Subject Index

GENERAL PRINCIPLES AND PROCEDURE

Admissibility

Diligent pursuance of Application

African Commission on Human and Peoples' Rights v Libya (order) (2013) 1 AfCLR 21

Exhaustion of local remedies

African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153

Urban Mkandawire v Malawi (admissibility) (2013) 1 AfCLR 283

Lohé Issa Konaté v Burkina Faso (merits) (2014) 1 AfCLR 314

Frank David Omary and Others v Tanzania (admissibility) (2014) 1 AfCLR 358

Peter Joseph Chacha v Tanzania (admissibility) (2014) 1 AfCLR 398

Effective remedies

Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507

Administrative jurisdiction

Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (merits) (2016) 1 AfCLR 668

Availability, effectiveness, sufficiency

Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (merits) (2016) 1 AfCLR 668

Effectiveness of local remedies linked to merits

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (preliminary objections) (2013) 1 AfCLR 197

Extra-ordinary remedies

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507

Fair trial rights

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Outcome of local remedies already known

Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (merits) (2016) 1 AfCLR 668

Parties

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Unduly prolonged

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (merits) (2014) 1 AfCLR 219

Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507

Failure to refer correctly to the name of the state party

Lohé Issa Konaté v Burkina Faso (merits) (2014) 1 AfCLR 314

Insufficient details of alleged violations

Syndicat des Anciens Travailleurs du Group de Laboratoire Australian Laboratory Services, ALS-BAMAKO (Morila) v Mali (admissibility) (2016) 1 AfCLR 661

Lack of interest

Request for Advisory Opinion by Socio-economic Rights & Accountability Project (striking out) (2013) 1 AfCLR 721

Matter pending before African Commission

Request for Advisory Opinion by the Pan African Lawyers' Union and Southern African Litigation Centre (jurisdiction) (2013) 1 AfCLR 723

Requirements for admissibility are cumulative

Frank David Omary and Others v Tanzania (review) (2016) 1 AfCLR 383

Rule 34(1) does not set admissibility requirements

Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507

Submission within reasonable time

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (preliminary objections) (2013) 1 AfCLR 197

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Amicus curiae

Admission of amicus, discretion of the Court

Ingabire Victoire Umuhoza v Rwanda (procedure) (2016) 1 AfCLR 562

Complementarity

African Commission

Femi Falana v African Commission on Human and Peoples' Rights (jurisdiction) (2015) 1 AfCLR 499

Evidence

Documentation of national proceedings should be public

Ingabire Victoire Umuhoza v Rwanda (procedure) (2016) 1 AfCLR 562

Video conferencing

Ingabire Victoire Umuhoza v Rwanda (procedure) (2016) 1 AfCLR 562

Interpretation

Ordinary meaning

Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child (Advisory Opinion) (2014) 1 AfCLR 725

Interpretation of judgment

Purpose

Urban Mkandawire v Malawi (review and interpretation) (2014) 1 AfCLR 299

Judgment in default

African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153

Jurisdiction

Advisory proceedings

Personal jurisdiction to request advisory opinion to be considered with substance

Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child (Advisory Opinion) (2014) 1 AfCLR 725

Article 34(6) Declaration

Michelot Yogogombaye v Senegal (jurisdiction) (2009) 1 AfCLR 1

Convention Nationale des Syndicats du Secteur Education (CONASYSED) v Gabon (jurisdiction) (2012) 1 AfCLR 100

Soufiane Ababou v Algeria (jurisdiction) (2011) 1 AfCLR 24

Daniel Amare and Mulugeta Amare v Mozambique and Mozambique Airlines (jurisdiction) (2011) 1 AfCLR 26

Ekollo Moundi Alexandre v Cameroon and Nigeria (jurisdiction) (2011) 1 AfCLR 86

Delta International Investments SA, Mr AGL de Lange and Mrs M. de Lange v South Africa (jurisdiction) (2012) 1 AfCLR 103

Emmanuel Joseph Uko and Others v South Africa (jurisdiction) (2012) 1 AfCLR 107

Amir Adam Timan v Sudan (jurisdiction) (2012) 1 AfCLR 111

Withdrawal

Ingabire Victoire Umuhoza v Rwanda (jurisdiction) (2016) 1 AfCLR 540

Case brought by the Commission

African Commission on Human and Peoples' Rights v Kenya (provisional measures) (2013) 1 AfCLR 193

Court does not have appellate jurisdiction

Ernest Francis Mtingwi v Malawi (jurisdiction) (2013) 1 AfCLR 190

Court to determine proprio moto

Lohé Issa Konaté v Burkina Faso (merits) (2014) 1 AfCLR 314

Entities which may submit contentious cases to the Court

Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child (Advisory Opinion) (2014) 1 AfCLR 725

Human rights instrument

Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (merits) (2016) 1 AfCLR 668

Request for Advisory Opinion by the Coalition for the International Criminal Court, the Legal Defence & Assistance Project (LEDAP), the Civil Resource Development & Documentation Center (CIRDDOC) and the Women Advocates Documentation Center (WARDC) (jurisdiction) (2015) 1 AfCLR 743

ICCPR more detailed than African Charter

Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507

International organization as Respondent

Femi Falana v African Union (jurisdiction) (2012) 1 AfCLR 118

Atabong Denis Atemnkeng v African Union (jurisdiction) (2013) 1 AfCLR 182
Femi Falana v African Commission on Human and Peoples' Rights
(jurisdiction) (2015) 1 AfCLR 499

Material jurisdiction

Efoua Mbozo'o Samule v The Pan African Parliament (jurisdiction) (2011) 1
AfCLR 95

No need to specify treaty provision alleged to have been violated

Frank David Omary and Others v Tanzania (admissibility) (2014) 1 AfCLR
358

Peter Joseph Chacha v Tanzania (admissibility) (2014) 1 AfCLR 398

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR
507

Non-AU member state

Youssef Ababou v Morocco (jurisdiction) (2011) 1 AfCLR 30

Observer status of the Applicant before the African Commission

Convention Nationale des Syndicats du Secteur Education (CONASYSED)
v Gabon (jurisdiction) (2012) 1 AfCLR 100

Association Jurists d'Afrique pour la Bonne Gouvernance v Republic of Côte
d'Ivoire (jurisdiction) (2011) 1 AfCLR 28

Party to Protocol

Ekollo Moundi Alexandre v Cameroon and Nigeria (jurisdiction) (2011) 1
AfCLR 86

Prima facie jurisdiction before provisional measures

African Commission on Human and Peoples' Rights v Kenya (provisional
measures) (2013) 1 AfCLR 193

Lohé Issa Konaté v Burkina Faso (provisional measures) (2013) 1 AfCLR
310

Ratification of Court Protocol

Tanganyika Law Society, Legal and Human Rights Centre and Reverend
Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Temporal jurisdiction

Continuous violation

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse,
Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits
de l'Homme et des Peuples v Burkina Faso (preliminary objections)
(2013) 1 AfCLR 197

Urban Mkandawire v Malawi (admissibility) (2013) 1 AfCLR 283

Unlawful killing

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (preliminary objections) (2013) 1 AfCLR 197

Vienna Convention on the Law of Treaties

Ingabire Victoire Umuhoza v Rwanda (jurisdiction) (2016) 1 AfCLR 540

Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507

Limitations of rights

Article 27(2), proportionality

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Procedure

Change of title of Application

Karata Ernest and others v Tanzania (procedure) (2013) 1 AfCLR 356

Evidence of representation

Request for Advisory Opinion by Libya (striking out) (2012) 1 AfCLR 720

Notice period for withdrawal of Article 34(6) declaration

Ingabire Victoire Umuhoza v Rwanda (jurisdiction) (2016) 1 AfCLR 540

Transfer to Commission

Soufiane Ababou v Algeria (jurisdiction) (2011) 1 AfCLR 24

Daniel Amare and Mulugeta Amare v Mozambique and Mozambique Airlines (jurisdiction) (2011) 1 AfCLR 26

Association Jurists d'Afrique pour la Bonne Gouvernance v Republic of Côte d'Ivoire (jurisdiction) (2011) 1 AfCLR 28

Ekollo Moundi Alexandre v Cameroon and Nigeria (jurisdiction) (2011) 1 AfCLR 86

Provisional measures

Access to legal representation and family

African Commission on Human and Peoples' Rights v Libya (provisional measures) (2013) 1 AfCLR 145

Adequate medical care

Lohé Issa Konaté v Burkina Faso (provisional measures) (2013) 1 AfCLR 310

Death penalty

- Armand Guehi v Tanzania (provisional measures) (2016) 1 AfCLR 587
- Ally Rajabu and Others v Tanzania (provisional measures) (2016) 1 AfCLR 590
- John Lazaro v Tanzania (provisional measures) (2016) 1 AfCLR 593
- Evodius Rutechura v Tanzania (provisional measures) (2016) 1 AfCLR 596
- Habiyalimana Augustino and Mbuuro Abdukarim v Tanzania (provisional measures) (2016) 1 AfCLR 646
- Deogratius Nicholas Jeshi v Tanzania (provisional measures) (2016) 1 AfCLR 38
- Cosma Faustin v Tanzania (provisional measures) (2016) 1 AfCLR 652
- Joseph Mukwano v Tanzania (provisional measures) (2016) 1 AfCLR 655
- Amini Juma v Tanzania (provisional measures) (2016) 1 AfCLR 658
- Oscar Josiah v Tanzania (provisional measures) (2016) 1 AfCLR 665
- Dominick Damian v Tanzania (provisional measures) (2016) 1 AfCLR 699
- Chrizant John v Tanzania (provisional measures) (2016) 1 AfCLR 702
- Crospery Gabriel and Ernest Mutakyawa v Tanzania (provisional measures) (2016) 1 AfCLR 705
- Nzigiyimana Zabron v Tanzania (provisional measures) (2016) 1 AfCLR 708
- Marthine Christain Msuguri v Tanzania (provisional measures) (2016) 1 AfCLR 711
- Gozbert Henerico v Tanzania (provisional measures) (2016) 1 AfCLR 714
- Mulokozi Anatory v Tanzania (provisional measures) (2016) 1 AfCLR 717

Integrity of detainee

- African Commission on Human and Peoples' Rights v Libya (provisional measures) (2013) 1 AfCLR 145

Non-compliance

- African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153

Relation to merits

- African Commission on Human and Peoples' Rights v Libya (provisional measures) (2011) 1 AfCLR 17

Release

- Lohé Issa Konaté v Burkina Faso (provisional measures) (2013) 1 AfCLR 310

Situation of extreme gravity and urgency and risk of irreparable harm

African Commission on Human and Peoples' Rights v Kenya (provisional measures) (2013) 1 AfCLR 193

Where there is imminent risk of loss of human life

African Commission on Human and Peoples' Rights v Libya (provisional measures) (2011) 1 AfCLR 17

Without request from the Commission

African Commission on Human and Peoples' Rights v Libya (provisional measures) (2011) 1 AfCLR 17

Without written pleadings or oral hearings

African Commission on Human and Peoples' Rights v Libya (provisional measures) (2011) 1 AfCLR 17

Public hearing

Non-appearance of Respondent State

Ingabire Victoire Umuhoza v Rwanda (procedure) (2016) 1 AfCLR 562

Reparations

Cessation of violation

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Close relatives of direct victim

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Evidence to show relationship to direct victim

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Equity in determining moral damage

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Expenses to attend hearings at the African Court

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Full reparation

Lohe Issa Konaté v Burkina Faso (reparations) (2016) 1 AfCLR 346

Guarantees of non-repetition

Reverend Christopher R. Mtikila v Tanzania (reparations) (2014) 1 AfCLR 72

Measures of satisfaction

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Reverend Christopher R. Mtikila v Tanzania (reparations) (2014) 1 AfCLR 72

Moral damages to legal entity

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Nexus between claim and facts of the case

Reverend Christopher R. Mtikila v Tanzania (reparations) (2014) 1 AfCLR 72

Lohe Issa Konaté v Burkina Faso (reparations) (2016) 1 AfCLR 346

Other appropriate measures

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Reimbursement of lawyers' fees

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Release

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Restitution, erase judicial record

Lohe Issa Konaté v Burkina Faso (reparations) (2016) 1 AfCLR 346

Retrial

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

When to raise reparations claim

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Review of judgment

Urban Mkandawire v Malawi (review and interpretation) (2014) 1 AfCLR 299

Frank David Omary and Others v Tanzania (review) (2016) 1 AfCLR 383

State responsibility

Due diligence of investigation

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (merits) (2014) 1 AfCLR 219

Non-state actor

African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153

SUBSTANTIVE RIGHTS

Association

Freedom not to join an association

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Equal protection of the law

Political candidates

Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (merits) (2016) 1 AfCLR 668

Equality before the law

Complexity of the case

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (merits) (2014) 1 AfCLR 219

Expression

Custodial sentence for defamation

Lohé Issa Konaté v Burkina Faso (merits) (2014) 1 AfCLR 314

Fear caused by extra-judicial killing

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (merits) (2014) 1 AfCLR 219

Fair trial

Delivery of judgment in public

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Extra-ordinary court

African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153

Evidence for criminal conviction

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Freely communicate with legal representative

Ingabire Victoire Umuhoza v Rwanda (procedure) (2016) 1 AfCLR 562

Legal aid

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Legal counsel

African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153

Protracted duration of proceedings

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (merits) (2014) 1 AfCLR 219

Right to be heard

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Right to defence

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Trial within reasonable time

Complexity of case

Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507

Duty of court to prevent unnecessary delay

Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507

Role of defendant in delay of trial

Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507

Personal liberty and security

Incommunicado detention

African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153

Right to be informed of reasons of arrest

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Political participation

Direct participation

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Independent and impartial electoral body

Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (merits) (2016) 1 AfCLR 668

Instruments Cited

AFRICAN UNION INSTRUMENTS

Constitutive Act of the African Union

Article 5

Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child (Advisory Opinion) (2014) 1 AfCLR 725

Article 12

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Article 23

Request for Advisory Opinion by the Coalition for the International Criminal Court, the Legal Defence & Assistance Project (LEDAP), the Civil Resource Development & Documentation Center (CIRDDOC) and the Women Advocates Documentation Center (WARDC) (jurisdiction) (2015) 1 AfCLR 746

Article 30

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

African Charter on Democracy, Elections and Governance

Article 17

Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (merits) (2016) 1 AfCLR 668

Article 23

Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (merits) (2016) 1 AfCLR 668

African Charter on Human and Peoples' Rights

Article 1

African Commission on Human and Peoples' Rights v Libya (provisional measures) (2011) 1 AfCLR 17

Femi Falana v African Union (jurisdiction) (2012) 1 AfCLR 118

African Commission on Human and Peoples' Rights v Kenya (provisional measures) (2013) 1 AfCLR 193

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (preliminary objections) (2013) 1 AfCLR 197

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (merits) (2014) 1 AfCLR 219

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Article 2

African Commission on Human and Peoples' Rights v Libya (provisional measures) (2011) 1 AfCLR 17

Femi Falana v African Union (jurisdiction) (2012) 1 AfCLR 118

African Commission on Human and Peoples' Rights v Kenya (provisional measures) (2013) 1 AfCLR 193

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Frank David Omary and Others v Tanzania (admissibility) (2014) 1 AfCLR 358

Article 3

African Commission on Human and Peoples' Rights v Kenya (provisional measures) (2013) 1 AfCLR 193

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (preliminary objections) (2013) 1 AfCLR 197

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (merits) (2014) 1 AfCLR 219

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Frank David Omary and Others v Tanzania (admissibility) (2014) 1 AfCLR 358

Marthine Christian Msuguri v Tanzania (provisional measures) (2016) 1 AfCLR 711

Nzigiyimana Zabron v Tanzania (provisional measures) (2016) 1 AfCLR 708

Crosperry Gabriel and Ernest Mutakyawa v Tanzania (provisional measures) (2016) 1 AfCLR 705

Chriszant John v Tanania (provisional measures) (2016) 1 AfCLR 702

Dominick Damian v Tanzania (provisional measures) (2016) 1 AfCLR 699

Oscar Josiah v Tanzania (provisional measures) (2016) 1AfCLR 43

Amini Juma v Tanzania (provisional mesures) (2016) 1 AfCLR 658

Joseph Mukwano v Tanzania (provisional measures) (2016) 1 AfCLR 655

Cosma Faustin v Tanzania (provisional measures) (2016) 1 AfCLR 652

Ingabire Victoire Umuhoza v Rwanda (procedure) (2016) 1 AfCLR 562

Request for Advisory Opinion by the Pan African Lawyers' Union and Southern African Litigation Centre (jurisdiction) (2013) 1 AfCLR 723

Peter Joseph Chacha v Tanzania (admissibility) (2014) 1 AfCLR 398

Article 4

African Commission on Human and Peoples' Rights v Libya (provisional measures) (2011) 1 AfCLR 17

African Commission on Human and Peoples' Rights v Kenya (provisional measures) (2013) 1 AfCLR 193

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (preliminary objections) (2013) 1 AfCLR 197

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (merits) (2014) 1 AfCLR 219

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Urban Mkandawire v Malawi (admissibility) (2013) 1 AfCLR 283

Frank David Omary and Others v Tanzania (admissibility) (2014) 1 AfCLR 358

Chriszant John vTanania (provisional measures) (2016) 1 AfCLR 702

Dominick Damian v Tanzania (provisional measures) (2016) 1 AfCLR 699

Article 5

- African Commission on Human and Peoples' Rights v Libya (provisional measures) (2011) 1 AfCLR 17
- Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465
- Urban Mkandawire v Malawi (admissibility) (2013) 1 AfCLR 283
- Amini Juma v Tanzania (provisional measures) (2016) 1 AfCLR 658
- Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Article 6

- African Commission on Human and Peoples' Rights v Libya (provisional measures) (2013) 1 AfCLR 145
- Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465
- African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153
- Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507
- Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34
- Peter Joseph Chacha v Tanzania (admissibility) (2014) 1 AfCLR 398

Article 7

- Michelot Yogogombaye v Senegal (jurisdiction) (2009) 1 AfCLR 1
- Femi Falana v African Union (jurisdiction) (2012) 1 AfCLR 118
- African Commission on Human and Peoples' Rights v Libya (provisional measures) (2013) 1 AfCLR 145
- Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465
- African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153
- Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (preliminary objections) (2013) 1 AfCLR 197
- Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (merits) (2014) 1 AfCLR 219
- Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258
- Urban Mkandawire v Malawi (admissibility) (2013) 1 AfCLR 283

Frank David Omary and Others v Tanzania (admissibility) (2014) 1 AfCLR 358

Mulokozi Anatory v Tanzania (provisional measures) (2016) 1 AfCLR 717

Marthine Christian Msuguri v Tanzania (provisional measures) (2016) 1 AfCLR 711

Nzigiyimana Zabron v Tanzania (provisional measures) (2016) 1 AfCLR 708

Crospery Gabriel and Ernest Mutakyawa v Tanzania (provisional measures) (2016) 1 AfCLR 705

Chriszant John v Tanzania (provisional measures) (2016) 1 AfCLR 702

Dominick Damian v Tanzania (provisional measures) (2016) 1 AfCLR 699

Oscar Josiah v Tanzania (provisional measures) (2016) 1 AfCLR 665

Cosma Faustin v Tanzania (provisional measures) (2016) 1 AfCLR 652

Evodius Rutechura v Tanzania (provisional measures) (2016) 1 AfCLR 596

Ally Rajabu and Others v Tanzania (provisional measures) (2016) 1 AfCLR 590

Armand Guehi v Tanzania (provisional measures) (2016) 1 AfCLR 587

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Ingabire Victoire Umuhoza v Rwanda (procedure) (2016) 1 AfCLR 562

Ingabire Victoire Umuhoza v Rwanda (jurisdiction) (2016) 1 AfCLR 540

Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507

Request for Advisory Opinion by the Pan African Lawyers' Union and Southern African Litigation Centre (jurisdiction) (2013) 1 AfCLR 723

Peter Joseph Chacha v Tanzania (admissibility) (2014) 1 AfCLR 398

Article 9

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (preliminary objections) (2013) 1 AfCLR 197

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (merits) (2014) 1 AfCLR 219

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Lohé Issa Konaté v Burkina Faso (merits) (2014) 1 AfCLR 314

Ingabire Victoire Umuhoza v Rwanda (procedure) (2016) 1 AfCLR 562

Article 10

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (merits) (2016) 1 AfCLR 668

Article 11

African Commission on Human and Peoples' Rights v Libya (provisional measures) (2011) 1 AfCLR 17

Article 12

African Commission on Human and Peoples' Rights v Libya (provisional measures) (2011) 1 AfCLR 17

Article 13

African Commission on Human and Peoples' Rights v Libya (provisional measures) (2011) 1 AfCLR 17

Femi Falana v African Union (jurisdiction) (2012) 1 AfCLR 118

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Article 14

African Commission on Human and Peoples' Rights v Kenya (provisional measures) (2013) 1 AfCLR 193

Peter Joseph Chacha v Tanzania (admissibility) (2014) 1 AfCLR 398

Article 15

Frank David Omary and Others v Tanzania (admissibility) (2014) 1 AfCLR 358

Urban Mkandawire v Malawi (admissibility) (2013) 1 AfCLR 283

Ingabire Victoire Umuhoza v Rwanda (procedure) (2016) 1 AfCLR 562

Article 17

African Commission on Human and Peoples' Rights v Kenya (provisional measures) (2013) 1 AfCLR 193

Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (merits) (2016) 1 AfCLR 668

Article 19

Urban Mkandawire v Malawi (admissibility) (2013) 1 AfCLR 283

Article 21

African Commission on Human and Peoples' Rights v Kenya (provisional measures) (2013) 1 AfCLR 193

Article 22

African Commission on Human and Peoples' Rights v Kenya (provisional measures) (2013) 1 AfCLR 193

Article 23

African Commission on Human and Peoples' Rights v Libya (provisional measures) (2011) 1 AfCLR 17

Article 26

Femi Falana v African Union (jurisdiction) (2012) 1 AfCLR 118

Request for Advisory Opinion by the Pan African Lawyers' Union and Southern African Litigation Centre (jurisdiction) (2013) 1 AfCLR 723

Peter Joseph Chacha v Tanzania (admissibility) (2014) 1 AfCLR 398

Article 27

Femi Falana v African Union (jurisdiction) (2012) 1 AfCLR 118

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Lohé Issa Konaté v Burkina Faso (merits) (2014) 1 AfCLR 314

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Article 28

Urban Mkandawire v Malawi (review and interpretation) (2014) 1 AfCLR 299

Article 29

Femi Falana v African Union (jurisdiction) (2012) 1 AfCLR 118

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Article 36

Peter Joseph Chacha v Tanzania (admissibility) (2014) 1 AfCLR 398

Article 50

African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (merits) (2014) 1 AfCLR 219

Frank David Omary and Others v Tanzania (admissibility) (2014) 1 AfCLR 358

Article 56

Femi Falana v African Union (jurisdiction) (2012) 1 AfCLR 118

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (preliminary objections) (2013) 1 AfCLR 197

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (merits) (2014) 1 AfCLR 219

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Urban Mkandawire v Malawi (admissibility) (2013) 1 AfCLR 283

Urban Mkandawire v Malawi (review and interpretation) (2014) 1 AfCLR 299

Frank David Omary and Others v Tanzania (admissibility) (2014) 1 AfCLR 358

Frank David Omary and Others v Tanzania (review) (2016) 1 AfCLR 383

Peter Joseph Chacha v Tanzania (admissibility) (2014) 1 AfCLR 398

Lohé Issa Konaté v Burkina Faso (merits) (2014) 1 AfCLR 314

Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (merits) (2016) 1 AfCLR 668

Article 58

African Commission on Human and Peoples' Rights v Kenya (provisional measures) (2013) 1 AfCLR 193

Article 60

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Article 63

Femi Falana v African Union (jurisdiction) (2012) 1 AfCLR 118

Article 66

Femi Falana v African Union (jurisdiction) (2012) 1 AfCLR 118

African Charter on the Rights and Welfare of the Child

Article 4

Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child (Advisory Opinion) (2014) 1 AfCLR 725

Article 5

Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child (Advisory Opinion) (2014) 1 AfCLR 725

Article 32

Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child (Advisory Opinion) (2014) 1 AfCLR 725

Article 33

Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child (Advisory Opinion) (2014) 1 AfCLR 725

Article 42

Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child (Advisory Opinion) (2014) 1 AfCLR 725

Protocol on the Statute of the African Court of Justice and Human Rights

Article 30

Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child (Advisory Opinion) (2014) 1 AfCLR 725

Urban Mkandawire v Malawi (review and interpretation) (2014) 1 AfCLR 299

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights

Article 2

Femi Falana v African Commission on Human and Peoples' Rights (jurisdiction) (2015) 1 AfCLR 499

Article 3

Michelot Yogombaye v Senegal (jurisdiction) (2009) 1 AfCLR 1

African Commission on Human and Peoples' Rights v Libya (provisional measures) (2011) 1 AfCLR 17

Femi Falana v African Union (jurisdiction) (2012) 1 AfCLR 118

Femi Falana v African Commission on Human and Peoples' Rights (jurisdiction) (2015) 1 AfCLR 499

Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child (Advisory Opinion) (2014) 1 AfCLR 725
Gozbert Henerico v Tanzania (provisional measures) (2016) 1 AfCLR 714
Marthine Christian Msuguri v Tanzania (provisional measures) (2016) 1 AfCLR 711
Nzigiyimana Zabron v Tanzania (provisional measures) (2016) 1 AfCLR 708
Crospery Gabriel and Ernest Mutakyawa v Tanzania (provisional measures) (2016) 1 AfCLR 705
Chriszant John v Tanzania (provisional measures) (2016) 1 AfCLR 702
Dominick Damian v Tanzania (provisional measures) (2016) 1 AfCLR 699
Oscar Josiah v Tanzania (provisional measures) (2016) 1 AfCLR 665
Amini Juma v Tanzania (provisional measures) (2016) 1 AfCLR 658
Cosma Faustin v Tanzania (provisional measures) (2016) 1 AfCLR 652
Deogratius Nicholas Jeshi v Tanzania (2016) 1 AfCLR 649
Habiyalimana Augustino and Mburo Abdulkarim v Tanzania (provisional measures) (2016) 1 AfCLR 646
John Lazaro v Tanzania (provisional measures) (2016) 1 AfCLR 593
Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599
Ingabire Victoire Umuhoza v Rwanda (jurisdiction) (2016) 1 AfCLR 540
Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507
Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Article 4

Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child (Advisory Opinion) (2014) 1 AfCLR 725
Request for Advisory Opinion by the Pan African Lawyers' Union and Southern African Litigation Centre (jurisdiction) (2013) 1 AfCLR 723
African Commission on Human and Peoples' Rights v Libya (provisional measures) (2013) 1 AfCLR 145
African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153
Atabong Denis Atemnkeng v the African Union (jurisdiction) (2013) 1 AfCLR 182
Ernest Francis Mtingwi v Malawi (jurisdiction) (2013) 1 AfCLR 190
African Commission on Human and Peoples' Rights v Kenya (provisional measures) (2013) 1 AfCLR 193

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (preliminary objections) (2013) 1 AfCLR 197

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (merits) (2014) 1 AfCLR 219

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Urban Mkandawire v Malawi (admissibility) (2013) 1 AfCLR 283

Lohé Issa Konaté v Burkina Faso (provisional measures) (2013) 1 AfCLR 310

Lohé Issa Konaté v Burkina Faso (merits) (2014) 1 AfCLR 314

Frank David Omary and Others v Tanzania (admissibility) (2014) 1 AfCLR 358

Peter Joseph Chacha v Tanzania (admissibility) (2014) 1 AfCLR 398

Article 5

Michelot Yogogombaye v Senegal (jurisdiction) (2009) 1 AfCLR 1

African Commission on Human and Peoples' Rights v Libya (provisional measures) (2011) 1 AfCLR 17

Femi Falana v African Union (jurisdiction) (2012) 1 AfCLR 118

African Commission on Human and Peoples' Rights v Libya (provisional measures) (2013) 1 AfCLR 145

African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153

African Commission on Human and Peoples' Rights v Kenya (provisional measures) (2013) 1 AfCLR 193

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Lohé Issa Konaté v Burkina Faso (provisional measures) (2013) 1 AfCLR 310

Marthine Christian Msuguri v Tanzania (provisional measures) (2016) 1 AfCLR 711

Gozbert Henerico v Tanzania (provisional measures) (2016) 1 AfCLR 714

Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child (Advisory Opinion) (2014) 1 AfCLR 725

Nzigiymana Zabron v Tanzania (provisional measures) (2016) 1 AfCLR 708

Crospery Gabriel and Ernest Mutakyawa v Tanzania (provisional measures) (2016) 1 AfCLR 705

Oscar Josiah v Tanzania (provisional measures) (2016) 1 AfCLR 665

Amini Juma v Tanzania (provisional measures) (2016) 1 AfCLR 658

Joseph Mukwano v Tanzania (provisional measures) (2016) 1 AfCLR 655

Cosma Faustin v Tanzania (provisional measures) (2016) 1 AfCLR 652

Deogratus Nicholas Jeshi v Tanzania (2016) 1 AfCLR 699

Habiyalimana Augustino and Mburo Abdukarim v Tanzania (provisional measures) (2016) 1 AfCLR 646

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507

Femi Falana v African Commission on Human and Peoples' Rights (jurisdiction) (2015) 1 AfCLR 499

Article 6

Femi Falana v African Union (jurisdiction) (2012) 1 AfCLR 118

African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (preliminary objections) (2013) 1 AfCLR 197

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (merits) (2014) 1 AfCLR 219

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Urban Mkandawire v Malawi (admissibility) (2013) 1 AfCLR 283

Frank David Omary and Others v Tanzania (admissibility) (2014) 1 AfCLR 358

Urban Mkandawire v Malawi (review and interpretation) (2014) 1 AfCLR 299

Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (merits) (2016) 1 AfCLR 668

Article 7

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Request for Advisory Opinion by the Pan African Lawyers' Union and Southern African Litigation Centre (jurisdiction) (2013) 1 AfCLR 723

Joseph Mukwano v Tanzania (provisional measures) (2016) 1 AfCLR 655
John Lazaro v Tanzania (provisional measures) (2016) 1 AfCLR 593
Tanganyika Law Society, Legal and Human Rights Centre and Reverend
Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Article 8

Femi Falana v African Commission on Human and Peoples' Rights
(jurisdiction) (2015) 1 AfCLR 499

Article 22

Michelot Yogogombaye v Senegal (jurisdiction) (2009) 1 AfCLR 1
Atabong Denis Atemnkeng v African Union (jurisdiction) (2013) 1 AfCLR 182
Ernest Francis Mtingwi v Malawi (jurisdiction) (2013) 1 AfCLR 190
Urban Mkandawire v Malawi (admissibility) (2013) 1 AfCLR 283

Article 26

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse,
Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de
l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR
258

Article 27

African Commission on Human and Peoples' Rights v Libya (provisional
measures) (2011) 1 AfCLR 17
African Commission on Human and Peoples' Rights v Libya (order) (2013) 1
AfCLR 21
African Commission on Human and Peoples' Rights v Libya (provisional
measures) (2013) 1 AfCLR 145
African Commission on Human and Peoples' Rights v Libya (merits) (2016)
1 AfCLR 153
African Commission on Human and Peoples' Rights v Kenya (provisional
measures) (2013) 1 AfCLR 193
Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse,
Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de
l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR
258
Gozbert Henerico v Tanzania (provisional measures) (2016) 1 AfCLR 714
Crospery Gabriel and Ernest Mutakyawa v Tanzania (provisional measures)
(2016) 1 AfCLR 705
Oscar Josiah v Tanzania (provisional measures) (2016) 1 AfCLR 665

Lohé Issa Konaté v Burkina Faso (provisional measures) (2013) 1 AfCLR 310
Reverend Christopher R. Mtikila v Tanzania (reparations) (2014) 1 AfCLR 72
Marthine Christian Msuguri v Tanzania (provisional measures) (2016) 1 AfCLR 711
Mulokozi Anatory v Tanzania (provisional measures) (2016) 1 AfCLR 717
Nzigiyimana Zabron v Tanzania (provisional measures) (2016) 1 AfCLR 708
Chriszant John v Tanzania (provisional measures) (2016) 1 AfCLR 702
Dominick Damian v Tanzania (provisional measures) (2016) 1 AfCLR 699
Amini Juma v Tanzania (provisional measures) (2016) 1 AfCLR 658
Joseph Mukwano v Tanzania (provisional measures) (2016) 1 AfCLR 655
Cosma Faustin v Tanzania (provisional measures) (2016) 1 AfCLR 652
Habiyalimana Augustino and Mburo Abdukarim v Tanzania (provisional measures) (2016) 1 AfCLR 646
Ally Rajabu and Others v Tanzania (provisional measures) (2016) 1 AfCLR 590
Armand Guehi v Tanzania (provisional measures) (2016) 1 AfCLR 587
Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507

Article 28

Atabong Denis Atemnkeng v the African Union (jurisdiction) (2013) 1 AfCLR 182
Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465
Urban Mkandawire v Malawi (review and interpretation) (2014) 1 AfCLR 299

Article 30

Reverend Christopher R. Mtikila v Tanzania (reparations) (2014) 1 AfCLR 72
Frank David Omary and Others v Tanzania (review) (2016) 1 AfCLR 383
Femi Falana v African Commission on Human and Peoples' Rights (jurisdiction) (2015) 1 AfCLR 499

Article 31

Femi Falana v African Commission on Human and Peoples' Rights (jurisdiction) (2015) 1 AfCLR 499

Article 34

Michelot Yogogombaye v Senegal (jurisdiction) (2009) 1 AfCLR 1
Femi Falana v African Union (jurisdiction) (2012) 1 AfCLR 118

Femi Falana v African Commission on Human and Peoples' Rights (jurisdiction) (2015) 1 AfCLR 499

African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153

Atabong Denis Atemnkeng v African Union (jurisdiction) (2013) 1 AfCLR 182

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (merits) (2014) 1 AfCLR 219

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Lohé Issa Konaté v Burkina Faso (provisional measures) (2013) 1 AfCLR 310

Lohé Issa Konaté v Burkina Faso (merits) (2014) 1 AfCLR 314

Peter Joseph Chacha v Tanzania (admissibility) (2014) 1 AfCLR 398

Oscar Josiah v Tanzania (provisional measures) (2016) 1 AfCLR 665

Amini Juma v Tanzania (provisional measures) (2016) 1 AfCLR 658

Joseph Mukwano v Tanzania (provisional measures) (2016) 1 AfCLR 655

Cosma Faustin v Tanzania (provisional measures) (2016) 1 AfCLR 652

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Ingabire Victoire Umuhoza v Rwanda (jurisdiction) (2016) 1 AfCLR 540

Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507

Article 56

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Interim Rules of Court

Rule 8

Michelot Yogogombaye v Senegal (jurisdiction) (2009) 1 AfCLR 1

Rule 26

Michelot Yogogombaye v Senegal (jurisdiction) (2009) 1 AfCLR 1

Rule 30

Michelot Yogogombaye v Senegal (jurisdiction) (2009) 1 AfCLR 1

Rule 34

Michelot Yogogombaye v Senegal (jurisdiction) (2009) 1 AfCLR 1

Rule 35

Michelot Yogogombaye v Senegal (jurisdiction) (2009) 1 AfCLR 1

Rule 39

Michelot Yogogombaye v Senegal (jurisdiction) (2009) 1 AfCLR 1

Rule 52

Michelot Yogogombaye v Senegal (jurisdiction) (2009) 1 AfCLR 1

Rules of Court**Rule 3**

Frank David Omary and Others v Tanzania (admissibility) (2014) 1 AfCLR 358

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Rule 5

Atabong Denis Atemnkeng v African Union (jurisdiction) (2013) 1 AfCLR 182

Rule 8

Atabong Denis Atemnkeng v African Union (jurisdiction) (2013) 1 AfCLR 182

Ernest Francis Mtingwi v Malawi (jurisdiction) (2013) 1 AfCLR 190

Urban Mkandawire v Malawi (admissibility) (2013) 1 AfCLR 283

Rule 26

Femi Falana v African Union (jurisdiction) (2012) 1 AfCLR 118

Atabong Denis Atemnkeng v African Union (jurisdiction) (2013) 1 AfCLR 182

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (preliminary objections) (2013) 1 AfCLR 197

Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Rule 28

Ingabire Victoire Umuhoza v Rwanda (procedure) (2016) 1 AfCLR 562

Rule 29

African Commission on Human and Peoples' Rights v Libya (provisional measures) (2013) 1 AfCLR 145

African Commission on Human and Peoples' Rights v Libya (merits) (2016)
1 AfCLR 153

Urban Mkandawire v Malawi (admissibility) (2013) 1 AfCLR 283

Femi Falana v African Commission on Human and Peoples' Rights
(jurisdiction) (2015) 1 AfCLR 499

Rule 30

Atabong Denis Atemnkeng v African Union (jurisdiction) (2013) 1 AfCLR 182

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Tanganyika Law Society, Legal and Human Rights Centre and Reverend
Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Urban Mkandawire v Malawi (admissibility) (2013) 1 AfCLR 283

Frank David Omary and Others v Tanzania (admissibility) (2014) 1 AfCLR
358

Peter Joseph Chacha v Tanzania (admissibility) (2014) 1 AfCLR 398

Lohé Issa Konaté v Burkina Faso (merits) (2014) 1 AfCLR 314

Rule 31

Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR
507

Rule 32

Ingabire Victoire Umuhoza v Rwanda (procedure) (2016) 1 AfCLR 562

Rule 33

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Request for Advisory Opinion by the African Committee of Experts on the
Rights and Welfare of the Child (Advisory Opinion) (2014) 1 AfCLR 725

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Rule 34

African Commission on Human and Peoples' Rights v Libya (provisional
measures) (2011) 1 AfCLR 17

African Commission on Human and Peoples' Rights v Libya (provisional
measures) (2013) 1 AfCLR 145

African Commission on Human and Peoples' Rights v Libya (merits) (2016)
1 AfCLR 153

Atabong Denis Atemnkeng v African Union (jurisdiction) (2013) 1 AfCLR 182

African Commission on Human and Peoples' Rights v Kenya (provisional
measures) (2013) 1 AfCLR 193

Femi Falana v African Commission on Human and Peoples' Rights (jurisdiction) (2015) 1 AfCLR 499

Urban Mkandawire v Malawi (admissibility) (2013) 1 AfCLR 283

Lohé Issa Konaté v Burkina Faso (provisional measures) (2013) 1 AfCLR 310

Frank David Omary and Others v Tanzania (admissibility) (2014) 1 AfCLR 358

Syndicat des Anciens Travailleurs du Group de Laboratoire Australian Laboratory Services, ALS-BAMAKO (Morila) v Mali (admissibility) (2016) 1 AfCLR 661

Deogratius Nicholas Jeshi v Tanzania (2016) 1 AfCLR 699

Ingabire Victoire Umuhoza v Rwanda (procedure) (2016) 1 AfCLR 562

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Peter Joseph Chacha v Tanzania (admissibility) (2014) 1 AfCLR 398

Rule 35

African Commission on Human and Peoples' Rights v Libya (provisional measures) (2011) 1 AfCLR 17

African Commission on Human and Peoples' Rights v Libya (order) (2013) 1 AfCLR 21

Femi Falana v African Union (jurisdiction) (2012) 1 AfCLR 118

Femi Falana v African Commission on Human and Peoples' Rights (jurisdiction) (2015) 1 AfCLR 499

African Commission on Human and Peoples' Rights v Libya (provisional measures) (2013) 1 AfCLR 145

African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153

Atabong Denis Atemnkeng v African Union (jurisdiction) (2013) 1 AfCLR 182

African Commission on Human and Peoples' Rights v Kenya (provisional measures) (2013) 1 AfCLR 193

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (preliminary objections) (2013) 1 AfCLR 197

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (merits) (2014) 1 AfCLR 219

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Urban Mkandawire v Malawi (admissibility) (2013) 1 AfCLR 283
Lohé Issa Konaté v Burkina Faso (provisional measures) (2013) 1 AfCLR 310
Lohé Issa Konaté v Burkina Faso (merits) (2014) 1 AfCLR 314
Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507

Rule 36

Oscar Josiah v Tanzania (provisional measures) (2016) 1 AfCLR 665

Rule 37

African Commission on Human and Peoples' Rights v Libya (order) (2013) 1 AfCLR 21
African Commission on Human and Peoples' Rights v Kenya (provisional measures) (2013) 1 AfCLR 193
Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (preliminary objections) (2013) 1 AfCLR 197
Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (merits) (2014) 1 AfCLR 219
Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34
Lohé Issa Konaté v Burkina Faso (provisional measures) (2013) 1 AfCLR 310
Lohé Issa Konaté v Burkina Faso (merits) (2014) 1 AfCLR 314

Rule 38

Atabong Denis Atemnkeng v African Union (jurisdiction) (2013) 1 AfCLR 182
Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Rule 39

Femi Falana v African Union (jurisdiction) (2012) 1 AfCLR 118
African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153
Atabong Denis Atemnkeng v African Union (jurisdiction) (2013) 1 AfCLR 182
Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (preliminary objections) (2013) 1 AfCLR 197

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (merits) (2014) 1 AfCLR 219

Frank David Omary and Others v Tanzania (admissibility) (2014) 1 AfCLR 358

Lohé Issa Konaté v Burkina Faso (merits) (2014) 1 AfCLR 314

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Urban Mkandawire v Malawi (admissibility) (2013) 1 AfCLR 283

Rule 40

Femi Falana v African Union (jurisdiction) (2012) 1 AfCLR 118

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (preliminary objections) (2013) 1 AfCLR 197

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (merits) (2014) 1 AfCLR 219

Urban Mkandawire v Malawi (admissibility) (2013) 1 AfCLR 283

Karata Ernest and others v Tanzania (procedure) (2013) 1 AfCLR 356

Frank David Omary and Others v Tanzania (admissibility) (2014) 1 AfCLR 358

Peter Joseph Chacha v Tanzania (admissibility) (2014) 1 AfCLR 398

Lohé Issa Konaté v Burkina Faso (merits) (2014) 1 AfCLR 314

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Rule 45

Ingabire Victoire Umuhoza v Rwanda (procedure) (2016) 1 AfCLR 562

Femi Falana v African Commission on Human and Peoples' Rights (jurisdiction) (2015) 1 AfCLR 499

Rule 50

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Rule 51

African Commission on Human and Peoples' Rights v Libya (provisional measures) (2011) 1 AfCLR 17

African Commission on Human and Peoples' Rights v Libya (provisional measures) (2013) 1 AfCLR 145

African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153

African Commission on Human and Peoples' Rights v Kenya (provisional measures) (2013) 1 AfCLR 193

Gozbert Henerico v Tanzania (provisional measures) (2016) 1 AfCLR 714

Mulokozi Anatory v Tanzania (provisional measures) (2016) 1 AfCLR 717

Marthine Christian Msuguri v Tanzania (provisional measures) (2016) 1 AfCLR 711

Nzigiyimana Zabron v Tanzania (provisional measures) (2016) 1 AfCLR 708

Crosperry Gabriel and Ernest Mutakyawa v Tanzania (provisional measures) (2016) 1 AfCLR 705

Chriszant John v Tanzania (provisional measures) (2016) 1 AfCLR 702

Dominick Damian v Tanzania (provisional measures) (2016) 1 AfCLR 699

Oscar Josiah v Tanzania (provisional measures) (2016) 1 AfCLR 665

Amini Juma v Tanzania (provisional measures) (2016) 1 AfCLR 658

Joseph Mukwano v Tanzania (provisional measures) (2016) 1 AfCLR 655

Cosma Faustin v Tanzania (provisional measures) (2016) 1 AfCLR 652

Deogratius Nicholas Jeshi v Tanzania (2016) 1 AfCLR 649

Habiyalimana Augustino and Mburo Abdukarim v Tanzania (provisional measures) (2016) 1 AfCLR 646

John Lazaro v Tanzania (provisional measures) (2016) 1 AfCLR 593

Ally Rajabu and Others v Tanzania (provisional measures) (2016) 1 AfCLR 590

Armand Guehi v Tanzania (provisional measures) (2016) 1 AfCLR 587

Rule 52

Femi Falana v African Union (jurisdiction) (2012) 1 AfCLR 118

Atabong Denis Atemnkeng v African Union (jurisdiction) (2013) 1 AfCLR 182

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (preliminary objections) (2013) 1 AfCLR 197

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (merits) (2014) 1 AfCLR 219

Urban Mkandawire v Malawi (admissibility) (2013) 1 AfCLR 283

Rule 53

Lohé Issa Konaté v Burkina Faso (provisional measures) (2013) 1 AfCLR 310

Rule 55

African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Rule 59

Urban Mkandawire v Malawi (review and interpretation) (2014) 1 AfCLR 299

Rule 60

Atabong Denis Atemnkeng v African Union (jurisdiction) (2013) 1 AfCLR 182

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Rule 61

Frank David Omary and Others v Tanzania (review) (2016) 1 AfCLR 383

Rule 66

Urban Mkandawire v Malawi (review and interpretation) (2014) 1 AfCLR 299

Rule 67

Urban Mkandawire v Malawi (review and interpretation) (2014) 1 AfCLR 299

Frank David Omary and Others v Tanzania (review) (2016) 1 AfCLR 383

Rule 63

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Rule 64

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Rule 65

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Rule 69

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Rule 69

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Rule 70

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Article 6

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Article 23

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Article 18

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Article 19

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Article 8

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Article 30

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Article 32

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Article 78

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Article 6

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Protocol 1

Article 3

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Article 1

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Article 10

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Article 11

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Article 18

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Article 19

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Article 21

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Article 23

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Article 25

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Article 30

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Article 2

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Article 3

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Article 6

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Article 7

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Article 9

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Article 14

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Article 19

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Lohé Issa Konaté v Burkina Faso (merits) (2014) 1 AfCLR 314

Article 22

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Article 25

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Article 26

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Article 11

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Article 1

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Article 2

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Article 19

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Article 27

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Article 28

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (preliminary objections) (2013) 1 AfCLR 197

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Article 31

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Article 33

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Article 34

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Article 70

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Article 31

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Article 32

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Article 34

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Standard 4.3

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Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Chaparro Álvarez and Lapo Íñiguez v Ecuador

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Reverend Christopher R. Mtikila v Tanzania (reparations) (2014) 1 AfCLR 72

Chitay Nech and Others v Guatemala

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Constitutional Court v Peru

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

El Amparo v Venezuela

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Garrido and Baigorria v Argentina

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Reverend Christopher R. Mtikila v Tanzania (reparations) (2014) 1 AfCLR 72

Goiburu and Others v Paraguay

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Gonzales and Others ("Cotton Field") v Mexico

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Gonzalez Medina and Others v Dominican Republic

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Hilaire and Others v Trinidad & Tobago

Peter Joseph Chacha v Tanzania (admissibility) (2014) 1 AfCLR 398

Ituango Massacres v Colombia

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Ivcher Bronstein v Peru

Ingabire Victoire Umuhoza v Rwanda (jurisdiction) (2016) 1 AfCLR 540

Kimel v Argentina

Ingabire Victoire Umuhoza v Rwanda (procedure) (2016) 1 AfCLR 562

Loayza-Tamayo v Peru

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Peter Joseph Chacha v Tanzania (admissibility) (2014) 1 AfCLR 398

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Mapiripan Massacre v Colombia

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Montero-Artanguren and Others (Detention Center of Catia) v Venezuela

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Myrna Mack v Guatemala

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Neira Alegria and Others v Peru

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

“Street Children” (Villagran-Morales and Others) v Guatemala

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Reverend Christopher R. Mtikila v Tanzania (reparations) (2014) 1 AfCLR 72

Suarez-Rosero v Ecuador

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507

Peter Joseph Chacha v Tanzania (admissibility) (2014) 1 AfCLR 398

Panagua Morales v Guatemala (Reparations)

Peter Joseph Chacha v Tanzania (admissibility) (2014) 1 AfCLR 398

Ticona Estrada and Others v Bolivia

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Velásquez Rodríguez v Honduras

Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (merits) (2016) 1 AfCLR 668

Yvon Neptune v Haiti

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

“White Van” (Paniagua-Morales and Others) v Guatemala

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Ximenes-Lopes v Brazil

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Inter-American Commission on Human Rights

Mariblanca Staff Wilson & Oscar E. Ceville v Panama

Urban Mkandawire v Malawi (admissibility) (2013) 1 AfCLR 283

Santiago Marzioni v Argentina

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

European Court of Human Rights

André and Another v France

Ingabire Victoire Umuhiza v Rwandan (procedure) (2016) 1 AfCLR 562

Akdivar and Others v Turkey

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Al Jedda v UK

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Aslakhanova v Russia

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

A.T. v Luxembourg

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Balta and Demir v Turkey

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Artico v Italy

Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507

Bavmann v Austria

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Benham v United Kingdom

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507

Blecic v Croatia

Frank David Omary and Others v Tanzania (admissibility) (2014) 1 AfCLR 358

Biba v Greece

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Bónisch v Austria

Reverend Christopher R. Mtikila v Tanzania (reparations) (2014) 1 AfCLR 72

Brusco v France

African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153

Civet v France

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (merits) (2014) 1 AfCLR 219

Colozza v Italy

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Comingersoll S.A v Portugal

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Cuscani v United Kingdom

Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507

Dayanan v Turkey

African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153

Del Rio Prada v Spain

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Dufaurans v France

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Findlay v United Kingdom

Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (merits) (2016) 1 AfCLR 668

Freedom and Democracy Party (Ozdep) v Turkey

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Garcia Ruiz v Spain

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Gillow v United Kingdom

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Handyside v United Kingdom

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Lithgow v United Kingdom

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Lorenzetti v Italy

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Mathieu Mohin and Clerfayt v Belgium

Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (merits) (2016) 1 AfCLR 668

Olsson v Sweden (No. 1)

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Perks and Others v United Kingdom

Reverend Christopher R. Mtikila v Tanzania (reparations) (2014) 1 AfCLR 72

Petrov v Bulgaria

Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507

Pelissier and Sassi v France

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Pretty v United Kingdom

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Price v United Kingdom

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Quaranta v Switzerland

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Perez v France

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Prezec v Croatia

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Ruiz Mateos v Spain

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Sahin v Germany

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Salduz v Turkey

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507

Sarp Kuray v Turkey

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Sporrong and Lonroth v Sweden

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Stoyanov v Bulgaria

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Talat Tunc v Turkey

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Thomas v Germany

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Valasinas v Lithuania

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Varnava and Others v Turkey

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Union Alimentaria Sanders SA v Spain

Femi Falana v African Commission on Human and Peoples' Rights (jurisdiction) (2015) 1 AfCLR 499

Yahaoui v France

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (merits) (2014) 1 AfCLR 219

Yumak and Sadak v Turkey

Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (merits) (2016) 1 AfCLR 668

Zdravka Stanev v Bulgaria

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Permanent Court of International Justice

The Factory at Chorzów

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Reverend Christopher R. Mtikila v Tanzania (reparations) (2014) 1 AfCLR 72

International Court of Justice

Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the United Nations

Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child (Advisory Opinion) (2014) 1 AfCLR 725

Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict

Request for Advisory Opinion by the Coalition for the International Criminal Court, the Legal Defence & Assistance Project (LEDAP), the Civil Resource Development & Documentation Center (CIRDDOC) and the Women Advocates Documentation Center (WARDC) (jurisdiction) (2015) 1 AfCLR 743

Matter of the Land, Island and Maritime Frontier Dispute (El Salvador/Hondura v Nicaragua)

Frank David Omary and Others v Tanzania (review) (2016) 1 AfCLR 383

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)

Ingabire Victoire Umuhoza v Rwanda (jurisdiction) (2016) 1 AfCLR 540

Reparations for injuries suffered in the service of the United Nations

Femi Falana v African Union (jurisdiction) (2012) 1 AfCLR 118

United Kingdom v Albania (Strait of Corfu)

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Reverend Christopher R. Mtikila v Tanzania (reparations) (2014) 1 AfCLR 72

United Nations Committee against Torture

Ali Ben Salem v Tunisia

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de

l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Kepra Urra Guridi v Spain

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

United Nations Human Rights Committee

Anthony Currie v Jamaica

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Wilfred Onyango Nganyi and Others v Tanzania (merits) (2016) 1 AfCLR 507

Earl Pratt and Ivan Morgan v Jamaica

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

El Abani v Libyan Arab Jamahiriya

African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153

Keun-Tae v Republic of Korea

Lohé Issa Konaté v Burkina Faso (merits) (2014) 1 AfCLR 314

Marlem Carranza Alegre v Peru

African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153

M'Boissona v Central African Republic

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women v Mauritius

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Michelot Yogogombaye v Senegal (jurisdiction) (2009) 1 AfCLR 1

Michelot Yogogombaye v The Republic of Senegal

Judgment, 15 December 2009. Done in English and French, the French text being authoritative.

Judges: MUTSINZI, AKUFFO, MAFOSO-GUNI, NGOEPE, FANNOUSH, GUINDO, NIYUNGEKO, OUGUERGOUZ and MULENGA

Recused under Article 22: GUISSÉ

The Applicant brought the case seeking to stop the Respondent State from prosecuting Mr Hissein Habré, the former head of state of Chad, who was at the material time in Senegal. The Court held that it lacked jurisdiction since the Respondent State had not made the Declaration allowing for direct access by individuals and NGOs.

Jurisdiction (Article 34(6) declaration, 31, 34, 39, 40)

Separate opinion: OUGUERGOUZ

Jurisdiction (Article 34(6) declaration, 10, 26; Application to be rejected by Registrar, 12, 40; consent necessary for jurisdiction in international law 21, 22, 31)

1. By an Application dated 11 August 2008, Mr Michelot Yogogombaye (hereinafter referred to as “the Applicant”), a Chadian national, born in 1959 and currently residing in Bienne, Switzerland, brought before the Court a case against the Republic of Senegal (hereinafter referred to as “Senegal”), “with a view to obtaining suspension of the ongoing proceedings instituted by the Republic and State of Senegal, with the objective to charge, try and sentence Mr Hissein Habré, former Head of State of Chad, presently asylumed in Dakar, Senegal”.
2. 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 8(2) of the Interim Rules of Court (hereinafter referred to as “the Rules”), Judge El Hadj Guissé, Member of the Court, and a national of Senegal, recused himself.
3. The Applicant sent his Application to the Chairperson of the African Union Commission by electronic mail dated 19 August 2008. This Application was received in the Court Registry on 29 December 2008, with a covering correspondence from the Legal Counsel of the African Union Commission dated 21 November 2008.
4. The Registry acknowledged receipt of the Application, and notified the Applicant by letter dated 2 January 2009, that all communications

meant for the Court must be addressed directly to it, at its Seat in Arusha, Tanzania.

5. In accordance with Rule 34(6) of the Rules, the Registry served a copy of the Application on Senegal by registered post on 5 January 2009; also in accordance with Rule 35(4)(a) of the Rules, the Registry invited Senegal to communicate to it, within 30 days, the names and addresses of its representatives.

6. Pursuant to Rule 35(3) of the Rules, the Registry also informed the Chairperson of the African Union Commission about the Application by letter of that same date.

7. The Applicant informed the Registry, by letter dated 30 January 2009 received at the Registry on 5 February 2009, that he would represent himself in the matter that he had brought before the Court.

8. Senegal acknowledged receipt of the Application and transmitted to the Court, the names of its representatives mandated to represent it before the Court, by letter of 10 February 2009 received by the Registry on the same day, by fax.

9. By another faxed letter dated 17 February 2009, received in the Registry on the same day, Senegal requested the Court to extend the time limit "to enable it to better prepare a reply to the Application".

10. By an order dated 6 March 2009, the Court granted the request of Senegal and extended, up to 14 April 2009, the period within which to submit its reply to the Application.

11. A copy of the order was served on the Applicant, and on Senegal, by facsimile transmission dated 7 March 2009.

12. Senegal submitted its statement of defence within the time limit indicated in the aforesaid order, in which it raised preliminary objections regarding the jurisdiction of the Court and admissibility of the Application, and also addressed substantive issues.

13. The Registry served on the Applicant, under covering letter of 14th April 2009, a copy of the statement of defence by Senegal.

14. The Applicant having failed to respond to the said statement, the Registry by another letter dated 19 June 2009, notified the Applicant that if he failed to respond within 30 days, the Court would assume that he did not want to present any submission in reply to the statement of defence, in accordance with Rule 52(5) of the Rules.

15. On 29 July 2009, the Applicant acknowledged receipt of the statement of defence and submitted that: "the afore-mentioned reply did not introduce any new element likely to significantly modify the views I expressed in my initial Application. I therefore maintain the said views in their entirety, and resubmit myself to the authority of the Court."

16. In view of the facts, the Court did not deem it necessary to hold a public hearing and, consequently, decided to close the case for deliberation.

17. In his Application, the Applicant averred, among other things, that "the Republic and State of Senegal and the Republic and State of Chad, members of the African Union, are parties to the Protocol

[establishing the African Court on Human and Peoples' Rights] and have, respectively, made the declaration prescribed in Article 34(6) accepting the competence of the Court to receive Applications submitted by individuals”.

18. With regard to the facts, the Applicant submitted that Hissein Habré, former President of Chad, is a political refugee in Senegal since December 1990, and that in 2000, he was suspected of complicity in crimes against humanity, war crimes and acts of torture in the exercise of his duties as Head of State, an allegation based on the complaints by the presumed victims of Chadian origin.

19. The Applicant further averred that, by decision of July 2006, the African Union had mandated Senegal to “consider all aspects and implications of the Hissein Habré case and take all appropriate steps to find a solution; or that failing, come up with an African option to the problem posed by the criminal prosecution of the former Head of State of Chad, Mr Hissein Habré ...”

20. He also submitted that, on 23 July 2008, the two chambers of the Parliament of Senegal adopted a law amending the Constitution and “authorizing retroactive Application of its criminal laws, with a view to trying exclusively and solely Mr Hissein Habré”.

21. He alleged that by so doing, Senegal violated the “sacrosanct principle of non-retroactivity of criminal law, a principle enshrined not only in the Senegalese Constitution but also in Article 7(2) of the African Charter on Human and Peoples' Rights” to which Senegal is a party.

22. According to the Applicant, the action of Senegal also portrayed that country's intention “to use in abusive manner, for political and pecuniary ends, the mandate conferred on it by the African Union in July 2006”. Further, according to the Applicant, in opting for a judicial solution rather than an African solution inspired by African tradition, such as the use of the “Ubuntu” institution (reconciliation through dialogue, truth and reparations), Senegal sought to use its services as legal agent of the African Union for financial gain.

23. In conclusion, the Applicant prayed the Court to:

- “1) Rule that the Application is admissible;
- 2) Declare that the Application has the effect of suspending the ongoing execution of the July 2006 African Union's mandate to the Republic and State of Senegal, until such time that an African solution is found to the case of the former Chadian Head of State, Hissein Habré, currently a statutory political refugee in Dakar in the Republic and State of Senegal;
- 3) Rule that the Republic and State of Senegal has violated several clauses of the Preamble and the Articles of the African Charter on Human and Peoples' Rights;
- 4) Rule that the Republic and State of Senegal has violated the African Charter on Human and Peoples' Rights and, in particular, the 10 September 1969 OAU[AU] Convention Governing the Specific Aspects of Refugee Problems in Africa, which came into force on 26 June 1974;
- 5) Rule that the case is politically motivated and that the Republic and State of Senegal violated the principle of universal jurisdiction in the

ongoing proceedings instituted with a view to indicting and trying Mr Hissein Habré;

- 6) Rule that, in the said procedure instituted with a view to indicting and trying Mr Hissein Habré, there is political motivation, pecuniary motivation and the abuse of the said principle of universal jurisdiction, Application of which will become, de facto, lucrative for the Respondent (estimated to cost 40 billion CFA Francs). This cannot but create precedents in other African countries in which former Heads of State would possibly take refuge;
- 7) Rule that the charges brought against Mr Hissein Habré have been abused and abusively used by the Republic and State of Senegal, the French Republic and State and the humanitarian organization, Human Rights Watch (HRW), particularly in view of the media publicity given to, and the media hype into which they turned, the said allegations;
- 8) Rule that the said abuse of the principle of universal jurisdiction has destabilizing effect for Africa, that it could impact negatively on the political, economic, social and cultural development of not only the State of Chad but also all other African States, and on the capacity of these States to maintain normal international relations;
- 9) Suspend the July 2006 African Union mandate to Senegal and hence the current proceedings instituted by the Republic and State of Senegal with a view to indicting and eventually trying Mr Hissein Habré;
- 10) Order the Republic and State of Chad and the Republic and State of Senegal to establish a national "Truth, Justice, Reparations and Reconciliation" Commission for Chad, on the South African model derived from the philosophical concept of "Ubuntu" for all the crimes committed in Chad between 1962 and 2008; and in so doing, resolve in an African manner the problematic case of the former Chadian Head of State, Hissein Habré;
- 11) Recommend that other Member States of the African Union assist Chad and Senegal in establishing and putting into operation the said "Truth, Justice, Reparations and Reconciliation" Commission;
- 12) With regard to costs and expenses, grant the Applicant the benefit of free proceedings."

24. In its statement of defence, Senegal for its part submitted, *inter alia*, that for the Court to be able to deal with Applications brought by individuals, "the Respondent State must first have recognized the jurisdiction of the Court to receive such Applications in accordance with Article 34(6) of the Protocol establishing the Court".

25. In this regard, Senegal "strongly asserted that it did not make any such declaration accepting the jurisdiction of the African Court on Human and Peoples' Rights to deal with Applications brought by individuals".

26. Alternatively, Senegal averred that the Applicant "was wrong to meddle in a matter that is the exclusive concern of Senegal, Hissein Habré and the victims" as *per* the obligations arising from the Convention against Torture; and that it does not see any "justification for legitimate interest on the part of the Applicant to bring the case against the Republic of Senegal".

27. In addition, Senegal denied the allegations made by the Applicant in regard to the "purported violation [by it] of the principle of non-

retroactivity of criminal law”, and the “purported violation of African Union mandate” of July 2006.

28. In conclusion, Senegal prayed the Court to:

“On matters of procedure:

Rule that Senegal has not made a declaration accepting the jurisdiction of the Court to hear Applications submitted by individuals;

Rule that the Applicant has no interest to institute the Application;

Therefore, declare that the Application is inadmissible.

On the merits:

Declare and decide that the evidence adduced by Mr Michelot Yogogombaye is baseless and incompetent;

Therefore, strike out the pleas submitted by the Applicant as baseless;

Rule that Mr Michelot Yogogombaye should bear the cost incurred by the State of Senegal in regard to the Application.”

29. In accordance with Rules 39(1) and 52(7) of the Rules, the Court has to at this stage, first consider the preliminary objections raised by Senegal, starting with the objection to the Court’s jurisdiction.

30. Article 3(2) of the Protocol and Rule 26(2) of the Rules provide that “in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide”.

31. To resolve this issue, it should be noted that, for the Court to hear a case brought directly by an individual against a State Party, there must be compliance with, *inter alia*, Article 5(3) and Article 34(6) of the Protocol.

32. Article 5(3) provides that: “The Court may entitle relevant Non-Governmental Organizations (NGOs) with observer status before the Commission and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol.”

33. For its part, Article 34(6) of the Protocol provides that: “At the time of ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration.”

34. The effect of the foregoing two provisions, read together, is that direct access to the Court by an individual is subject to the deposit by the Respondent State of a special declaration authorizing such a case to be brought before the Court.

35. As mentioned earlier, the Applicant in his submission averred that “the Republic and State of Senegal and the Republic and State of Chad, both members of the African Union, are Parties to the Protocol and have, respectively, made the declaration as *per* Article 34(6) of the Protocol accepting the competence of the Court to receive cases from individuals”. For its part, Senegal in its statement of defence “strongly asserted that it did not make any such declaration accepting the jurisdiction of the African Court on Human and Peoples’ Rights to hear Applications brought by individuals”.

36. In order to resolve this issue, the Court requested the Chairperson of the African Union Commission, depository of the Protocol, to forward to it a copy of the list of the States Parties to the Protocol that have made the declaration prescribed by the said Article 34(6). Under covering letter dated 29 June 2009, the Legal Counsel of the African Union Commission transmitted the list in question, and the Court found that Senegal was not on the list of the countries that have made the said declaration.

37. Consequently, the Court concludes that Senegal has not accepted the jurisdiction of the Court to hear cases instituted directly against the country by individuals or non-governmental organizations. In the circumstances, the Court holds that, pursuant to Article 34(6) of the Protocol, it does not have jurisdiction to hear the Application.

38. The Court notes, in this respect, that although presented by Senegal in its written statement of defence as an objection on the ground of “inadmissibility”, its first preliminary objection pertains, in reality, to lack of jurisdiction by the Court.

39. The Court further notes that the second sentence of Article 34(6) of the Protocol provides that “it shall not *receive* any petition under Article 5(3) involving a State Party which has not made such a declaration” (emphasis added). The word “receive” should not however be understood in its literal meaning as referring to “physically receiving” nor in its technical sense as referring to “admissibility”. It should instead be interpreted in light of the letter and spirit of Rule 34(6) in its entirety and, in particular, in relation to the expression “declaration accepting the competence of the Court to receive Applications [emanating from individuals or NGOs]” contained in the first sentence of this provision. It is evident from this reading that the objective of the aforementioned Rule 34(6) is to prescribe the conditions under which the Court could hear such cases; that is to say, the requirement that a declaration should be deposited by the concerned State Party, and to set forth the consequences of the absence of such a deposit by the State concerned.

40. Since the Court has concluded that it does not have jurisdiction to hear the case, it does not deem it necessary to examine the question of admissibility.

41. Each of the parties having made submissions regarding costs, the Court will now pronounce on this issue.

42. In his pleadings, the Applicant prayed the Court, “with respect to the costs and expenses of the case”, to grant him “the benefit of free proceedings”.

43. In its statement of defence, Senegal, on the other hand, prayed the Court to “order Mr Michelot Yogogombaye to bear the cost incurred by the State of Senegal in this case”.

44. The Court notes that Rule 30 of the Rules states that “Unless otherwise decided by the Court, each party shall bear its own costs”.

45. Taking into account all the circumstances of this case, the Court is of the view that there is no reason for it to depart from the provisions of Rule 30 of its Rules.

46. In view of the foregoing,
THE COURT, unanimously:

- 1) *Holds* that, in terms of Article 34(6) of the Protocol, it has no jurisdiction to hear the case instituted by Mr Yogogombaye against Senegal;
- 2) *Orders* that each party shall bear its own costs.

Separate Opinion: OUGUERGOUZ

1. I am in agreement with the views of my colleagues in regard to the conclusions reached by the Court on the question of its jurisdiction and on that of the costs and expenses of the case, and consequently I have voted in favour of the said conclusions. However, I believe that these two issues deserved to be developed in a more comprehensive manner.

2. The Applicant indeed has the right to know why it has taken nearly one year between the date of receipt of his Application at the Registry and the date on which the Court took its decision thereon. Senegal, on the other hand, has the right to know why the Court chose to make a solemn ruling on the Application by means of a Judgment, rather than reject it *de plano* with a simple letter issued by the Registry. The two Parties also have the right to know the reasons for which their prayers in respect of the costs and expenses, respectively, of the case, have been rejected; the Applicant should also know why his prayer in this regard was addressed on the basis of Rule 30 of the Interim Rules of the Court (hereinafter referred to as the “Rules”) on Legal Costs, whereas the Court could have equally, if not exclusively, treated this prayer on the basis of Rule 31 on Legal Assistance.

3. However, only the question of the jurisdiction of the Court seems to me to be sufficiently vital, to lead me to append to the Judgment, an *expose* of my separate opinion in regard to the manner in which this question should have been treated by the Court.

4. In the present case, the question of the jurisdiction of the Court is relatively simple. It is that of the Court’s “personal jurisdiction” or “jurisdiction *ratione personae*” in respect of Applications brought by individuals. This is governed by Article 5(3) 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 “Protocol”) and Article 34(6) of the said Protocol which set forth the modalities by which a State shall accept the said jurisdiction.

5. However, paragraph 31 of the Judgment states, not without ambiguity, that for the

Court to hear a case brought directly by an individual against a State Party, there must be compliance with, *inter alia*, Article 5(3) and Article 34(6) of the Protocol.

6. If the only issue referred to here is that of the jurisdiction of the Court, then the expression "*inter alia*" introduces confusion because it lends itself to the understanding that the said jurisdiction is predicated on one or several other conditions that have not been spelt out. However, in my view, there are no other conditions to the jurisdiction of the Court in the case than that which has been specified in Article 34(6) of the Protocol, reference to which was made in Article 5(3).

7. Nevertheless, if the expression "*inter alia*" also refers to the conditions for admissibility of the Application, there would no longer be any logical linkage between paragraph 31 and paragraph 29 of the Judgment in which the Court indicated that it would start by considering the question of its jurisdiction. It would be particularly difficult to understand the meaning of paragraph 39 in which the Court gives its interpretation of the word "receive" as used in Article 34(6) of the Protocol. In paragraph 39, the Court indeed points out that the word "receive" as applied to the Application should not be understood in its literal meaning as referring to "physically receiving" nor in its technical sense as referring to "admissibility"; rather it refers to the "jurisdiction" of the Court to "examine" the Application; that is to say, its jurisdiction to hear the case, as it states very clearly in paragraph 37 *in fine* of the Judgment.

8. Read in light of paragraph 39 of the Judgment, paragraph 31 should therefore be interpreted as referring exclusively to the question of the Court's jurisdiction. Since the meaning of the expression "*inter alia*" is unclear, the Court had better do away with it.

9. Even if the expression is removed therefrom, paragraph 31 of the Judgment, and also paragraph 34 thereof, pose the question of the Court's jurisdiction in terms that do not faithfully reflect the Court's liberal approach to the treatment of the Application.

10. In the foregoing two paragraphs of the Judgment, the question of the Court's jurisdiction is indeed posed by the exclusive reference to Article 5(3) and Article 34(6) of the Protocol. However, Article 5 essentially deals with the question of "Access to the Court" as the title clearly indicates. Thus, the question of the personal jurisdiction of the Court in this case cannot but receive the response set forth in paragraph 37 of the Judgment, *Le.*, that since Senegal has not made the declaration provided for in Article 34(6) of the Protocol, the Court has no jurisdiction to hear cases instituted directly against this State by individuals. This ruling could have been made expeditiously in terms of the preliminary consideration of the Court's jurisdiction as provided for in Rule 39 of the Rules.

11. Though of fundamental importance to the question of the personal jurisdiction of the Court, Article 5(3) and Article 34(6) of the Protocol should be read in their context, *i.e.* in particular in light of Article 3 of the Protocol entitled "Jurisdiction" of the Court.

12. Indeed, although the two are closely related, the issues of the Court's "jurisdiction" and of "access" to the Court are no less distinct, as

paragraph 39 of the Judgment in fact suggests;¹ it is precisely this distinction that explains why the Court did not reject *de plano* the Application given the manifest lack of jurisdiction, by means of a simple letter issued by the Registry, and why it took time to rule on the Application by means of a very solemn Judgment.”

13. The Application was received at the Court Registry on 29 December 2008 and it was placed on the general list as No. 001/2008. The Application was served on Senegal on 5 January 2009; and on the same day, the Chairperson of the African Union Commission was informed about the filing of the Application and through him the Executive Council and the other Parties to the Protocol.

14. Thus, upon submission, the Application was subject to a number of procedural acts including its registration on the general list of the Court,² and its service on Senegal.

15. For their part, Applications or communications addressed to the African Commission on Human and Peoples’ Rights,³ the defunct European Commission of Human Rights,⁴ the Inter-American

1 On this point, see for example, Prosper Weil who notes as follows: “jurisdiction and seizure are not only distinct. conceptually: they are separate in time. Normally jurisdiction precedes seizure. In certain cases, however, the sequence may be reversed”, [Translation by the Registry] P Weil ‘Competence et Saisine Un Nouvel Aspect Du Principe de La Jurisdiction Consensuelle’ in J Makarczyk (ed) *Theory of International Law at the Threshold of the 21st Century – Essays in Honour of Krzysztof Skubiszewski* (1996) 839.

2 The registration of an Application or communication on the general list of a judicial or quasi-judicial organ may be defined as an “act of recognition which establishes that such a communication is indeed a seizure and, as of the date of receipt, actualizes the introduction of the case”, C Santulli *Droit du contentieux international* (19 September 2005) 400.

3 Rule 102 of the Rules of Procedure of the African Commission, as adopted on 6 October 1995, is worded as follows: “Pursuant to these Rules of Procedure, the Secretary shall transmit to the Commission the communications submitted to him for consideration by the Commission in accordance with the Charter. 2. No communications concerning a State which is not a party to the Charter shall be received by the Commission or placed in a list under Rule 103 of the present Rules” (emphasis added); see <http://www.achnr.org/francais/infa/rulesfr.html> (site consulted on 9 December 2009). When member States of the African Union had not all become parties to the African Charter, and the Commission received a communication against a State that was not a party to the Charter, the Commission limited itself to writing to the Applicant informing him/her that it has no jurisdiction to deal with the communication. It did not serve the communication on the State concerned, E Ankumah *The African Commission on Human and Peoples’ Rights: Practices and Procedures* (1996) 57.

4 “When an Application is filed by simple letter, even where such Application is complete, the practice of the Commission is to address an Application form to the Applicant. The various points detailed in this form facilitate effective consideration of the admissibility of the Application. The Applicant is requested to return this form duly completed and accompanied with the requisite annexes. The answers to some of the points could mention the elements already contained in the Application. As a general rule (except in case of emergency), it is only after the receipt of the duly completed form that the Application is entered on the Commission’s list and given a serial number [“1. It is said that the entry on the list transforms a “petition” into an Application in terms of Article 25 of the Convention” (emphasis added). Michel Melchior, “La procedure devant la Commission europeenne des droits de l’Homme” in Michel Melchior (and others), *Imroduire un recours a Strasbourg? Fen Zaak Aanhangig Maken te Straatsburg?* Nemesis Editions, Brussels, 1986, 24.

Commission of Human Rights,⁵ the United Nations Human Rights Committee,⁶ or the International Court of Justice, for example,⁷ undergo a process of vetting prior to being registered or served on the States against which they were instituted.

16. In this case, the Application did not go through this initial procedural phase of vetting. It was treated in the same way as the Applications brought before the International Court of Justice before 1 July 1978, date of entry into force of its new Rules.⁸ Prior to that date, all cases brought before the Court, including those instituted against States that had not previously accepted the Court's jurisdiction by making the optional declaration accepting the compulsory jurisdiction provided for in Article 36(2) of the Statute, were indeed placed on the general list and served on the States against which they were instituted, and on the United Nations Secretary General and, through him, on all the other members of the Organization.

17. As indicated in the foregoing paragraph 13, procedural acts similar to the aforesaid were undertaken in connection with Mr

- 5 The jurisdiction of the Inter-American Commission in regard to communications from individuals now lies as of right in regard to all member States of the Organization of American States irrespective of whether or not they are parties to the American Convention on Human Rights, see Rules 27, 49 and 50 of the Rules of Procedure of the Commission as amended in July 2008; Rule 26 of the Rules however provides for an initial procedural stage that can be equated to the stage of consideration of *prima facie* admissibility of the Application. It is described by an author in the following terms: "the Commission receives the petition and registers it. In practice, it is the responsibility of the Executive Secretariat of the Commission to ascertain whether the petition is admissible *prima facie*. If so, it registers the petition and opens a file [...]. If the correct format has not been followed, [it] may request the petitioner to correct any deficiencies". L Hennebel & AAC Trindade *La convention américaine des droits de l'homme : Mécanismes de protection et étendue des droits et libertés* (2007) 163.
- 6 The UN Secretary General maintains on a permanent basis a register of the communications that he submits to the Committee; however, under no circumstance can he enter in the register a communication made against a State that is not a party to the Optional Protocol to the International Covenant on Civil and Political Rights, see Rules 84 and 85 of the Rules of Procedure of the Human Rights Committee, United Nations Doc. CCPRIC/3fRev.7, 4 August 2004. When he receives such communication, the Secretary General limits himself to informing its author that the communication cannot be received owing to the fact that the State against which it was instituted is not a party to the Optional Protocol, M Nowak *UN Covenant on Civil and Political Rights - CCPR Commentary*, 2nd ed (2005) 824-825.
- 7 It should be mentioned that the reference to the practice of the European Court of Human Rights and the Inter-American Court of Human Rights is of limited interest in this regard, given that the question of personal jurisdiction is posed in different terms before these two Courts. In the Inter-American Court, individuals having no direct access to the Court, the question of personal jurisdiction indeed arises only in regard to State Parties; in the European Court where individuals have direct access to the Court, it has automatic jurisdiction solely on the ground of the participation of the member States of the Council of Europe in the European Convention on Human Rights.
- 8 Rule 38, paragraph 5, of the current Rules of Procedure of the International Court of Justice states that: "When the Applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such Application is made, the Application shall be transmitted to that State. *It shall not however be entered in the General List. Nor any action be taken in the proceedings unless and until the State against which such Application is made consents to the Court's jurisdiction for the purposes of the case*" (emphasis added).

Yogogombaye's Application; this was, *inter alia*, served on Senegal under covering letter dated 5 January 2009.

18. Senegal acknowledged receipt thereof by letter dated 10 February 2009 in which it also transmitted the names of those to represent it before the Court. At that stage, Senegal could have limited itself to indicating that it had not made the declaration provided for in Article 34(6) of the Protocol and that, consequently, the Court had no jurisdiction to deal with the Application on the grounds of the provisions of Article 5(3) of the Protocol. However, by notifying the Court of the names of its representatives, it gave room for the suggestion that it did not exclude appearing before the Court and of participating in its proceedings, with doubts as to the object of its participation: to contest the Court's jurisdiction, contest the admissibility of the Application or to defend itself on the merits of the case.

19. By a second letter dated 17 February 2009, Senegal requested the Court to extend the time limit for submission of its observations to "enable it to better prepare a reply to the Application". By so doing, Senegal signalled its intention to comply with the provisions of Rule 37 of the Rules according to which "the State Party against which an Application has been filed shall respond thereto within sixty (60) days provided that the Court may, if the need arises, grant an extension of time". Even in this letter, Senegal did not exclude the eventual acceptance of the Court's jurisdiction. Still at this stage, it could have put up the argument that it has not made the declaration provided for in Article 34(6) of the Protocol and, on that ground, contested the jurisdiction of the Court.

20. Even though it would not have made the aforementioned declaration, Senegal, by its attitude, left open the possibility, however slim, that it might accept the jurisdiction of the Court to deal with the Application.

21. The fundamental principle regarding the acceptance of the jurisdiction of an international Court is indeed that of consent, a principle which itself is derived from that of the sovereignty of the State. A State's consent is the condition *sine qua non* for the jurisdiction of any international Court,⁹ irrespective of the moment or the way the consent is expressed.¹⁰

22. This principle of jurisdiction by consent is also upheld by the Protocol. Thus, in contentious matters, the Court can exercise jurisdiction only in respect of the States Parties to the Protocol. The scope of the Court's jurisdiction in such cases and the modalities of access thereto are defined in Articles 3 and 5, respectively, of the Protocol.

9 "It is a well-established principle in International Law that no State can be compelled to submit its disputes with other States to mediation, arbitration or to any method of peaceful solution without its consent", Permanent Court of International Justice, *Statute of Eastern Carelia*, Advisory Opinion of 23 July 1923, Series B, p 27.

10 "Such consent may be given once and for all in the form of a freely accepted obligation: it may however be given in a specific case beyond any pre-existing obligation".

23. By becoming Parties to the Protocol, member States of the African Union *ipso facto* accept the jurisdiction of the Court to entertain Applications from other States Parties, the African Commission or African Inter-governmental Organizations. The jurisdiction of the Court in respect of Applications from individuals or Non Governmental Organizations against States Parties is not, for its part, automatic; it depends on the optional expression of consent by the States concerned.

24. This is provided for in Article 34(6) of the Protocol which states that:

“At the time of ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration”. As it is drafted, this provision raises two questions:

25. The first is the meaning to give to the word “shall” used in the first sentence which suggests that filing of the declaration by the State Party is an “obligation” for the State Party and not simply “a matter of choice”.

26. Understood in this way, Article 34(6) would make it obligatory for State Parties to make such a declaration after depositing their instruments of ratification (or accession).¹¹ This prescription does not however have any real legal effect because it does not set any time limit. It also does not make much sense when read in light of its context and particularly of Article 5(3) and the second sentence of 34(6) which states that “The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration”. It can thus be said in conclusion that the filing of the declaration is optional; this conclusion is corroborated by an analysis of the “*travaux préparatoires*” of the Protocol.¹²

27. The second question raised in Article 34(6) is that of whether the filing of the optional declaration by States Parties is the only means of

11 Paragraph 6 of the English version, unlike the French, provides that the declaration may be freely made on two different occasions: “at the time of the ratification of this Protocol or any time thereafter” (emphasis added); the Arab and Portuguese versions of the said Paragraph 6 are identical to the English version.

12 See Article 6(I) (Special jurisdiction) of the Cape Town draft (September 1995), *Draft Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights*, Government Legal Experts Meeting on the establishment of an African Court on Human and Peoples’ Rights, 6-12 September 1995, Cape Town, South Africa Doe. OAUILEGIEXP/AFCHPRIPRO (I) Rev. I, Article 6(I), of the Nouakchott Draft (April 1997), *Draft (Nouakchott) Protocol to the African Charter on Human and Peoples’ Rights, on the Establishment of an African Court on Human and Peoples’ Rights*, Second Government Legal Experts Meeting on the establishment of an African Court on Human and Peoples’ Rights, 11-14 April 1997, Nouakchott, Mauritania, Doe. OAUILEGIEXP/AFCHPRIPROT (2), paragraphs 21, 23, 24 and 25 of the Report of this Second Experts Meeting Report - *Second Government Legal Experts Meeting on the establishment of an African Court on Human and Peoples’ Rights*, 11-14 April 1997, Nouakchott, Mauritania, Doc. OAUILEXP/JURICAFDHPPIRAP (2), Article 34(6) of the Addis Ababa Draft (December 1997), *Draft Protocol to the African Charter on Human and Peoples’ Rights on the establishment of an African Court on Human and Peoples’ Rights*, Third Government Experts Meeting (including Diplomats) on the Establishment of an African Court on Human and Peoples’ Rights, 8-13 December 1997, Addis Ababa, Ethiopia, Doe. OAUILEGIEXP/AFCHPRIPRO (III) and para 35

expressing their recognition of the jurisdiction of the Court to deal with Applications brought against them by individuals.

28. In this regard, it should first be noted that Article 34(6) does not require that the filing of the optional declaration be done “before” the filing of the Application; it simply provides that the declaration may be made “at the time of ratification or any time thereafter”. Nothing therefore prevents a State Party from making the declaration “after” an Application has been introduced against it. In accordance with Article 34(4) of the Protocol, the declaration, just as ratification or accession, enters into force from the time of submission and takes effect from this date. Senegal was therefore free to make such a declaration after the Application was introduced.

29. If a State can accept the jurisdiction of the Court by filing an optional declaration “at any time”, nothing in the Protocol prevents it from granting its consent, after the introduction of the Application, in a manner other than through the optional declaration.¹³

30. Therefore, the second sentence of Article 34(6) must not, as the first sentence, be interpreted literally. It must be read in light of the object and purpose of the Protocol and, in particular, in light of Article 3 entitled “Jurisdiction” of the Court. Indeed, Article 3 provides in general manner that: “the jurisdiction of the Court shall extend to all cases and disputes submitted to it”; it also provides that “in the event of dispute as to whether the Court has jurisdiction, the Court shall decide”. It therefore lies with the Court to determine in all sovereignty the conditions for the validity of its seizure; and do so only in the light of the principle of consent.

31. Consent by a State Party is the only condition for the Court to exercise jurisdiction with regard to Applications brought by individuals. This consent may be expressed before the filing of an Application against the State Party, with the submission of the declaration mentioned in Article 34(6) of the Protocol. It may also be expressed later, either formally through the filing of such a declaration, or informally or implicitly through *forum prorogatum*.¹⁴

32. *Forum prorogatum* or “prorogation of competence” may be understood as the acceptance of the jurisdiction of an international Court by a State after the seizure of this Court by another State or an individual, and this either, expressly or tacitly, through decisive acts or

of the report of the Third Meeting of Experts, *Report - Third Government Legal Experts Meeting including Diplomats on the establishment of an African Court on Human and Peoples' Rights*, 8-11 December 1997, Addis Ababa, Ethiopia, Doe. OAU/LEG/EXP/AFCHPR/RPT (111), Rev. I.

¹³ Such a possibility is for instance codified under Article 62, paragraph 3, of the American Convention on Human Rights as well as in Article 48 of the European Convention on Human Rights before the Convention was amended by Protocol 11.

¹⁴ “Normally jurisdiction precedes seizure. [...] In some cases, however, the sequence may be reversed. Such is the essence of the theory of *forum prorogatum* according to which the Court may have been properly seized of an Application whereas its jurisdiction may not have existed at the time the Application was filed and may only have been assumed subsequently because of the consent of the defendant”, Prosper Weil, *op. cit.*, 839. [translation by the Registry].

an unequivocal behavior.¹⁵ It was in particular this possibility that the letters issued by Senegal dated 10 and 17 of February 2009 led the Court to foresee in this case.

33. Up to 9 April 2009, the date on which the Registry received the written observations of Senegal, there was the possibility that Senegal might accept the jurisdiction of the Court. It was only on this date that it became unequivocally clear that Senegal had no intention of accepting the Court's jurisdiction to deal with the Application.

34. It was therefore up to the Court to take into account Senegal's refusal to consent to the jurisdiction of the Court to deal with the Application and to draw the consequences thereof by putting an end to the matter and removing the case from the general list.

35. Under the former Rules of the International Court of Justice (before 01 July 1978), when a case was brought against a State which has not previously accepted the jurisdiction of the Court by filing the optional declaration and such a State did not accept the Court's jurisdiction in regard to the case after having been invited to do so by the Applicant State, such a case was closed by the issuance of a succinct order.¹⁶ In the European Court of Human Rights where the problem of jurisdiction occurs less frequently than that of admissibility of Applications, when there is no serious doubt as to the inadmissibility of an Application, the corresponding decision is notified to the Applicant through a simple letter.¹⁷

36. In the present case, Senegal having formally raised preliminary objections in its "statement of defense",¹⁸ dated 9 April 2009, the Court deemed it necessary to comply with the provisions of Rule 52(7) of its

15 "*Forum prorogatum*": Latin expression usually translated by the expression "prorogated jurisdiction", Acceptance by a State of the jurisdiction of an international judicial body, such as the International Court of Justice, after a matter has been referred thereto, either by an express declaration to that effect. or by a decisive act implying tacit acceptance. The decisive acts may consist in effective participation in the proceedings, either by pleading on the merits, or by making findings on the merits or any other act implying lack of objection against any future decision on the merits. In the opinion of the International Court of Justice, such conduct can be tantamount to tacit acceptance of its jurisdiction, which cannot subsequently be revoked, by virtue of the *bonafide* or estoppel principle, Jean Salmon (Ed.). *op. cit.*, p. 518. On this doctrine, see Mohammed Bedjaoui & Falsah Ouguerouz, "*Le forum prorogatum de... 'Ont la Cour internationale de Justice: les ressources d'une institution ou laface cachee du consensualisme*" in *African Yearbook of International Law*, 1998, Vol. V, 91- 114.

16 See for example, *Treatment in Hungary of Aircraft and Crew of the United States of America*, Order of 12 July 1954, ICJ Report 1954, p 100 or *Aerial incident of 7 October 1952*, Order of 14 March 1956, ICJ Report 1956, p 10.

17 Personal jurisdiction of the European Court in matters of individual communications is indeed automatic; the Court must therefore first deal with the issue of admissibility of Applications and, in this respect, Article 53 of its Interim Rules, entitled "Proceedings before a Committee", provides in its paragraph 2 that "in accordance with Article 28 of the Convention, the Committee may, unanimously, declare an Application to be inadmissible or strike it of the cause list, when such a decision can be made without any further examination. The decision shall be final and shall be brought to the attention of the Applicant by letter". (emphasis added).

18 Expression used in the testimonium clause on page J7 of Senegal's written observations.

Rules which stipulates that “The Court shall give reasons for its ruling on the preliminary objection”.¹⁹ [Ed. Note: The expression “*arret motive*” in French appears as “*ruling*” in the English version of Rule 52(7) of the Rules].

37. However, consideration by the Court of Senegal’s preliminary objections, in a judgment, required that it addresses the question of its jurisdiction in a more comprehensive manner by developing in particular the possibility of a *forum prorogatum*. This possibility is all the more suggested in paragraph 37 of the Judgment where the Court, on the grounds of its ruling that Senegal has not made the optional declaration, concluded that the said State, on that basis, “has not accepted the jurisdiction of the Court to hear cases instituted directly against the Country by individuals or non governmental organizations”. [Ed. note: The expression “*sur celle base*” in French does not appear in the English version of paragraph 37 of the Judgment.].

38. Nevertheless, it is this possibility of a *forum prorogatum*, however slight, that explains why the Application of Mr Yogogombaye was not rejected right after 10 February 2009; and it is the filing of preliminary objections by Senegal which explains why the Court did not close the case in a less solemn manner by issuing an order or by simple letter by the Registry.

39. The submission of preliminary objections by Senegal may, in turn, be explained by scrupulous compliance by this State with the provisions of Rule 37 and 52(1) of the Rules.

40. Today, the question is whether “all” Applications filed with the Registry should be placed on the Court’s general list, notified to the States against which they are directed, and above all, as provided for under Article 35(3) of the Rules, notified to the Chairperson of the African Union Commission and, through him, to the Executive Council of the Union, as well as to all the other States Parties to the Protocol. As a judicial organ, once the Court receives an Application, it has the obligation to ensure, at least in a *prima facie* manner, that it has jurisdiction in the matter.²⁰ Certainly, here lies the object of preliminary consideration by the Court of its jurisdiction as provided for in Rule 39

19 The reference to Article 39 of the Rules in Paragraph 29 of the Judgment is not timely as this provision concerns preliminary examination by the Court of its jurisdiction, i.e. a stage of the proceedings during which it must ensure that it has at least *prima facie* jurisdiction to entertain an Application. At the stage of examining a preliminary objection for lack of jurisdiction, the Court must make a definitive ruling on its jurisdiction.

20 On this issue, see for example G Niyungeko *La preuve devant les juridictions internationales* (2005) 55. Thus, according to the International Court of Justice “In accordance with its Statute and established jurisprudence, the Court must, nonetheless, examine proprio motu the issue of its own jurisdiction in order to entertain the request of the Government of Greece”, *Aegean Continental Shell Judgment*, ICJ Report 1978 p. 7, para 15. With regard to practice at the Inter-American Court, see L Hennebel *La Convention américaine des droits de l’homme - Mécanismes de protection et étendue des droits et libertés* (2007) 238, para 277, or the practice of quasi-judicial organs such as the Human Rights Committee for example, see L Hennebel *La jurisprudence du Comité des droits de l’homme des Nations Unies - Le Pacte international relatif au droits civils et politiques et son mécanisme de protection individuelle* (2007) 346.

of its Rules. A selection should then be made between individual Applications in respect of which, at a glance, the Court has jurisdiction and those in respect of which it has not, which is the case when the State party concerned has not made the optional declaration. In this latter hypothesis, the Application should be rejected *de plano* by simple letter by the Registry. It could eventually be communicated to the State Party concerned, but it is only if such a State accepts the jurisdiction of the Court that the Application could be placed on the Court's general list²¹ and notified to the other States Parties. The idea is to avoid giving untimely or undue publicity to individual Applications in respect of which the Court clearly lacks jurisdiction.

41. In this regard, it is important to point out that the potential authors of individual Applications may in the present circumstances experience difficulties knowing the situation of an African State vis-à-vis the optional declaration. Indeed, only the list of the States Parties to the Protocol is being published on the African Union Commission website and this list does not mention the States that have made the optional declaration. It would therefore be desirable that the list of the States that have made the said declaration be similarly published on the website for the purposes of bringing the information to the knowledge of individuals and non governmental organizations.

42. The Court, for its part, cannot be satisfied with such publication as it does not have official value, and is not a "real time" reflection of the status of participation in the Protocol and in the system of the optional declaration. To date, the list of States Parties to the Protocol and that of the States Parties that have made the optional declaration, while being of primary interest to the Court, are not automatically notified to the Court by the Chairperson of the African Union Commission, depository of the Protocol. The Protocol does not oblige the depository to communicate declarations to the Court Registry, its Article 34(7) contenting itself with providing that declarations should be deposited with the Chairperson of the African Union Commission "who shall transmit copies thereof to the State parties". The Statute of the International Court of Justice and the American Convention of Human Rights for their part, provide that the depositories of the optional declarations accepting the compulsory jurisdiction of the International Court of Justice²² and the Inter-American Court,²³ respectively, should file copies thereof in the Registries of the said courts. Although the relevant department of the African Union Commission is not legally bound to do so, it would also be desirable that in future the said department inform the Court of any update of the two above-mentioned lists.

21 As has been rightly emphasized by an author, registration of an Application on the general list of a judicial organ "is in essence a means of eliminating frivolous correspondence or other irrelevant communications that cannot be considered as Applications" Santulli *op.cit.*, 400.

22 Article 36, para 4.

23 Article 62, para 2.

**African Commission on Human and Peoples' Rights v Libya
(provisional measures) (2011) 1 AfCLR 17**

African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya

Order (provisional measures), 25 March 2011. Done in Arabic, English and French, the English text being authoritative.

Judges: NIYUNGEKO, AKUFFO, MUTSINZI, NGOEPE, GUINDO, MULENGA, RAMADHANI, TAMBALA, THOMPSON and ORE

Provisional measures in relation to massive violations of human rights in Libya.

Provisional measures (without request from the Commission, 8, 9; without written pleadings or oral hearings, 13; where there is imminent risk of loss of human life, 13; relation to merits, 24)

After deliberations, having regard to the Application dated 3 March 2011, received at the Registry of the Court on 16 March 2011, by the African Commission on Human and Peoples' Rights (hereinafter referred to as the Commission), instituting proceedings against the Great Socialist People's Libyan Arab Jamahiriya (hereinafter referred to as Libya), for serious and massive violations of human rights guaranteed under the African Charter on Human and Peoples' Rights (hereinafter referred to as the Charter). Having regard to Article 27(2) 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 51 of the Rules of Court; Makes the following order:

1. Whereas, in its Application, the Commission submits that it received successive complaints against Libya, during its 9th extraordinary session held in Banjul (The Gambia) from 23 February to 3 March 2011:

2. Whereas, the Commission submits that the complaints allege:

- that following the detention of an opposition lawyer, peaceful demonstrations took place on 16 February 2011 in the eastern Libyan city of Benghazi;
- that on 19 February 2011, there were other demonstrations in Benghazi, Al Baida, Ajdabiya, Zayiwa and Derna, which were violently suppressed by security forces who opened fire at random on the demonstrators killing and injuring many people;
- that hospital sources reported that on 20 February 2011 they received individuals who had died or been injured with bullet wounds in the chest, neck and head;
- that Libyan security forces engaged in excessive use of heavy weapons and machine guns against the population, including targeted aerial bombardment and all types of attacks; and

- that these amount to serious violations of the right to life and to the integrity of persons, freedom of expression, demonstration and assembly.

3. Whereas, the Commission concludes that these actions amount to serious and widespread violations of the rights enshrined in articles 1, 2, 4, 5, 9, 11, 12, 13 and 23 of the Charter;

4. Whereas, on 21 March 2011, the Registry of the Court acknowledged receipt of the Application, in accordance with rule 34(1) of the Rules of Court;

5. Whereas, on 22 March 2011, the Registry forwarded copies of the Application to Libya, in accordance with rule 35(2)(a) of the Rules of Court, and invited Libya to indicate, within 30 days of receipt of the Application, the names and addresses of its representatives, in accordance with rule 35(4)(a), whereas the Registry further invited Libya to respond to the Application within 60 days, in accordance with rule 37 of the Rules;

6. Whereas, by letter dated the 22 March 2011, the Registry informed the Chairperson of the African Union Commission, and through him, the Executive Council of the African Union, and all the other states parties to the Protocol, of the filing of the Application, in accordance with rule 35(3) of the Rules;

7. Whereas, by letter dated 23 March 2011, the Registry forwarded copies of the Application to the complainants that seized the Commission, in accordance with rule 35(2)(e) of the Rules;

8. Whereas, by letter dated 23 March 2011, the Registry informed the parties to the Application that, given the extreme gravity and urgency of the matter, the Court might, on its own accord, and in accordance with Article 27(2) of the Protocol and rule 51(1) of its Rules, issue provisional measures;

9. Whereas in its Application, the Commission did not request the Court to order provisional measures;

10. Whereas, however, under Article 27(2) of the Protocol and rule 51(1) of the Rules, the Court is empowered to order provisional measures *proprio motu* "in cases of extreme gravity and urgency and when necessary to avoid irreparable harm to persons" and "which it deems necessary to adopt in the interest of the parties or of justice";

11. Whereas, it is for the Court to decide in each situation if, in the light of the particular circumstances, it should make use of the power provided for by the aforementioned provisions;

12. Whereas, given the particular circumstances of the case, the Court has decided to invoke its powers under these provisions;

13. Whereas, in the present situation where there is an imminent risk of loss of human life and in view of the ongoing conflict in Libya that makes it difficult to serve the Application timeously on the Respondent and to arrange a hearing accordingly, the Court decided to make an order for provisional measures without written pleadings or oral hearings;

14. Whereas, in dealing with an Application, the Court has to ascertain that it has jurisdiction under articles 3 and 5 of the Protocol;

15. Whereas, however, before ordering provisional measures, the Court need not finally satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction;

16. Whereas, Article 3(1) of the Protocol provides that “the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned”;

17. Whereas, Libya ratified the Charter on 19 July 1986 which came into force on the 21 October 1986; whereas, Libya ratified the Protocol on 19 November 2003 which came into force on 25 January 2004; and Libya is a party to both instruments;

18. Whereas, Article 5(1)(a) of the Protocol lists the Commission as one of the entities entitled to submit cases to the Court;

19. Whereas, in the light of the foregoing, the Court has satisfied itself that, *prima facie*, it has jurisdiction to deal with the Application;

20. Whereas, it appears from the Application that there exists a situation of extreme gravity and urgency, as well as a risk of irreparable harm to persons who are the subject of the Application;

21. Whereas, the Application alleges that international organizations, mentioned below, both universal and regional, to which Libya is a member, have considered the situation prevailing in Libya:

- On 23 February 2011, the Peace and Security Council of the African Union “express[ed] deep concern with the situation in the Great Socialist People’s Libyan Arab Jamahiriya and strongly condemn[ed] the indiscriminate and excessive use of force and lethal weapons against peaceful protestors, in violation of human rights and International Humanitarian Law which continues to contribute to the loss of human life and the destruction of property”;
- On 21 February 2011, the Secretary General of the Arab League called for an end to violence, stating that the demands of Arab people for change are legitimate and the Arab League has suspended Libya;
- The United Nations Security Council in Resolution 1970 (2011) adopted on 26 February 2011, denounced ‘the gross and systematic violations of human rights, including, the repression of peaceful demonstrators’, noting further that ‘the systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity’; and decided to refer the situation in the Libyan Ara Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court;

22. Whereas, in the opinion of the Court, there is therefore a situation of extreme gravity and urgency, as well as a risk of irreparable harm to persons who are the subject of the Application, in particular. in relation to the rights to life and to physical integrity of persons as guaranteed in the Charter;

23. Whereas, in the light of the foregoing, the Court finds that the circumstances require it to order, as a matter of great urgency and without any proceedings, provisional measures, in accordance with Article 27(2) of the Protocol and Rule 51 of its Rules;

24. Whereas, measures ordered by the Court would necessarily be provisional in nature and would not in any way prejudice the findings the Court might make on its jurisdiction, the admissibility of the Application and the merits of the case;

25. For these reasons, the Court, unanimously orders the following provisional measures:

(1) The Great Socialist People's Libyan Arab Jamahiriya must immediately refrain from any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the Charter or of other international human rights instruments to which it is a party.

(2) The Great Socialist People's Libyan Arab Jamahiriya must report to the Court within a period of fifteen (15) days from the date of receipt of the Order, on the measures taken to implement this Order.

**African Commission on Human and Peoples' Rights v Libya
(order) (2013) 1 AfCLR 21**

African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya

Order, 15 March 2013. Done in English and French, the English text being authoritative.

Judges: AKUFFO, OUGUERGOUZ, NGOEPE, NIYUNGEKO, RAMADHANI, TAMBALA, THOMPSON, ORE, KIOKO, GUISSSE and ABA

This Application dealt with alleged massive human rights violations in Libya. It was struck out by the Court as it had not received the submissions it had requested from the Applicant, the African Commission Human and Peoples' Rights.

Admissibility (diligent pursuance of Application, 26)

I. Order

1. By an Application dated 3 March 2011, received at the Registry of the Court on 16 March 2011, the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Applicant"), brought an action against the Great Socialist People's Libyan Arab Jamahiriya (hereinafter referred to as "the Respondent"), alleging serious and massive violation of human rights guaranteed under the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter").
2. By letter of 22 March 2011, the Respondent was notified of the Application in accordance with Rule 35(2)(a) of the Rules of Court, and the Respondent was invited to indicate the names and addresses of its representatives within thirty (30) days, and to respond to the Application within sixty (60) days, in accordance with Rule 37 of the Rules of Court.
3. By letter of 22 March 2011, and in accordance with Rule 35(3) of the Rules of Court, the Registry of the Court informed the Chairperson of the African Union Commission and, through him, the Executive Council and all States Parties to the Protocol, of the submission of the said Application.
4. By letter dated 13 June 2011, the Pan African Lawyers' Union ('PALU') applied to the Court for leave to participate as *amicus curiae* in the Application, and at its 24th Ordinary Session, the Court granted PALU leave as prayed.
5. On 23 March 2011, the Court notified the parties that, in accordance with Article 27(2) of the Protocol and Rule 51(1) of its Rules, it had the power, on its own and without having to hear the parties, to order provisional measures in view of the urgency and gravity of the situation.

6. On 25 March 2011, the Court issued an order of provisional measures, receipt of which the Respondent acknowledged on 2 April 2011.
7. On 13 April 2011, the Court received the Respondent's reaction to the Order of provisional measures.
8. On 18 May, 2011, the Registry received a letter from the Embassy of Libya in Addis Ababa in Ethiopia, requesting for three weeks' extension of time for the Respondent to submit its response to the Application.
9. On 8 June, 2011, during its 21st Ordinary Session, and before the Court had considered the Respondent's request for extension of time, the Registry received both the Respondent's notification of the name and address of its representative and its response to the Application dated 7 June, 2011.
10. On 16 June 2011, the Court decided to extend the time for the Respondent to submit its response to the Application to 8 June, 2011, the date on which the Court received the Respondent's response communicating the names and addresses of its representatives, as well as its response to the Application.
11. By letter of 18 June, 2011, the Registry transmitted to the Applicant, the Respondent's response to the Application, and indicated that the Applicant should submit its reply within thirty (30) days of the date of receipt of the letter.
12. On 28 June, 2011, the Registry received a letter from the Applicant requesting for extension of time for its reply, up to 30 September, 2011.
13. On 2 September, 2011, the Court decided to extend the time for the Applicant to file its reply to 30 September, 2011.
14. By letter dated 28 September, 2011, the Applicant requested the Court for a second extension of time for its reply, for a further period of one year, to allow the situation in Libya to evolve sufficiently to permit the gathering of the required evidence.
15. During its 23rd Ordinary Session, the Court decided to serve the Applicant's request for extension of time on the Respondent.
16. By letter dated 22 December, 2011, the Registry served on the Respondent, the Applicant's request for extension of time.
17. During its 24th Ordinary Session held from 19 to 30 March, 2012, the Court noted that the Respondent had not reacted to the Applicant's request, and decided to extend the time for the Applicant to file its reply to 31 August, 2012.
18. By letter dated 2 May, 2012 and received at the Registry on 15 June 2012, the Representative of the Respondent requested the Court to drop the case as the Respondent government is no longer in existent.
19. By separate letters of 27 June 2012, the Applicant, as well as PALU, were served with copies of the Respondent's letter of 2 May.
20. By letter dated 28 August, 2012, received at the Registry on 30 August, 2012, the Applicant requested that the matter be "stood down until the circumstances on the ground in Libya permit the gathering of the necessary evidences and testimonies".

21. At its 25th Ordinary Session, the Court noted that the deadline given to the Applicant to submit its reply had not expired, and decided to wait for the expiration of the deadline before taking a decision.

22. At its 26th Ordinary Session held in September, 2012, the Court considered the request by the Applicant to adjourn the matter indefinitely, and decided that the request for adjournment should be served on the Respondent as well as on PALU, and they should be given thirty (30) days within which to respond.

23. By separate letters of 24 September, 2012, the Respondent, as well as PALU, were served with copies of the Applicant's request, and were given 30 days within which to respond. They were due to respond by 24 October, 2012.

24. The Court further decided that it would take a decision on the way forward regarding the Application during its 28th Ordinary Session in March, 2013, if the Applicant has still not provided any information.

25. At its 27th Ordinary Session, the Court noted that the Applicant had not made any additional submission, and neither had the Respondent nor PALU.

26. As at 15 March, 2013, the Applicant had not reacted to the Respondent's request and neither the Respondent nor PALU had Responded to the Registry's letter;

Now therefore:

The Court finds that the Applicant has failed to file its Reply within the extended time, that is, 31 August 2012, and instead has tried to preempt that order by requesting an indefinite extension of time by its letter of 28 August 2012;

The Court, consequently, finds that the Applicant has failed to pursue the Application which was filed on 3 March 2011;

The Court also finds that the Applicant has failed to respond to the Respondent's request to have the case dropped, which request has been served on the Applicant.

For these reasons,

THE COURT, acting by its inherent power, unanimously ORDERS that the Application herein be and the same is HEREBY struck out.

Soufiane Ababou v Algeria (jurisdiction) (2011) 1 AfCLR 24

Soufiane Ababou v The Peoples' Democratic Republic of Algeria

Decision, 16 June 2011. Done in French and English, the French text being authoritative.

Judges: NIYUNGEKO, AKUFFO, MUTSINZI, NGOEPE, GUINDO, MULENGA, RHAMADHANI, TAMBALA, THOMPSON and ORE

Recused under Article 22: OUGUERGOUZ

The Court rejected the Application due to the Respondent State not having filed the Declaration under Article 34(6) allowing individuals and NGOs to file cases directly before the Court.

Jurisdiction (Article 34(6) declaration, 11)

Procedure (transfer to Commission, 12)

1. By Application dated 20 February 2011, Mr Soufiane Ababou, living and residing in Cité des Jardins Lamtar - CP 22360 Wilaya of Cidi Bel Abbes, Algeria (hereinafter referred to as the Applicant), acting through his representative, Youssef Ababou, lodged a complaint to the Court, against the People's Democratic Republic of Algeria (hereinafter referred to as Algeria), regarding his forceful conscription into the Algerian army.

2. In conformity 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 8(2) of the Rules of Court (hereinafter referred to as the Rules), Mr Fatsah Ouguergouz, member of this Court, of Algerian nationality, recused himself.

3. By letter dated 18 March 2011, the Registry acknowledged receipt of the Application and requested the Applicant to submit a signed copy of the Application, to specify the alleged violation, to show proof of the exhaustion of local remedies or of their inordinate delay, and to specify the measures or the remedies requested from the Court.

4. By letter dated 25 March 2011, in accordance with Article 34(1) (2) and (4) of the Rules, the representative of the Applicant submitted a signed copy of the Application to the Registry, and provided information on the exhaustion of local remedies.

5. The Court notes that in order for it to receive an Application coming directly from an individual against a State Party, there must be

compliance with, amongst others, Articles 5(3) and 34(6) of the Protocol.

6. Article 5(3) of the Protocol provides that “The Court may entitle relevant non-governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol”.

7. On its part, Article 34(6) of the Protocol provides that “At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration”.

8. It emerges from a combined reading of the above-mentioned provisions that direct access to the Court by an individual is subject to the making of a special declaration by the Respondent State, authorizing such an access.

9. By letter dated 10 June, 2011, the Registrar of the Court wrote to the Legal Counsel of the African Union Commission, to find out whether the Respondent State had made the declaration required under Article 34(6) of the Protocol.

10. By a memorandum dated 13 June, 2011, the Legal Counsel of the African Union Commission informed the Court that the Respondent State had not made such a declaration.

11. On this basis, the Court concludes that Algeria has not accepted the Court’s jurisdiction to receive Applications directly from individuals and non-governmental organizations filed against her. Consequently, it is clear that the Court manifestly does not have jurisdiction to receive the Application.

12. Article 6(3) of the Protocol provides that the Court may consider cases or transfer them to the Commission. The Court notes that in view of the allegations contained in the Application, it would be appropriate to transfer the case to the African Commission on Human and Peoples’ Rights.

13. For these reasons:

THE COURT,

Unanimously:

1. Declares that pursuant to Article 34(6) of the Protocol, it does not have jurisdiction to receive the Application submitted by Mr Soufiane Ababou against the People’s Democratic Republic of Algeria.

2. Decides to transfer the case to the African Commission on Human and Peoples’ Rights in accordance with Article 6(3) of the Protocol.

Daniel Amare and Mulugeta Amare v Mozambique and Mozambique Airlines (jurisdiction) (2011) 1 AfCLR 26

Daniel Amare and Mulugeta Amare v Republic of Mozambique and Mozambique Airlines

Decision, 16 June 2011. Done in English and French, the English text being authoritative.

Judges: NIYUNGEKO, AKUFFO, MUTSINZI, NGOEPE, GUINDO, MULENGA, RAMADHANI, TAMBALA, THOMPSON and ORE

The Court rejected the Application due to the Respondent State not having filed the Declaration under Article 34(6) allowing individuals and NGOs to file cases directly before the Court.

Jurisdiction (Article 34(6) declaration, 8)

Procedure (transfer to Commission, 9)

1. The Applicants are two individuals whose Application dated 21 January 2011, was received by the Court Registry on 16 March 2011 and was registered on 30 March 2011. On the latter date, the Registrar wrote to the Applicants acknowledging receipt of the Application and observing that the Application did not indicate exhaustion of local remedies.

2. Pursuant to Rule 35(1) of the Rules of Court, the Registrar transmitted the Application to the Judges on 8 April 2011, and thereafter, having regard to Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights ("the Protocol"), the Court, on 10 and 16 June 2011, deliberated on its competence to hear the Application.

I. The Facts

3. In their Application, the Applicants allege as follows, namely that:

- In or about November 2008, having procured the requisite passports, visas and air tickets, they set out to travel to Maputo, Mozambique via Nairobi, Kenya.
- At Nairobi, they transited from the Ethiopian Airlines to a Mozambique Airline flight to Maputo.
- However, the flight did not take them to Maputo but landed in Pemba, Mozambique, where they were stranded for a period of twenty six (26) days.

4. The Applicants further allege that:

- During that period, they were subjected by the Mozambique Immigration Officials to diverse hardships, including demands for bribes, which they resisted, confiscating of their passports and visas, robbery of \$1000 from them, torture, and deportation to Dar-es Salaam, Tanzania. - Upon intervention of the Tanzanian Immigration Officials, the Applicants were returned to Pemba but thereafter the Mozambique Immigration Officials repatriated them back to Ethiopia.
5. The Applicants contend that the acts of the Mozambique Airline and Immigration Officials are illegal under international conventions and accordingly, they “request the African Union to take necessary measures to the Mozambique Airline and Immigration Officials to refund [them] the robbed money.”
6. As the Application is made by individuals, the Court *suo motto*, in a letter dated 10th June 2011, asked the Legal Counsel of the African Union Commission whether the Republic of Mozambique had deposited the declaration accepting the Court’s competence to hear cases brought under Article 5(3) of the Protocol. By a Memo dated 13th June 2011, the Legal Counsel of the African Union Commission informed the Court that the Republic of Mozambique had “not yet deposited the declaration under Article 34(6) of the Protocol.”

II. Applicable Law

7. Article 5(3) of the Protocol provides that the Court may entitle individuals to institute cases directly before it in accordance with Article 34(6) of the Protocol, which Article in turn provides, *inter alia*, that “The Court shall not receive cases under Article 5(3) involving a State Party which has not made a declaration accepting the competence of the Court to receive such cases”.

8. As this is an Application brought by individuals, and the Republic of Mozambique has not deposited the declaration under Article 34(6) of the Protocol, the Court concludes that manifestly, it does not have the jurisdiction to hear the Application.

9. Article 6(3) of the Protocol provides that the Court may consider cases or transfer them to the African Commission on Human and Peoples’ Rights. The Court observes that in the light of the allegations made in the Application, this would be an appropriate matter to transfer to the Commission

10. For these reasons, THE COURT, unanimously:

1) Finds that, in terms of Article 34(6) of the Protocol, it has no jurisdiction to hear the case instituted by Daniel Amare and Mulugeta Amare against the Republic of Mozambique and the Mozambique Airlines.

2) Decides, in terms of Article 6(3) of the Protocol, that the Application be and is hereby transferred to the African Commission on Human and Peoples’ Rights.

Association Juristes d’Afrique pour la Bonne Gouvernance v Côte d’Ivoire (jurisdiction) (2011) 1 AfCLR 28

Association Juristes d’Afrique pour la Bonne Gouvernance v Republic of Côte d’Ivoire

Decision, 16 June 2011. Done in French and English, the French text being authoritative.

Judges: NIYUNGEKO, AKUFFO, MUTSINZI, NGOEPE, GUINDO, MULENGA, RAMADHANI, TAMBALA and THOMPSON

Recused under Article 22: ORE

The Court rejected the Application due to the Applicant not having observer status before the African Commission.

Jurisdiction (observer status of the Applicant with the African Commission, 7, 8)

Procedure (transfer to Commission, 10)

Erratum (composition of the Court) 11: On 5 June 2012, the Court published an erratum removing the name of Judge Ouguegouz.

1. By an Application of 2 May, 2011, the *Association Juristes d’Afrique pour la bonne gouvernance*, with headquarters in Douala (Cameroon), through Barrister Kack Kack Serge Simon, Executive President and Lawyer with the Cameroon Bar Association, resident in Douala, submitted a complaint to the Court against the Republic of Côte d’Ivoire, for violation of Articles 2, 4, 5 and 6 of the African Charter on Human and Peoples’ Rights.

2. In accordance with Article 22 of the Protocol to the African Charter of Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (hereinafter referred to as the Protocol), and Rule 8(2) of the Rules of Court (hereinafter referred to as the Rules), Mr Sylvain ORE, a member of this Court of Ivorian nationality, recused himself.

3. In accordance with Rule 34(1) of the Rules, the Registry acknowledged receipt of the Application, through a letter of 5 May, 2011.

4. Article 5(3) of the Protocol provides that “The Court may entitle relevant non governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol”.

5. It is clear from this provision that any non-governmental organization that submits a complaint directly to the Court under Article 34(6) of the

Protocol must have observer status before the African Commission on Human and Peoples' Rights.

6. By letter of 15 June, 2011, the Registry inquired from the Commission if the *Association Juristes d'Afrique pour la bonne gouvernance* has observer status with it.

7. By email of 16 June, 2011, the Secretariat of the African Commission informed the Registry that the *Association Juristes d'Afrique pour la bonne gouvernance* does not have observer status with the Commission.

8. The Court notes therefore that the Association of African Lawyers for Good Governance is not entitled to seize it.

9. It can be concluded that having regard to Article 5(3) of the Protocol, the Court does not have jurisdiction to receive the Application submitted by the *Association Juristes d'Afrique pour la bonne gouvernance* against the Republic of Côte d'Ivoire.

10. Article 6(3) of the Protocol provides that "The Court may consider cases or transfer them to the Commission". The Court notes that in view of the allegations raised in the Application, it would be appropriate to transfer the case to the African Commission on Human and Peoples' Rights.

11. For these reasons,

THE COURT,

Unanimously

1. Decides that by virtue of Article 5(3) of the Protocol, it has no jurisdiction to receive the Application filed by the *Association Juristes d'Afrique pour la bonne gouvernance* against the Republic of Côte d'Ivoire.

2. Decides, pursuant to Article 6(3) of the Protocol, to transfer the Application to the African Commission on Human and Peoples' Rights.

Youssef Ababou v Morocco (jurisdiction) (2011) 1 AfCLR 30

Youssef Ababou v Kingdom of Morocco

Decision, 2 September 2011. Done in French and English, the French text being authoritative.

Judges: NIYUNGEKO, AKUFFO, MUTSINZI, NGOEPE, GUINDO, MULENGA, RAMADHANI, TAMBALA, THOMPSON and ORE

The Court rejected the Application since it was submitted against a state which was not a member of the African Union and one that had not ratified the African Charter or the Court Protocol.

Jurisdiction (non-AU member state, 12)

Erratum (composition of the Court): On 5 June 2012, the Court published an erratum removing the name of Judge Ouguergouz.

I. The Facts

1. In his Application, the Applicant alleges as follows:

- the Kingdom of Morocco has refused, and continues to refuse, to issue him his documents, which include, a national identity card and a passport; it has been many years since he started requesting his rights to these civil status documents from the Consulate General of the Kingdom of Morocco and the Ambassador of the Kingdom of Morocco in Algeria, "but the latter have systematically refused to respect [his] rights to these documents";
- he has all the necessary proof to show that he has taken all the required steps without success.

2. The Applicant prays the Court to "enroll this matter ... for justice to be rendered".

II. Procedure

3. The Application dated 13 May 2011, was received at the Registry of the Court on 18 May 2011, and was registered on the same date.

4. On 19 May 2011, the Registrar wrote to the Applicant acknowledging receipt of the Application and observing that the Application is not signed, does not specify the (i) alleged violation, (ii) evidence of exhaustion of local remedies or of the inordinate delay of such local remedies, and; (iii) orders sought from the Court.

5. Pursuant to Rule 35(1) of the Rules of Court, the Registrar transmitted the Application to the Judges on 19 May 2011.

6. On 15 June 2011, the Registrar wrote to the Applicant, reminding the latter to respond to the letter of 19 May 2011, within thirty (30) days.

7. Via electronic mail of 20 June 2011, the Applicant sent a signed copy of the Application to the Registry.

8. By letter of 16 June 2011, the Registrar requested the Office of the Legal Counsel of the African Union Commission, to indicate whether the Kingdom of Morocco is a member of the African Union, and if so, whether it has ratified the Protocol to the African Charter on Human and Peoples' Rights Establishing the African Court on Human and Peoples' Rights, ("the Protocol") as well as made the declaration under Article 34(6) thereof.

9. By letter of 19 July 2011, the Legal Counsel of the African Union Commission informed the Registrar that the Kingdom of Morocco is not a member of the African Union, and has neither signed nor ratified the Protocol establishing the Court.

10. Having regard to Article 3 of the Protocol, the Court deliberated on its competence to hear the Application.

III. Applicable Law

11. Article 3(1) of the Protocol provides that "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".

12. As this is an Application brought against a State which is not a member of the African Union, which has neither signed nor ratified the Protocol establishing the Court, the Court concludes that manifestly, it does not have the jurisdiction to hear the Application.

13. For these reasons,

THE COURT, unanimously:

1) Finds that, in terms of Article 3 of the Protocol, it has no jurisdiction to hear the case instituted by Mr Youssef Ababou against the Kingdom of Morocco

2) Strikes out this Application for want of jurisdiction.

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania (joinder) (2011) 1 AfCLR 32

In the matters of the Tanganyika Law Society and the Legal and Human Rights Centre v The United Republic of Tanzania and Reverend Christopher Mtikila v The United Republic of Tanzania

Order, 22 September 2011, Done in English and French, the English text being authoritative.

Judges: NIYUNGEKO, AKUFFO, MUTSINZI, NGOEPE, GUINDO, OUGUERGOUZ, MULENGA, TAMBALA, THOMPSON and ORÉ

The Court joined two cases submitted against Tanzania dealing with the same issue, namely, whether the prohibition of independent candidates to contest elections violated the African Charter.

Procedure (joinder, 5)

1. Having regard to the Application dated 2 June 2011 and received at the Registry of the Court on the same date, by which the Tanganyika Law Society and the Legal and Human Rights Centre (hereinafter referred to as the First Applicants) instituted proceedings against the United Republic of Tanzania (hereinafter referred to as the Respondent);
 2. Having regard to the Application dated 10 June 2011 and received at the Registry of the Court on the same date, by which Reverend Christopher Mtikila (hereinafter referred to as the Second Applicant) instituted proceedings against the Respondent;
 3. Having regard to Rule 54 of the Rules of Court, in accordance with which 'The Court may, at any stage of the pleadings, either on its own volition or in response to an Application by any of the parties, order the joinder of the interrelated cases and pleadings where it deems appropriate both in fact and in law';
 4. Noting that the subject matter and the defendant in the two cases are the same;
 5. Considering that a joinder is appropriate both in fact and in law;
- The Court orders:
1. The joinder of the Applications and pleadings by the First and Second Applications against the Respondent.
 2. That, henceforth the Application shall be known as: Applications 009 & 011 – *Tanganyika Law Society and The Legal and Human Rights*

Centre and Reverend Christopher Mtikila v The United Republic of Tanzania.

3. That consequent upon the joinder of the two matters, all pleadings related thereto shall be served on all parties.

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

In the consolidated matter of (1) *Tanganyika Law Society and the Legal and Human Rights Centre v The United Republic of Tanzania (009/2011)* and (2) *Reverend Christopher R. Mtikila v The United Republic of Tanzania (011/2011)*

Judgment, 14 June 2013, Done in English and French, the English text being authoritative.

Judges: AKUFFO, OUGUERGOUZ, MUTSINZI, NGOEPE, NIYUNGEKO, TAMBALA, THOMPSON, ORE and GUINDO

Recused under Article 22: RAMADHANI

The Court joined two cases submitted against Tanzania dealing with the same issue, namely, whether the prohibition of independent candidates to contest elections violated the African Charter. The Court held that the prohibition of independent candidates to contest elections violated the right to political participation as set out in Article 13 of the Charter.

Jurisdiction (ratification of Court Protocol, 84)

Admissibility (exhaustion of local remedies, parties, 82.3; submission within reasonable time, 83)

Political participation (direct participation, 109, 110)

Limitations of rights (Article 27(2); proportionality, 107.2)

Association (freedom not to join an association, 113-115)

Reparations (when to raise reparations claim, 124)

Separate opinion: OUGUERGOUZ

Jurisdiction (material jurisdiction; human rights instrument, 14-16; temporal jurisdiction, deposit of Article 34(6) declaration, 21-23)

Admissibility (NGO interest, seizing Court on behalf of individual, 26-27)

Limitations of rights (must comply with Article 27(2), 30; freedom of association and political participation not without limitations, 32; state must provide proof that limitations necessary for a legitimate purpose, 33, 34)

Separate opinion: NGOEPE

Sequence of judgment (no need for rigidity, 2)

Separate opinion: NIYUNGEKO

Sequence of judgment (Court should first deal with jurisdiction and then admissibility, 4)

Jurisdiction (temporal jurisdiction, entry into force of Protocol, 17)

I. The parties

1. The Tanganyika Law Society and The Legal and Human Rights Centre (“the 1st Applicants”) describe themselves as Non-Governmental Organizations (“NGOs”) with Observer Status before the African Commission on Human and Peoples’ Rights (“the Commission”). They are both based in the United Republic of Tanzania. They state their objectives as representing the interests of its members, the administration of justice, and upholding and advising the Government and the public on all legal matters, including human rights, rule of law and good governance; and the promotion and protection of human and peoples’ rights, respectively.

2. Reverend Christopher R Mtikila (“2nd Applicant”), is a national of the United Republic of Tanzania. He brings his Application in his personal capacity, as a national of the Republic.

3. The Respondent is the United Republic of Tanzania and is cited herein because the Applicants contend that it has ratified the African Charter on Human and Peoples’ Rights (“the Charter”), and also the Protocol. Furthermore, the Respondent has made a declaration in terms of Article 34(6) of the Protocol, accepting to be cited before this Court by an individual or an NGO with Observer Status before the Commission.

II. Nature of the Applications

4. On 2 June 2011 and 10 June 2011, respectively, the 1st Applicants and the 2nd Applicant filed in the Registry of the Court Applications instituting proceedings against the Respondent, claiming that the Respondent had, through certain amendments to its Constitution, violated its citizens’ right of freedom of association, the right to participate in public/governmental affairs and the right against discrimination by prohibiting independent candidates to contest Presidential, Parliamentary and Local Government elections. The Applicants also allege that the Respondent violated the rule of law by initiating a constitutional review process to settle an issue pending before the courts of Tanzania.

III. Procedure

5. The Application by the 1st Applicants (“the 1st Application”) was received at the Registry of the Court on 2 June 2011. By a letter of the same date, the Registrar acknowledged receipt of the Application and

informed the Applicants that their Application had been registered as Application No 009/2011.

6. At its 21st Ordinary Session, held from 6 to 17 June 2011, the Court directed the Registrar to enquire from the Commission whether the 1st Applicants had Observer Status before the Commission and decided that only if it was confirmed that the 1st Applicants had Observer Status, would the Application be served on the Respondent.

7. By a letter dated 17 June 2011 to the Executive Secretary of the Commission, the Registrar, as instructed by the Court, enquired whether the 1st Applicants had Observer Status before the Commission.

8. By a letter dated 15 July 2011 and received at the Registry on the same date, the Executive Secretary of the Commission responded that the 1st Applicants had Observer Status before the Commission.

9. In accordance with Rule 35(2)(a) of the Rules, and by a *Note Verbale* dated 18 July 2011 to the Respondent, the Registrar served a copy of the Application by the 1st Applicants on the Respondent by registered post. The Respondent was informed of the registration of the 1st Application and, in accordance with Rule 35(4)(a) of the Rules, was asked to communicate to the Court the names and addresses of its representatives within thirty (30) days and, in accordance with Rule 37 of the Rules, to respond to the Application within sixty (60) days. This *Note Verbale* was copied to the 1st Applicants' representative, the Tanganyika Law Society.

10. In accordance with Rule 35(3) of the Rules and by a letter dated 18 July 2011, the 1st Application was notified to the Executive Council of the African Union and State Parties to the Protocol through the Chairperson of the African Union Commission.

11. By a *Note Verbale* dated 19 August 2011 and received at the Registry of the Court on the same date, the Respondent communicated the names of its representatives. This list of representatives was copied to the Applicants.

12. The Respondent sent its Reply to the 1st Application by a *Note Verbale* dated 16 September 2011, which was received at the Registry of the Court on the same date.

13. By a *Note Verbale* dated 16 September 2011, the Registrar acknowledged receipt of the Respondent's Response to the 1st Application.

14. The Application by the 2nd Applicant ("the 2nd Application") was received at the Registry on 10 June 2011; in his Application, the 2nd Applicant informed the Registrar of the names of his Counsel.

15. By a letter dated 20 June 2011 to the 2nd Applicant's Counsel, the Registrar acknowledged receipt of the Application, informed Counsel that the Application had been registered number as Application No. 011/2011 and that service on the Respondent would be effected.

16. At its 21st Ordinary Session held from 6 to 17 June 2011, the Court directed the Registrar to serve the 2nd Application on the Respondent.

17. In accordance with Rule 35(2)(a) of the Rules, and by a *Note Verbale* dated 17 June 2011 to Respondent, the Registrar served a copy of the 2nd Application on the Respondent by registered post. The Respondent was informed of the registration of the Application, and also that, in accordance with Rule 35(4)(a) of the Rules, Respondent had to communicate the names and addresses of its representatives within thirty (30) days and further that, in accordance with Rule 37 of the Rules, Respondent had to respond to the Application within sixty (60) days.

18. In accordance with Rule 35(3) of the Rules and by a letter dated 18 July 2011, the 2nd Application was notified to the Executive Council of the African Union and States Parties to the Protocol, through the Chairperson of the African Union Commission.

19. By a *Note Verbale* dated 27 July 2011 and received at the Registry of the Court on the same date, the Respondent communicated the names and addresses of its representatives.

20. By a *Note Verbale* dated 23 August 2011 and received at the Registry of the Court on 24 August 2011, the Respondent filed its Response to the 2nd Application.

21. By a *Note Verbale* dated 25 August 2011, the Registrar acknowledged receipt of the Respondent's Response to the 2nd Application.

22. By a letter dated 25 August 2011, the Registrar served the 2nd Applicant's Counsel with the Respondent's Response to the 2nd Application and informed Counsel that he if he wished to file a Reply to the Respondent's Response he was to do so within thirty (30) days of receipt of the Respondent's Response.

23. At its 22nd Ordinary Session held from 12 to 23 September 2011 and by an Order dated 22 September 2011, the Court decided that the proceedings in the two cases be consolidated.

24. On 3 October 2011, the Registrar received the 2nd Applicant's Reply to the Respondent's Response to Application 011/2011; the Reply was dated 30 September 2011.

25. By a letter dated 3 October 2011, the Registrar acknowledged receipt of the 2nd Applicant's Reply to the Respondent's Response to the 2nd Application.

26. By separate letters dated 17 October 2011, the Registrar informed the Parties of the Court's decision to consolidate the Applications, and sent them the Order for Consolidation. In the letter to the Respondent, the Registrar also forwarded the 2nd Applicant's Reply to the Respondent's Response to the 2nd Application.

27. On 28 October 2011, the 1st Applicants filed with the Registry of the Court their Reply to the Respondent's Response to the 1st Application.

28. By a letter dated 1 November 2011, the Registrar acknowledged receipt of the 1st Applicants' Reply to the Respondent's Response to the 1st Application.

29. By a letter dated 5 November 2011, the Registrar served the Respondent with a copy of the 1st Applicants' Reply to the Respondent's Response to the 1st Application.

30. At its 23rd Ordinary Session held from 5 to 16 December 2011, the Court decided that the pleadings in the consolidated Applications were closed and that a public hearing on the Applications would be held during its 24th Ordinary Session from 19 to 30 March 2012. The actual dates proposed for the public hearing were 26 to 27 March 2012.

31. By a letter dated 21 December 2011, the Registrar informed the Parties of the proposed dates for the public hearing and requested them to confirm their availability, and also whether the proposed dates would suit them; they were asked to do so no later than 20 January 2012.

32. By a *Note Verbale* dated 19 January 2012 and received at the Registry of the Court on 7 February 2012, the Respondent informed the Registrar that the dates proposed for the hearings were not convenient and requested that the hearings be rescheduled to 11 and 12 April 2012.

33. By a letter dated 3 February 2012, the Registrar acknowledged receipt of the Respondent's letter of 19 January 2012.

34. By a letter dated 20 January 2012 and received at the Registry of the Court on 7 February 2012, the 1st Applicants informed the Registry of their availability for the public hearing on the dates proposed by the Court.

35. By a letter dated 8 February 2012, the Registrar acknowledged receipt of the 1st Applicant's letter of 20 January 2012.

36. By separate letters both dated 13 March 2012, the Registrar informed the Parties that the public hearing would take place during the 25th Ordinary Session of the Court scheduled for June 2012 and that, in due course, they would be informed of the actual dates.

37. On 2 April 2012, the Registry received an electronic mail from the 2nd Applicant's Counsel, forwarding submissions dated 31 March 2012, regarding the postponement of the public hearing.

38. By a letter dated 3 April 2012, the Registrar acknowledged receipt of the 2nd Applicant's Counsel's submissions on the postponement of the public hearing.

39. By separate letters all dated 12 April 2012, the Registrar informed the Parties of the Court's decision taken at its 24th Ordinary Session held from 19 to 30 March 2012, that the public hearing on the case would be held on 14 and 15 June 2012 and that the matters would be heard on both the preliminary objections and the merits.

40. On 13 April 2012, the Registry of the Court received an electronic mail from the 2nd Applicant's Counsel acknowledging receipt of the Registrar's letter dated 12 April 2012 informing the Parties of the new dates for the public hearing.

41. By a letter dated 4 May 2012, the Registry informed the Executive Council of the African Union and State Parties to the Protocol, through

the Chairperson of the African Union Commission, of the dates for the public hearing of the Applications.

42. By a letter dated 16 May 2012, the Respondent requested the Court for leave to submit additional documents to be appended to its pleadings.

43. By a letter dated 16 May 2012 to the Respondent, the Registrar acknowledged receipt of the letter from the Respondent requesting leave to submit additional documents to be appended to its pleadings, and that the Respondent would be informed accordingly regarding its request.

44. By separate letters dated 22 May 2012, the Registrar requested the Parties to confirm and/or indicate the names of their representatives and names of witnesses and/or experts, if any that they intended to call during the public hearing.

45. On 25 May 2012, the Registry received an electronic mail from Counsel for the 2nd Applicant that they would all attend the public hearing. He also advised the Registrar that he would be making a request for legal aid. The request was subsequently made by a letter dated 1 June 2012 applying for legal aid to facilitate the trip of the 2nd Applicant and two of his Counsel to attend the public hearing. The Registrar informed Counsel that the Court could not grant the requested legal aid as the Court had no legal aid policy in place.

46. By a letter dated 23 May 2012 and received at the Registry on 28 May 2012, Respondent communicated the names of its representatives who would be present at the public hearing.

47. On 28 May 2012, the Respondent submitted the additional documents which it had requested be appended to its pleadings.

48. By separate letters dated 29 May 2012, to the Respondent, the Registry acknowledged receipt of the Respondent's letter submitting the names of its representatives at the public hearing and the Respondent's letter submitting the additional documents which it had requested be appended to its pleadings.

49. By a letter dated 30 May 2012, the Registrar acknowledged receipt of the electronic mail from Counsel for the 2nd Applicant, dated 25 May 2012 confirming that the 2nd Applicant's Counsel's would attend the public hearing.

50. By an electronic mail of 3 June 2012, the 2nd Applicant's Counsel confirmed receipt of the Registrar's letter to him dated 30 May 2012.

51. By separate letters dated 31 May 2012, the Registrar served on the Applicants, copies of the additional documents which the Respondent had requested be appended to its pleadings; the Registrar also requested the Applicants to submit their comments, if any, by 7 June 2012, or, in the alternative, to include any comments in their oral submissions during the public hearing.

52. By separate letters dated 31 May 2012, the Registrar requested the Parties to submit written copies of their oral submissions by 7 June 2012.

53. On 4 June 2012, the 2nd Applicant's Counsel sent to Registry an electronic mail acknowledging receipt of the Registrar's letter dated 31 May 2012 which was informing the Applicants of their right to submit comments on the additional documents which the Respondent had requested be appended to its pleadings.

54. By a *Note Verbale* dated 4 June 2012, the Registrar informed the Respondent that the 25th Ordinary Session of the Court would be from 11 to 26 June 2012 and reminded it that the public hearing of the Applications would be held on 14 and 15 June 2012.

55. By separate letters dated 6 June 2012, the Registrar forwarded to the 1st Applicants and the Respondent, the submissions of the 2nd Applicant's Counsel, dated 31 March 2012, on the postponement of the public hearing of the Application.

56. By an electronic mail of 7 June 2012, the 1st Applicants filed with the Registry, the written copy of their oral submissions, also dated 7 June 2012. In the electronic mail, they informed the Registrar of their representatives at the hearing.

57. By a letter dated 8 June 2012, the Registrar acknowledged receipt of the electronic mail of the 1st Applicants dated 7 June 2012.

58. By a *Note Verbale* dated 7 June 2012, the Respondent submitted the written copy of its oral submissions for the Consolidated Applications.

59. By a letter dated 11 June 2012 to the Respondent, the Registrar acknowledged receipt of the written copy of the Respondent's oral submissions.

60. By separate letters dated 12 June 2012, the Parties were informed of the practical arrangements relating to the hearing of the Application.

61. By an electronic mail of 14 June 2012, the 2nd Applicant's Counsel informed the Registrar of the issues the 2nd Applicant would be raising during the public hearings.

62. Public hearings were held at the seat of the Court in Arusha, Tanzania on 14 and 15 June 2012, during which oral arguments were heard on both the preliminary objections and the merits. The appearances were as follows:

For the 1st Applicants:

- Mr Clement Julius Mashamba, Advocate;
- Mr James Jesse, Advocate; and
- Mr Donald Deya, Advocate

For the 2nd Applicant:

- Mr Setondji Roland Adjovi, Counsel

For the Respondent:

- Mr Mathew M. Mwaimu, Director of Constitutional Affairs and Human Rights, Attorney General's Chambers;
- Ms Sarah Mwaipopo, Principal State Attorney, Attorney General's Chambers;

- Mrs Alesia Mbuya, Principal State Attorney, Attorney General's Chambers;
- Ms Nkasori Sarakikya, Principal State Attorney, Attorney General's Chambers;
- Mr Edson Mweyunge, Senior State Attorney, Attorney General's Chambers; and
- Mr Benedict T. Msuya, Second Secretary/Legal Officer, Ministry of Foreign Affairs and International Cooperation.

63. At the hearing, questions were also put by Members of the Court to the Parties; the replies were given orally.

64. By separate letters dated 31 July 2012, the Registrar forwarded to the Parties copies of the verbatim record of the public hearings and informed them that their comments on the same, if any, had to be sent within thirty (30) days.

65. By a *Note Verbale* dated 31 August 2012 and received at the Registry by electronic mail of the same date and in hard copy on 3 September 2012, the Respondent transmitted to the Registrar its comments on the verbatim record of the public hearings; however, no comments were received from the Applicants.

A. Historical and factual background to the Applications

66. The Court briefly sets out below the historical and factual background to the two Applications.

67. In 1992, the National Assembly of the United Republic of Tanzania (“the Tanzanian National Assembly”) passed the Eighth Constitutional Amendment Act, which entered into force in the same year. It required that any candidate for Presidential, Parliamentary and Local Government elections had to be a member of, and be sponsored by, a political party.

68. In 1993, Reverend Christopher R. Mtikila, the 2nd Applicant, filed a Constitutional Case in the High Court of the United Republic of Tanzania (“the High Court”) in *Rev Christopher Mtikila v The Attorney General*, Civil Case No.5 of 1993 (“Civil Case No 5 of 1993”), challenging the amendment to Articles 39, 67 and 77 of the Constitution of the United Republic of Tanzania and to Section 39 of the Local Authorities (Elections) Act 1979 (as later amended by the Local Authorities (Elections) Act No 7 of 2002) through the Eighth Constitutional Amendment Act referred to above. The 2nd Applicant contended in the High Court, that the amendment conflicted with the Constitution of the United Republic of Tanzania and was therefore null and void.

69. On 24 October 1994, the High Court delivered its judgment in Civil Case No5 of 1993 in favour of the 2nd Applicant, declaring as unconstitutional the amendment which sought to bar independent candidates from contesting Presidential, Parliamentary and Local Government elections.

70. In the meantime, the Government had on 16 October 1994, tabled a Bill in Parliament (Eleventh Constitutional Amendment Act No 34 of

1994) seeking to nullify the right of independent candidates to contest Presidential, Parliamentary and Local Government Elections.

71. On 2 December 1994, the Tanzanian National Assembly passed the Bill (Eleventh Constitutional Amendment Act No 34 of 1994) whose effect was to restore the Constitutional position before Civil Case No 5 of 1993 by amending Article 21(1) of the Constitution of the United Republic of Tanzania. This Bill became law on 17 January 1995 when it received Presidential assent. This law negated the High Court's judgment in Civil Case No 5 of 1993.

72. In 2005, 2nd Applicant instituted another case in the High Court *Christopher Mtikila v The Attorney General*, Miscellaneous Civil Cause No 10 of 2005, again challenging the amendments to Articles 39, 67 and 77 of the Constitution of the United Republic of Tanzania as contained in the Eleventh Constitutional Amendment Act of 1994. On 5 May 2006, the High Court once more found in his favour, holding that the impugned amendments violated the democratic principles and the doctrine of basic structures enshrined in the Constitution. By this judgment, the High Court again allowed independent candidates.

73. In 2009, the Attorney General appealed to the Court of Appeal of the United Republic of Tanzania ("the Court of Appeal"), in *The Honourable Attorney General v Reverend Christopher Mtikila* Civil Appeal No 45 of 2009 ("Civil Appeal No 45 of 2009"), against the above judgment of the High Court. In its Judgment of 17 June 2010, the Court of Appeal reversed the High Court's judgment, thereby disallowing independent candidates for election to Local Government, Parliament or the Presidency.

74. The Court of Appeal ruled that the matter was a political one and therefore had to be resolved by Parliament. Afterwards, Parliament set in motion a consultative process aimed at obtaining the views of the citizens of Tanzania on the possible amendment of the Constitution. At the hearing, it was confirmed to the Court that the process was still ongoing.

75. As the municipal legal order currently stands in the United Republic of Tanzania, candidates who are not members of or sponsored by a political party cannot run in Presidential, Parliamentary or Local Government elections.

B. Remedies sought by the Applicants

76. The 1st Applicants pray the Court to:

- (a) Declare that the Respondent is in violation of Articles 2 and 13(1) of the African Charter on Human and Peoples' Rights and Articles 3 and 25 of the ICCPR (International Covenant on Civil and Political Rights);
- (b) Make an order that the Respondents put in place the necessary constitutional, legislative and other measures to guarantee the rights provided under Articles 2 and 13(1) of the African Charter and Articles 3 and 25 of the ICCPR;
- (c) Make an Order that the Respondent report to the Honourable Court, within a period of twelve (12) months from the date of the judgment issued by the Honourable Court, on the implementation of this judgment and consequential orders;

(d) Any other remedy and/or relief that the Honourable Court will deem fit to grant; and

(e) The Respondent to pay the Applicants' costs."

77. The 2nd Applicant prays the following remedies:

"(a) That the Court make a finding that the United Republic of Tanzania has violated and continues to violate his rights,

(b) That the United Republic of Tanzania ought to provide appropriate compensation to him for the continuous violation of his rights that forced him to endure long and costly judicial proceedings.

(c) That he reserves the right to substantiate the legal analysis for claiming compensation and reparations."

C. Nature of the Applicants' case

78. The 1st and 2nd Applicants have substantially the same case. They challenge the validity of the amendments, referred to earlier, to the Constitution of the United Republic of Tanzania, the effect of which is, briefly stated, to bar independent candidates to stand for the Presidential, Parliamentary and Local Government elections; the amendments require that candidates have to belong to or be sponsored by a registered political party. The Applicants contend that the prohibition of independent candidature violates an aspirant's rights to participate in public affairs in their country, which rights are protected under various international human rights instruments.

D. Respondent's preliminary objections

79. The Respondent raises certain preliminary objections on both admissibility and jurisdiction.

80. The preliminary objections on admissibility:

80.1 Lack of exhaustion of local remedies

Article 6(2) of the Protocol, read together with Article 56(5) of the Charter, requires that for an Application to this Court to be admissible, an Applicant must have exhausted local remedies. Article 6(2) of the Protocol reads: "The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter." In its turn, Article 56(5) of the Charter requires that Applications shall be considered if they "are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged". The Respondent contends that the Applicants have not done so. This is because, according to the Respondent, the judgment of the Court of Appeal stated that the issue relating to the prohibition of independent candidates had to be settled by Parliament. Respondent also argues that the Government has prepared and tabled the Constitutional Review Bill dated 11 March 2011, with a view to setting up a mechanism for the constitutional review process. At the time of the Applications the bill was awaiting its second and third reading, before being enacted into law. Respondent argued that the Appellate judgment of 17 June 2010, did not substantively deal with the issue of independent candidates; the matter was left to Parliament and this avenue has not yet been exploited. Respondent adds that Parliament

is yet to convene and deliberate on the matter. It further argues that there has been a significant development with the process of reviewing the Constitution of the United Republic of Tanzania. To this end, a commission has been set up, and mandated, to be in charge of the reviewing process. The Respondent argues that, since the commission is to collect the views of the public, the 2nd Applicant will have an opportunity to give his views on the issue of independent candidacy. There shall also be a Constituent Assembly which will deliberate on the provisions of the new Constitution. The Respondent therefore argues that the matter has been left to the people of Tanzania.

80.2 Unreasonable delay in filing the Applications

The second preliminary objection raised by Respondent on admissibility is based on Article 56(6) of the Charter, which requires that Applications be “... *submitted within a reasonable period from the time local remedies are exhausted or from the date the [Court] is seized with the matter*”. The Respondent contends that the Applicants took unreasonably too long to bring their Applications. It argues that whereas the Court of Appeal handed down its judgment on 17 June 2010, it was not until 2 June 2011 and 10 June 2011 that the 1st Applicants and 2nd Applicant, respectively, filed their Applications.

80.3 Lack of jurisdiction

The other preliminary objection raised by the Respondent relates to the issue of jurisdiction. Respondent argues that at the time of the alleged violation of the rights in question, the Protocol had not yet come into operation. The Court therefore has no jurisdiction to hear the matter.

E. The Applicants’ response to the preliminary objections

81. The Applicants responded to the above preliminary objections raised by the Respondent.

81.1 Alleged lack of exhaustion of local remedies

The Applicants contend that the constitution review process and Parliament do not constitute a viable local remedy required to be exhausted in terms of Article 6(2) of the Protocol, read together with Article 56(5) of the Charter. According to the Applicants, what constitutes a viable remedy which must first be exhausted is a judicial remedy.

81.2 Alleged unreasonable delay in filing the Applications

Regarding the objection that the Applicants took unreasonably long to bring their Applications:

The Applicants contend that there has not been any undue delay. Firstly, within four months of the judgment, there were general elections, and functionaries were preoccupied with those elections. Secondly, the Applicants say that they had to wait for Parliament to deal with the matter in the wake of the judgment of the Court of Appeal. They contend that the lapsed time must be reckoned from the time Parliament failed to act.

81.3 Alleged lack of jurisdiction

The objection based on lack of jurisdiction on the ground that the Protocol was not yet operational at the time of the alleged violation of the 2nd Applicant's rights: The 2nd Applicant argues that a distinction has to be made between normative and institutional provisions. The rights sought to be protected were enshrined in the Charter to which Respondent was already a party at the time of the alleged violation; although the Protocol came into operation later, it was merely a mechanism to protect those rights. The Charter sets out rights while the Protocol provides an institutional framework for enforcement of those rights. The Applicant stated that it is not the ratification of the Protocol that establishes the rights, rather these rights existed in the Charter and the Respondent has violated them and continues to do so. The issue of retroactivity therefore does not arise.

IV. The Court's ruling on admissibility

82. Lack of exhaustion of local remedies

82.1 The Court is of the view that, in principle, the remedies envisaged in Article 6(2) of the Protocol read together with Article 56(5) of the Charter are primarily judicial remedies as they are the ones that meet the criteria of availability, effectiveness and sufficiency that has been elaborated in jurisprudence. Thus, in Communication Nos 147/95, 147/96 *Sir Dawda K. Jawara v The Gambia*, Thirteenth Annual Activity Report (1999-2000) at paragraph 31, the African Commission stated that: "Three major criteria could be deduced in determining [the exhaustion] rule, namely: the remedy must be available, effective and sufficient." In Communication No 221/98 *Alfred B Cudjoe v Ghana*, Twelfth Annual Activity Report (1998-1999) at paragraph 13, the Commission had earlier stated that: "[T]he internal remedy to which Article 56(5) [of the Charter] refers entails a remedy sought from courts of a judicial nature." In the case of *Velásquez-Rodríguez v Honduras*, Judgment of 29 July 1988, Series C No 4 paragraph 64, the Inter-American Court of Human Rights stated that: "Adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted." In a similar vein, the European Court of Human Rights in *Akdivar and Others v Turkey* Application No 21893/93, Judgment of 16 September 1996, paragraph 66 stated that: "To meet the exhaustion requirement normal recourse should be had by an Applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness."

82.2 The 2nd Applicant contends that he has exhausted local judicial remedies since the judgment of the Court of Appeal, which is the final court, set aside the judgments of the High Court that had declared the prohibition of independent candidates unconstitutional. The 1st Applicants argued that it was not necessary for them to institute an action challenging this prohibition as the outcome would have been the same. The Respondent did not join issue on the 1st Applicants'

argument. However, the Respondent argues that the parliamentary process with which the constitutional review process is connected, is also a remedy which the Applicants should have exhausted.

82.3 The term local remedies is understood in human rights jurisprudence to refer primarily to judicial remedies as these are the most effective means of redressing human rights violations. That the 2nd Applicant has exhausted local judicial remedies is not in dispute. The Respondent, having not joined issue on the 1st Applicants' argument that they need not have instituted an action challenging the prohibition of independent candidates, is deemed to have admitted the position of the 1st Applicants. In the circumstances, the Court accepts that there was no need for the 1st Applicants to go through the same local judicial process the outcome of which was known. The parliamentary process, which the Respondent states should also be exhausted is a political process and is not an available, effective and sufficient remedy because it is not freely accessible to each and every individual; it is discretionary and may be abandoned anytime; moreover, the outcome thereof depends on the will of the majority. No matter how democratic the parliamentary process will be, it cannot be equated to an independent judicial process for the vindication of the rights under the Charter. In conclusion, we find that the Applicants have exhausted local remedies as is envisaged by Article 6(2) of the Protocol read together with Article 56(5) of the Charter.

83. Alleged delay in filing the Applications

The Court agrees with the Applicants that there has not been an inordinate delay in filing the Applications; because after the judgment of the Court of Appeal, the Applicants were entitled to wait for the reaction of Parliament to the judgment. In the circumstances, the period of about three hundred and sixty (360) days, which is about one year from the date of the judgment of the Court of Appeal until the Applications were filed was not unreasonably long.

V. The Court's ruling on the preliminary objection on jurisdiction

A. Temporal jurisdiction of the Court

84. The only point on which the Court's jurisdiction is challenged is based on the fact that the conduct complained of, namely, the barring of independent candidates, occurred before the Protocol came into operation. This argument cannot be upheld. The rights alleged to be violated are protected by the Charter. By the time of the alleged violation, the Respondent had already ratified the Charter and was therefore bound by it, The Charter was operational, and there was therefore already a duty on the Respondent as at the time of the alleged violation to protect those rights. At the time the Protocol was ratified by the Respondent and when it came into operation in respect of the Respondent, the alleged violation was continuing and is still continuing: independent candidates are still not allowed to stand for the position of President or to contest Parliamentary and Local Government elections. Furthermore, the alleged violations continued beyond the time the

Respondent made the declaration in terms of Article 34(6) of the Protocol.

B. Material and personal jurisdiction of the Court

85. Article 3(1) of the Protocol confers jurisdiction on this Court to hear matters concerning the alleged violation of human rights; the Article reads: “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.”

It appears that the alleged violations fall within the scope of this provision.

86. Article 5(3) of the Protocol read together with Article 34(6) of the Protocol sets out the jurisdiction of the Court to consider Applications from individuals and NGOs. Article 5(3) reads: “The Court may entitle relevant Non Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol”.

Article 34(6) provides: “At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration.”

From the record, the Respondent has ratified the Protocol and made the declaration under Article 34(6) thereof, thus the Court can consider Applications from individuals and NGOs brought against it; the 1st Applicants have Observer Status before the Commission therefore the Court has jurisdiction *ratione personae*.

87. Apart from the point of the temporal jurisdiction of the Court dealt with above which was raised by the Respondent, no other point challenging the jurisdiction of the Court was raised; there is no issue which deprives the Court of its jurisdiction. It therefore has jurisdiction to hear the matter.

88. As the Applications are admissible, and the Court has jurisdiction, the Court proceeds to consider the merits of the case which, as said earlier, were argued together with the Respondent’s preliminary objections.

VI. Merits of the case

89. The Applicants’ case on the merits

89.1 The case and arguments of the 1st Applicants and the 2nd Applicant on the merits are substantially the same; therefore, they will be dealt with together, except where it is necessary to make a distinction.

89.2 The gist of the Applicants’ case, set out earlier in more details, is that the Eleventh Constitutional Amendment passed by the Tanzanian National Assembly on 2 December 1994 and assented to by the President of the United Republic of Tanzania on 17 January 1995,

violates rights under Articles 2, 10 and 13(1) of the Charter, which articles are referred to later in detail, inasmuch as it bars independent candidates from contesting Presidential, Parliamentary as well as Local Government elections.

89.3 It is contended, firstly, that the prohibition constitutes discrimination against independent candidates. Secondly, that it violates the right to freedom of association and also the right to participate in public or government affairs in one's country. It is argued that the requirements for forming a political party are onerous; for example, a political party must have certain quota numbers by regions; it must also have members not only from the Mainland, but also from Zanzibar. One could not enjoy the exercise of one's political rights unless one belonged to a political party; the Applicants, therefore argue that there is no freedom of association.

90. Respondent's case on the merits

90.1 The Respondent argues that the prohibition of independent candidates is a way of avoiding absolute and uncontrolled liberty, which would lead to anarchy and disorder; the prohibition is necessary for good governance and unity. Therefore, the qualifications for election to the positions of President of the United Republic of Tanzania, Member of Parliament and in Local Government has been regulated by articles 39(1) and 67(1)(b) of the Constitution of the United Republic of Tanzania 1977, and section 39(f) of the Local Authorities (Elections) Act, Cap 292, respectively. The prohibition on independent candidates for positions of government leadership is necessary for national security, defence, public order, public peace and morality. Respondent further argues that the requirements for the registration of a political party, such as the need to include regional representation, are necessary to avoid tribalism.

90.2 Regarding the alleged discrimination, the Respondent argues that the relevant constitutional amendments were not targeted at any particular individuals, but apply to all Tanzanians equally; therefore, the amendments are not discriminatory.

90.3 With regard to the alleged violation of the right to freedom of association, the Respondent argues that standing for a political position is a matter of personal ambition; one is not forced to do so if one does not want to. Referring to 2nd Applicant in particular, Respondent argues that he has never been prevented from participating in politics; he belongs to a political party and has stood for the position of President but lost.

90.4 The Respondent therefore prays the Court to dismiss the Applications.

VII. The decision of the Court on the merits

A. The right to participate freely in the government of one's country

91. The Applicants, as stated earlier, contend that the Respondent is in violation of Article 13(1) of the Charter. They argue that the violation is

still continuing as it pertains to constitutional and statutory provisions which are still in force.

92. They are also relying on Articles 3 and 25 of the International Covenant on Civil and Political Rights (ICCPR) and Article 21(1) of the Universal Declaration of Human Rights (UDHR).

93. In summary, they contend that the judgment of the Tanzanian Court of Appeal, Articles 39, 47, 67 and 77 of the Constitution of the United Republic of Tanzania 1977, and the Local Authorities (Election) Act No 7 of 2002, which collectively require that candidates for Presidential, Parliamentary and Local Government elections must be members of and be sponsored by a Political Party, constitute a violation of Articles 2, 10 and 13 of the Charter and Articles 3 and 25 of the ICCPR.

94. The Respondent, on its part, states that the decision on whether or not to introduce independent candidature in Tanzania is dependent on the social needs of the country, based on its historical reality. The Respondent argues that the issue of independent candidature is political and not legal. This argument is in line with the decision of the Tanzanian Court of Appeal.

95. The Respondent contends further that the restriction on independent candidature is a means for avoiding absolute and uncontrolled liberty, “whole and free from restraint which would lead to anarchy”.

96. The Respondent also points out that the 2nd Applicant has formed his own political party and, effectively, has not been prevented from participating in politics.

97. In considering this alleged violation of Article 13(1) of the Charter by the Respondent, it is necessary for the Court to consider critically the Article relied on. Article 13(1) of the Charter, which is the main provision on political participation, states that: “1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.”

98. It is imperative to state here that the rights guaranteed under the Charter as stated in Article 13(1) are individual rights. They are not meant to be enjoyed only in association with some other individuals or group of individuals such as political parties. Therefore, in an Application such as the instant one, what is of paramount significance is whether or not an individual right has been placed into jeopardy, or otherwise violated, not whether or not groups may enjoy the particular right.

99. In view of the patently clear terms of Article 13(1) of the Charter, which gives to the citizen the option of participating in the governance of her country directly or through representatives, a requirement that a candidate must belong to a political party before she is enabled to participate in the governance of Tanzania surely derogates from the rights enshrined in Article 13(1) of the Charter. Although, the exercise of this right must be in accordance with the law.

100. The enjoyment of this right is also restricted by Article 27(2) of the Charter which provides that: “The rights and freedoms of each

individual shall be exercised with due regard to the rights of others, collective security, morality and common interest”.

Further, the duty set out in Article 29(4) of the Charter which requires individuals, “To preserve and strengthen social and national solidarity, particularly when the latter is threatened;” also limits the enjoyment of this right.

101. The Respondent, in support of the said restrictions calls in aid the principle of necessity based on the social needs of the people of Tanzania. What are these social needs?

102. In response to the questions put by the Court during the hearing, the Respondent stated that the circumstances prevailing in Tanzania demand that the prohibition of independent candidates be maintained. According to the Respondent, this is in view of the structure of the Union, the United Republic of Tanzania comprising Mainland Tanzania and Tanzania Zanzibar. They contended that the restriction that there should be at least a minimum number of members of a party from the Mainland and from Zanzibar is justifiable and that the requirements to be met regarding the registration of political parties have resulted in no tribalism in Tanzania. The Respondent argues that the law merely sets out the procedure of exercising the right but does not restrict it and that the procedure merely sets out the minimum obligations one has to discharge in order to enjoy the rights and that these are reasonable.

103. The Respondent reiterated the position of the Court of Appeal in Civil Appeal No 45 of 2009 which was similar to the decision in the Inter-American Court of Human Rights; *Castañeda Gutman v Mexico*, Judgment of 6 August 2008 Series C No 184 to the effect that the decision to introduce independent candidates depends on the social needs of each state based on its historical reality. The Respondent cited paragraphs 192 and 193 of the judgment in the *Castañeda Gutman v Mexico* case as follows:

“192. The systems that accept independent candidates can be based on the need to expand and improve participation and representation in the management of public affairs and to enable a greater rapprochement between the citizens and the democratic institutions; while the systems that opt for the exclusivity of candidacies through political parties can be based on different social needs, such as strengthening these organisations as essential instruments of democracy, or the efficient organization of the electoral process. These needs must ultimately respond to a legitimate purpose in accordance with the American Convention.

“193. The Court considers that the State has justified that the registration of candidates exclusively through political parties responds to compelling social needs based on diverse historical, political and social grounds. The need to create and strengthen the party system as a response to an historical and political reality; the need to organize efficiently the electoral process in a society of 75 million voters, in which everyone would have the same right to be elected; the need for a system of predominantly public financing to ensure the development of genuine free elections, in equal conditions and the need to monitor efficiently the funds used in the elections, all respond to essential public interest. To the contrary, the representatives have not provided sufficient evidence that, over and above their statements regarding the lack of credibility of the political parties and

the need for independent candidates, would nullify the arguments put forward by the State.”

104. The Respondent elaborated on what it described as the historical and social realities leading to the prohibition of independent candidates. According to the Respondent, after independence, Tanzania had a multiparty system but the one-party system was instituted to cement national unity. Multi-party democracy was reintroduced in the early 90s and through the Eighth Amendment to the Constitution, particularly Articles 39, 47 and 67, independent candidacy was prohibited. These provisions were enacted at a time when Tanzania was a young democracy and were necessary so that multi-party democracy is strengthened.

105. The Respondent also elaborated on the alleged mischief which sought to be addressed by the Eleventh Constitutional Amendment. They stated that prior to the passing of Eleventh Constitutional Amendment, a reading of Article 21 of the Constitution dealt exclusively with the right to participate in national public affairs, while the qualifications for party affiliation for Presidential, Parliamentary, as well as Local Government posts, were enshrined in Articles 39, 47 and 67 of the Constitution. Therefore, Article 21 of the Constitution was read in isolation from the provisions dealing with the requirement of party affiliation for participation in national public affairs. This was a mischief which was caused by non-harmonisation of the two sets of provisions. The Eleventh Constitutional amendment was meant to cure this mischief by harmonizing and cross referring the provisions dealing with party sponsorship, that is, Articles 39, 47 and 67 to Article 21 which deals with the right to participate in public affairs. They also maintained the already existing provisions by solidifying and concretizing them. Similarly, the intention of the government was to allow participation in public affairs through political parties, bearing in mind that the amendments were only made two years after the enactment of the Political Parties Act in 1992 and Tanzania was still in the throes of establishing a multiparty democracy. The country, at the time, was as yet to hold its very first general election under the multi-party system, and it was still at its infant stage of multiparty democracy, and there was not any compelling social need for independent candidature.

106. Jurisprudence

106.1 Jurisprudence regarding the restrictions on the exercise of rights has developed the principle that, the restrictions must be necessary in a democratic society; they must be reasonably proportionate to the legitimate aim pursued. Once the complainant has established that there is a *prima facie* violation of a right, the Respondent State may argue that the right has been legitimately restricted by “law”, by providing evidence that the restriction serves one of the purposes set out in Article 27(2) of the Charter. In Communications No 105/93, 128/94, 130/94, 152/96) *Media Rights Agenda and others v Nigeria* Fourteenth Activity Report (2000-2001) and Communication No 255/2002 *Gareth Anver Prince v South Africa* Eighteenth Activity Report (July 2004 –December 2004), the Commission has stated that the “only legitimate reasons for limitations to the rights and freedoms of the African Charter” are found in Article 27(2) of the Charter. After

assessing whether the restriction is effected through a “law of general Application”, the Commission applies a proportionality test, in terms of which it weighs the impact, nature and extent of the limitation against the legitimate state interest serving a particular goal. The legitimate interest must be “proportionate with and absolutely necessary for the advantages which are to be obtained”.

106.2 The European Court of Human Rights (“European Court”) also adopts a similar approach. In *Handyside v United Kingdom*, Application No 5493/72 Judgment of 7 December 1976, Series A No 24 at paragraph 49, the Court stated that: “The Court’s supervisory functions oblige it to pay the utmost attention to the principles characterizing a “democratic society”. ... This means, amongst other things, that every “formality”, “condition”, “restriction” or “penalty” imposed ... must be proportionate to the legitimate aim pursued.”

This approach was restated in *Gillow v United Kingdom* Application No 9063/80 Judgment of 24 November 1986 at paragraph 55:

“As to the principles relevant to the assessment of the ‘necessity’ of a given measure ‘in a democratic society’, reference should be made to the Court’s case-law. The notion of necessity implies a pressing social need; in particular, the measure employed must be proportionate to the legitimate aim pursued. In addition, the scope of the margin of appreciation enjoyed by the national authorities will depend not only on the nature of the aim of the restriction but also on the nature of the right involved.”

106.3 Concerning the social need, the European Court does not only verify if the State applied the principle of margin of appreciation in good faith, it also assesses whether the reasons given are “relevant and sufficient”, as the Court specified in *Olsson v Sweden Application* No 10465/83 Judgment of 24 March 1988 at paragraph 68.

106.4 Next, in accordance with the specification set out in *Sporrong and Lonnroth v Sweden Applications No 7151/75, 7152/75* Judgment of 23 September 1982, the European Court assesses if the interference is proportionate to the legitimate aim, in doing so it “must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights”.

106.5 In order to determine whether the restriction of rights is legal, the Inter-American Court of Human Rights is guided by Articles 30 and 32(2) of the American Convention on Human Rights (ACHR) which sets out the scope of restrictions on rights. Article 30 of the ACHR provides that: “The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.” On its part, Article 32(2) provides that: “The rights of each person are limited by the rights of others, by the security of all and by the just demands of the general welfare, in a democratic society.” A restriction on rights is authorized only if the legal basis is a legislative act and if the law’s content conforms to the ACHR. The Court requires that the restrictions be legal and legitimate. This approach is settled in *Baena Ricardo and others against Panama* (Judgment of 2 February 2001).

B. The Court's finding

107.1 The Court agrees with the Commission, that the limitations to the rights and freedoms in the Charter are only those set out in Article 27(2) of the Charter and that such limitations must take the form of "law of general Application" and these must be proportionate to the legitimate aim pursued. This is the same approach with the European Court, which requires a determination of whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

107.2 Article 27(2) of the Charter allows restrictions on the rights and freedoms of individuals only on the basis of the rights of others, collective security, morality and common interest. The needs of the people of Tanzania, to which individual rights are subjected, we believe, must be in line with and relate to the duties of the individual, as stated in Article 27(2) of the Charter, requiring considerations of security, morality, common interest and solidarity. There is nothing in the Respondent's arguments set out earlier, to show that the restrictions on the exercise of the right to participate freely in the government of the country by prohibiting independent candidates falls within the permissible restrictions set out in Article 27(2) of the Charter. In any event, the restriction on the exercise of the right through the prohibition on independent candidacy is not proportionate to the alleged aim of fostering national unity and solidarity.

107.3 The Respondent has relied heavily on the *Castañeda Gutman v Mexico* case. In that case, the Inter-American Court found that individuals had other options if they wished to seek public elective office. Thus, apart from having to be a member of and being sponsored by a political party, one could be sponsored by a political party without being a member of that party and also one could form one's own political party particularly since the requirements for doing so were not arduous. In the instant case, Tanzanian citizens can only seek public elective office by being members of and being sponsored by political parties; there is no other option available to them.

107.4 The United Nation's Human Rights Committee's General Comment No. 25 on the right to participate in public affairs, voting rights and the right of equal access to public service (Art.25), at paragraph 17 thereof, provides that:

"The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties. If a candidate is required to have a minimum number of supporters for nomination this requirement should be reasonable and not act as a barrier to candidacy. Without prejudice to paragraph (1) of Article 5 of the Covenant, political opinion may not be used as a ground to deprive any person of the right to stand for election."

The Court agrees with this General Comment, as it is an authoritative statement of interpretation of Article 25 of the ICCPR, which reflects the spirit of Article 13 of the Charter and which, in accordance with Article 60 of the Charter, is an "instrument adopted by the United Nations on human and peoples' rights" that the Court can "draw inspiration from" in its interpretation of the Charter.

108. Furthermore, it is the view of the Court that the limitation imposed by the Respondent ought to be in consonance with international standards, to which the Respondent is expected to adhere. This is in line with the principle set out in Article 27 of the Vienna Convention on the Law of Treaties which provides that: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46." Additionally, Article 32 of the International Law Commission Articles on State Responsibility 2001 provides that "the Responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations".

109. The Respondent relies on Article 13(1) of the Charter, that the enjoyment of the rights thereunder must be in accordance with the law, that is, the Respondent's national law. It is pertinent to note that such limitations as may be placed by national law may not negate the clearly expressed provisions of the Charter. The Court agrees with the Commission's finding in *Communication No 212/98 Amnesty International v Zambia* Twelfth Activity Report (1998 – 1999) paragraph 50 that:

"The Commission is of the view that the "claw-back" clauses must not be interpreted against the Charter. Recourse to them shouldn't be used as a means of giving credence to violations of the express provisions of the Charter It is important for the Commission to caution against a too easy resort to the limitation clauses in the African Charter. The onus is on the state to prove that it is justified to resort to the limitation clause."

Having ratified the Charter, the Respondent has an obligation to make laws in line with the intents and purposes of the Charter. Thus it is the view of the Court that whilst the said clause envisages the enactment of rules and regulations for the enjoyment of the rights enshrined therein, such rules and regulations may not be allowed to nullify the very rights and liberties they are to regulate. Wherein lies any freedom if in order to even choose a representative of one's choice one is compelled to choose only from persons sponsored by political parties, however unsuitable such persons might be. To the extent that the said provision reserves to the citizen the right to participate directly or through representatives in government, any law that requires the citizen to be part of a political party before she can become a presidential candidate is an unnecessary fetter that denies to the citizen the right of direct participation, and amounts to a violation.

110. Finally on the issue that the 2nd Applicant has now formed his own political party, the Court finds that it does not in any way absolve the Respondent from any of its obligations. If the 2nd Applicant in his eagerness to participate in politics as a responsible citizen forms his own party to cross the hurdle set up by the Respondent, he should not be forced to continue if he finds himself unable to cope with the burden of establishing and maintaining a political party. It cannot be said he has not been prevented from freely participating in the government of his Country. He tried it once and if he no longer wishes to go that route, he has the right to seek to insist on the strict observance of his Charter rights. And having chosen not to form his own party, must he be excluded? Certainly not. Indeed, it is even arguable that, even if the

Applicant has successfully formed a political party, he cannot be stopped from challenging the validity of the laws in question and from asserting that the same amounts to a violation of the Charter. A matter such as this one cannot and must not be dealt with as though it were a personal action, and it would be inappropriate for this Court to do so. If there is violation, it operates to the prejudice of all Tanzanians; and if the Applicants' Application succeeds, the outcome inures to the benefit of all Tanzanians.

111. The Court therefore finds a violation of the right to participate freely in the government of one's country since for one to participate in Presidential, Parliamentary or Local Government elections in Tanzania, one must belong to a political party. Tanzanians are thus prevented from freely participating in the government of their Country directly or through freely chosen representatives.

C. The right to freedom of association

112. It is the contention of the Applicants that the restriction requiring affiliation to a political party has impaired the freedom of association for Tanzanians wishing to participate in politics. They contend further that freedom of association is a core democratic principle which is meant to allow citizens to monitor the State so as to ensure appropriate discharge of public functions and demand government compliance with legislations thus ensuring transparency and accountability. They placed reliance on Article 10 of the African Charter, Article 20 of the Universal Declaration of Human Rights and Article 22 of the ICCPR. Article 10(2) of the Charter indeed states that: "2. Subject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association". The relevant cross reference to Article 29 of the Charter is Article 29(4) thereof which imposes a duty on the individual to "preserve and strengthen social and national solidarity, particularly when the latter is threatened". Article 27(2) of the Charter, being the general limitation clause is pertinent to the consideration of this matter. For ease of reference it is cited again. It provides that: "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest." This provision means that State Parties to the Charter are allowed some measure of discretion [to restrict] the freedom of association in the interest of collective security, morality, common interest and the rights and freedoms of others.

113. It is the view of the Court that freedom of association is negated if an individual is forced to associate with others. Freedom of association is also negated if other people are forced to join up with the individual. In other words freedom of association implies freedom to associate and freedom not to associate.

114. The Court therefore finds that by requiring individuals to belong to and to be sponsored by a political party in seeking election in the Presidential, Parliamentary and Local Government posts; the Respondent has violated the right to freedom of association. This is because individuals are compelled to join or form an association before seeking these elective positions.

115. The Court is not satisfied that the social needs argument raised by the Respondent, which has already been dealt with, meets the exceptions in Articles 29(4) and 27(2) of the Charter to such an extent that it justifies the limitation of the right to freedom of association.

D. The right not to be discriminated against and the right to equality

116. The Applicants allege that the constitutional provisions which prohibit independent candidature have the effect of discriminating against the majority of Tanzanians, therefore violating the right to freedom from discrimination enshrined in Article 2 of the African Charter. The Article provides: “Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”

117. The Applicants argue that though the law prohibiting independent candidature applies to all Tanzanians equally, its effects are discriminatory because only those who are members of and are sponsored by political parties can seek election to the Presidency, Parliament and Local Government positions. The Applicants referred the Court to the jurisprudence of the Commission in Communication No 211/98 *Legal Resources Foundation v Zambia* Fourteenth Activity Report (2000 – 2001) at paragraph 64 where the Commission held *inter alia* that any “measure which seeks to exclude a section of the citizenry from participating in the democratic processes is discriminatory and falls foul of the Charter”.

118. The Respondent maintained that the law prohibiting independent candidature is not discriminatory as it applies equally to all Tanzanians.

119. It appears that the Applicants are alleging discrimination stemming from the abovementioned constitutional amendments between Tanzanians belonging to political parties on one hand, and Tanzanians not belonging to political parties to the other, as the former can contest presidential, legislative and local elections while the latter are not so permitted. In that understanding, the right not to be discriminated is related to the right to the equal protection by the law as guaranteed by Article 3(2) of the Charter, which stipulates that “[e]very individual shall be entitled to equal protection of the law”. In the light of Article 2 of the Charter above quoted, the alleged discrimination might be related to a distinction based on “political or any other opinion”. To justify the difference in treatment between Tanzanians, the Respondent has, as already mentioned, invoked the existence of social needs of the people of Tanzania based, *inter alia*, on the particular structure of the State (Union between Mainland Tanzania and Tanzania Zanzibar) and the history of the country, all requiring a gradual construction of a pluralist democracy in unity.

The question then arises whether the grounds raised by the Respondent State in answer to that difference in treatment enshrined in the abovementioned constitutional amendments are pertinent, in other words reasonable, and legitimate. As the Court has already indicated,

those grounds of justification cannot lend legitimacy to the restrictions introduced by the same constitutional amendments to the right to participate in the Government of one's country, and the right not to be compelled to be part of an association (*supra*, paragraphs 107 – 11 and paragraphs 114 -115). It is the view of the Court that the same grounds of justification do not legitimise the restrictions to not be discriminated against and the right to equality before the law. The Court therefore concludes that there has been violation of Articles 2 and 3(2) of the Charter.

E. Alleged breach of the rule of law

120. The 2nd Applicant argues that by initiating a Constitutional amendment to settle a legal dispute that was pending before the Courts, the effect of which was to nullify the judicial settlement of the matter, the Respondent abused the distinctive process of constitutional amendment and therefore the principle of the rule of law. The 2nd Applicant contended that the rule of law is a principle of customary international law.

The Respondent submitted that the Government of Tanzania fully adheres to principles of the rule of law, separation of powers and independence of the judiciary as provided for under the Constitution of the United Republic of Tanzania. In response to the 2nd Applicant's argument that the 11th constitutional amendment was in violation of the rule of law; Respondent argued that constitutional review and amendment is not a new phenomenon in Tanzania and that the Constitution of the United Republic of Tanzania has so far undergone fourteen (14) constitutional amendments. Article 98(1) of the Constitution provides that the Constitution can be amended at any time when the need arises and this is what happened in 1994; therefore, the issue of the rule of law being violated does not arise at all.

121. The Court is of the view that the concept of the rule of law is an all-encompassing principle under which human rights fall and so cannot be treated in abstract or wholesale. Furthermore, the Applicants' claim that the rule of law has been violated is not related to a specific right; therefore, the Court finds that the issue of the violation of the principle of the rule of law does not properly arise in this case.

F. Alleged violations of the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights

122. The Court notes that it has jurisdiction to interpret the said Treaties vide Article 3(1) of the Protocol which provides that:

“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”.

123. The Court having considered the alleged violations under the relevant provisions of the Charter, does not, however, deem it necessary in this case to consider the Application of these treaties.

i. Compensation and reparation

124. The Court has the power to make orders for compensation or reparation on the basis of Article 27(1) of the Protocol which reads: "If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation including the payment of fair compensation or reparation." Rule 63 of the Rules of Court allows the Court to: "... rule on the request for the reparation, submitted in accordance with Rule 34(5) of these Rules, by the same decision establishing the violation of a human and peoples' right or, if the circumstances so require, by a separate decision." The 2nd Applicant in his prayer reserved his right to elaborate on his claim for compensation and reparation. He has not done so nor did the parties address the Court on this issue. As a result, the Court cannot in this judgment make a pronouncement on compensation and reparation. The Court decides to call upon the 2nd Applicant, if he so wishes, to exercise his rights in this regard.

ii. Costs

125. The 1st Applicants prayed the Court to order that the Respondent pay their costs. The Respondent prayed that the Court orders the Applicants to pay its costs. The Court notes that Rule 30 of the Rules of Court states that "[U]nless otherwise decided by the Court, each party shall bear its own costs." Taking into account all the circumstances of this case, the Court is of the view that there is no reason to depart from the provisions of this Rule.

VIII. On the prayers

126. In Conclusion:

Having found the Applications admissible and that the Court has jurisdiction to consider the Applications, the Court by majority finds:

1. In respect of the 1st Applicants the Court holds: That the Respondent has violated Articles 2, 3, 10 and 13(1) of the Charter.

2. In respect of the 2nd Applicant, the Court holds:

That the Respondent has violated Articles 2, 3, 10 and 13(1) of the Charter.

3. The Respondent is directed to take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations found by the Court and to inform the Court of the measures taken.

4. In accordance with Rule 63 of the Rules of Court, the Court grants leave to the 2nd Applicant to file submissions on his request for reparations within thirty (30) days hereof and the Respondent to reply thereto within thirty (30) days of the receipt of the 2nd Applicant's submissions.

5. In accordance with Rule 30 of the Rules of Court, each Party shall bear its own costs.

Separate opinion: OUGUERGOUZ

1. I am of the view that there is a violation by the Respondent State of the rights guaranteed under Articles 2, 3(2), 10 and 13(1) of the African Charter; however, I do not think that the reasons invoked in arriving at such a conclusion have been articulated with sufficient clarity in this judgment. Moreover, the Court should have first pronounced itself on the issue of its jurisdiction to deal with the two Applications before considering the issue of the admissibility of the said Applications; it should equally have set aside more substantial developments to the treatment of these two important issues.

I. Jurisdiction of the Court

2. The Court has first to ensure that it has the jurisdiction to deal with an Application before considering its admissibility. It has to do so *proprio motu* even if the Respondent State has not raised a preliminary objection in that regard. In the exercise of its contentious function, the Court can indeed only use its jurisdictional powers against State Parties to the Protocol and within the limits set by that instrument regarding the status of entities entitled to refer matter to it and the type of disputes that can be submitted to it. It is only when an Application is filed against a State Party to the Protocol and within the limits set by the said Protocol that its admissibility could be considered by the Court. Besides, it is in that chronological order that issues of jurisdiction and admissibility are dealt within the Protocol (Articles 3(1), 5 and 6; see also Rule 39 of the Rules of Court).

3. In the Brief in Response to the Application of the 1st Applicants, the Respondent raised two objections on the admissibility of the Application; in its Brief in Response to the Application of the 2nd Applicant, the Respondent raised five objections on the admissibility of the Application.

In its Briefs in Response to the two Applications, the Respondent however addressed both issues of admissibility and merits. For reasons related to the proper administration of justice, the Court therefore decided not to suspend the proceedings on the merits of the case but to join consideration of the objections raised by the Respondent to that of the merits in both Applications, as allowed under Rule 52(3) of the Rules. The Rejoinders of both Applicants as well as the oral pleadings of all the Parties thus dealt with the jurisdiction of the Court and the admissibility of both Applications as well as with the merits of the case.

4. It should be noted here that the Respondent did not formally raise any objection to the jurisdiction of the Court. Although in its Brief in Response to the second Applicant (pages 9-11, par. 19-23), it presented its five preliminary objections as objections to the admissibility of the Application, its 3rd, 4th and 5th objections should in fact be considered as objections relating to the jurisdiction of the Court.

5. The Court's jurisdiction to deal with an Application brought against a State party and originating directly from an individual or a non-governmental organisation is mainly governed by Articles 3(1) and 5(3) of the Protocol. This jurisdiction must be considered both at the

personal level (*ratione personae*) and at the material (*ratione materiae*), temporal (*ratione temporis*) and geographical (*ratione loci*) levels.

A. Personal jurisdiction

6. Article 3 of the Protocol, entitled “Jurisdiction”, deals with the general jurisdiction of the Court, whereas Article 5, entitled “Access to the Court”, deals specifically with the personal jurisdiction of the Court. Though they are different in form, the issues of the “jurisdiction” of the Court and “access” to the Court are closely related in the context of the Protocol. The Court’s jurisdiction is also treated under Article 34(6) of the Protocol, to which makes reference Article 5(3) mentioned above.

7. Articles 5(3) and 34(6) of the Protocol, read together, show that direct access to the Court by an individual or a non-governmental organization is subject to the deposit by the Respondent State of a special declaration authorizing such access.

8. In the instant case, the Court has first ensured that the Respondent State is one of the State Parties to the Protocol which have made the declaration under Article 34(6). As the 1st Applicants are two non-governmental organizations, the Court has similarly ensured that they enjoy observer status with the African Commission on Human and Peoples’ Rights. The Court has then concluded that, these two cumulative conditions being met, it has jurisdiction *ratione personae* to deal with the two Applications.

9. The issue of the jurisdiction *ratione loci* of the Court was not raised by the Respondent and there can be no dispute in that regard considering the nature of the violations alleged by the Applicants. The Court did not therefore need to consider the issue of its jurisdiction *ratione loci*.

10. It is not however the case of the jurisdiction *ratione materiae* and *ratione temporis* of the Court even if the Respondent did not raise a formal objection challenging the Court’s jurisdiction; these objections were indeed implicitly raised in the submissions on the Preliminary objections to the admissibility of the Application from the 2nd Applicant.

B. Material jurisdiction

11. In its Brief in response to the Application of the 2nd Applicant, the Respondent argues in its 3rd, 4th, and 5th objections to the admissibility, respectively, that the “Application contains provisions inconsistent with Rule 26(l)(a) of the Rules of Court (...) and Article 7 of the Protocol (...)”, that it is “relying on the Treaty establishing the East African Community which was not in existence at the time the Applicant took the Government of Tanzania to Court in 1993” and that “it is retrospective with regard to the Protocol” (see also the Public Hearing of 14 June 2012, *Oral Hearing Verbatim Record*, p. 26, lines 36-37, p. 27, lines 1-9, and p. 27, lines 15-26, respectively).

12. In support of its 3rd Preliminary objection, the Respondent argues that the Treaty establishing the East African Community of 30 November 1999, is not “a human rights instrument” within the meaning of Article 7 of the Protocol and Rule 26(l) (a) of the of Court and that, as

a result, “it is extraneous to this case” (Paragraphs 19-20 of the Brief in Response; see also the Public Hearing of 14 June 2012, *Oral Hearing Verbatim Record*, p. 26, lines 19-20). In its Rejoinder, the 2nd Applicant noted that “Article 3(l) of the Protocol (...) does not specify which instrument should be considered as a human rights instrument” and argues further “that any Treaty containing provisions on the protection of human rights should be considered as relevant and within the jurisdiction of the Court” (Paragraph 13).

At the Public Hearing of 15 June 2012, the second Applicant indicated that “the East African Treaty (...) does have in Article 6 a provision that protects the human rights” and “that provision not the entire treaty but that particular provision (...) is part of applicable law before the Court” (Public Hearing of 15 June 2012, *Oral Hearing Verbatim Record*, p. 12, lines 20-23).

13. Therefore, contrary to what it indicated in Paragraph 87 of the Judgment, the Court had also to determine whether the Treaty establishing the East African Community was applicable in the light of Articles 3(1) and 7 of the Protocol, as well as Rule 26(l) (a) of the Rules of Court.

14. These three provisions make mention of “any other relevant human rights instrument ratified by the States concerned” and direct reference to three requirements: 1) The instrument in question must be an international treaty, hence the requirement that it be ratified by the State concerned, 2) this international treaty must “relate to human rights” and 3) it must have been ratified by the State concerned. These three requirements are cumulative and, if met, the Court would again have had to ensure that the said treaty is “relevant” to the treatment of the matter.

15. On the issue of whether a particular treaty can be considered as “a human rights instrument”, the Court could, for instance, have suggested that some distinction be made between treaties which deal mainly with the protection of human rights and those which address other issues but which contain provisions related to human rights. Treaties of the first category which are crafted in such a manner as to give “subjective rights” to individuals could beyond any doubt be considered as human rights instruments; they are human rights instruments *par excellence*. Treaties of the first category providing essentially for undertakings by States Parties and no subjective rights to individuals could also be considered as human rights instruments. For treaties of the second category, that is treaties the main purpose of which is not the protection of human rights but which contain provisions relating to human rights, their case is more problematic insofar as the said provisions generally do not grant subjective rights to individuals within the jurisdiction of States Parties.

The Court possessing «*la compétence de sa compétence*» (Article 3(2) of the Protocol), it is for it to determine which are the treaties relating to human rights falling within its material jurisdiction, taking due consideration of their “relevance” for the examination of a case (Article 3(l) of the Protocol).

16. Such a weighty issue as the applicable law required consideration by the Court especially as the latter had asserted in Paragraphs 122 and 123 of the Judgment that its jurisdiction extends to the interpretation and Application of both the 1966 International Covenant on Civil and Political Rights and the 1948 Universal Declaration of Human rights. This assertion of the Court raises questions in relation to the first instrument which is a treaty providing for an international monitoring body, the Human Rights Committee of the United Nations; the risk of fragmentation of the international jurisprudence should indeed not be overlooked. Such an assertion also raises questions in relation to the second instrument which is in fact a resolution of the United Nations General Assembly.

C. Temporal jurisdiction

17. In its written submissions, the Respondent did not raise any Preliminary objection to the temporal jurisdiction of the Court, other than that on the Treaty establishing the East African Community. At the Public Hearing of 15 June 2012, the Respondent however challenged the temporal jurisdiction of the Court as follows: “our contention with retrospectivity is hinged only on the aspect of the Eleventh Constitutional Amendment Act No. 34 of 1994, which was enacted before the Government of the United Republic of Tanzania ratified the Protocol to the African Charter establishing the African Court. The Court cannot adjudicate on matters which transpired prior to Tanzania having ratified the instruments and placing the United Republic of Tanzania under the jurisdiction of this Court, hence the issue is retrospective” (Public Hearing of 15 June 2012, *Oral Hearing Verbatim Record*, p. 27, lines 16-21); the Respondent added as follows: “the international principle is that international treaties are not retrospective. [...] This principle is applicable to the United Republic of Tanzania with regard to Article 34(6) of the Protocol to the African Charter establishing an African Court” (Public Hearing of 15 June 2012, *Oral Hearing Verbatim Record*, p. 27, lines 30-31 and p. 28, lines 1-5).

18. At the same Public Hearing, the 2nd Applicant for his part stated that: “the violations that were alleged goes before the setting up of the Charter and the issue of retroactivity that Tanzania raises is not relevant. And we would like to refer to what we have already argued that violation existed in the past, it continues to exist” (Public Hearing of 15 June 2012, *Oral Hearing Verbatim Record*, p. 13, lines 11 - 14).

19. Since it had to ensure that it had jurisdiction to deal with the matter before it, the Court, as required, considered the merits of the 6th Preliminary objection of the Respondent, even though it was raised belatedly, that is, during the second round of oral pleadings.

20. I am however of the view that in dealing with this objection, the Court should have made a clearer distinction between the obligations of the Respondent under the African Charter and its obligations under the Protocol and the optional declaration. The 2nd Applicant indeed mixed up these two kinds of obligations (see Paragraph 81(3) of the Judgment) and the Court should have lifted any ambiguity in this matter

by clearly indicating that in the instant case its personal jurisdiction is solely based on the Protocol and the optional declaration.

21. On the basis of the non-retroactivity of treaties, a well-established principle in international law, the Court cannot be seized of allegations of violations of human and people's rights by an individual or by a non-governmental organization unless such alleged violations occurred after the entry into force for the State concerned, not only of the African Charter but also of the Protocol and more important of the optional declaration; Article 34(6) of the Protocol does not suffer any ambiguity in this regard since it provides that "the Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration".

22. In the instant case, the critical date for determining the jurisdiction of the Court to deal with the Applications cannot therefore be the date of entry into force for Tanzania of the sole African Charter or the Protocol; the only date to be considered is that of the deposit by Tanzania of the declaration under Article 34(6) of the Protocol, that is 29 March 2010. It is therefore clear, on this basis, that any alleged violation of the African Charter by Tanzania occurring before that date would not fall within the temporal jurisdiction of the Court unless in circumstances where such violation bears a continuous character.

23. In Paragraph 84 of the Judgment, the Court should have clearly indicated that the only date to be considered in the instant case is the date of entry into force of the optional declaration for the Respondent State and not the date of entry into force of the Charter or the Protocol for the said State; it should then have focused its attention on the sole issue of the continuous character of the alleged violations beyond the critical date of 29 March 2010.

II. Admissibility of the Applications

24. The Court should have considered, even in a summary manner, the issue of the legal interest to act of the Tanganyika Law Society and the Legal Human Rights Center, the two non-governmental organizations which lodged the first Applications.

25. Indeed, a distinction needs to be made between the "capacity to act" and "the interest to act" before the Court. The capacity of an entity to act relates to its authority to appear before the Court and therefore comes within the personal jurisdiction of the Court in relation to the Applicant. The interest to act, for its part, refers to the notion of legitimate interest, in other words the legally recognized or protected interest, the existence of which the Court has to independently determine in each case. In other words the capacity to act deals with the Applicant whereas the interest to act relates to the action that he or she undertakes.

26. An action before the Court is indeed only allowed if the Applicant justifies his or her own interest in initiating it. To show proof of such interest, the Applicant must accordingly demonstrate that the action or abstention of the Respondent State applies to a right which the Applicant has or the right of an individual on behalf of which it wishes to seize the Court.

27. In the instant case, since Mr Mtikila, whose rights have allegedly been violated, is party to the case, the issue at stake is one of ascertaining if a non-governmental organization is also allowed to file an Application based on the same allegations. It would have been a different situation if Mr Mtikila had not initiated an action before the Court and that both non-governmental organizations had acted for Mr Mtikila and initiated action on his behalf.

III. Merits

28. I am of the view that barring independent candidates from certain elections and the correlative obligation to belong to a political party are not in themselves violations of Articles 10 and 13(l) of the African Charter; they can only be violations of those provisions if they are considered as unreasonable or illegitimate limitations to the exercise of the rights enshrined in the said provisions (see, on a similar matter, the findings of the Inter-American Court of Human Rights in paragraphs 193 and 205 of its judgment of 6 August 2008 in the case *Castaneda Gutman v Mexico*).

29. Unlike Articles 22 and 25 of the International Covenant on Civil and Political Rights, Articles 10 and 13(1) of the African Charter do not provide in a satisfactory manner for the freedom of association and the right of the citizen to freely participate in the government of his or her country.

30. The main weakness of these two provisions of the Charter lies in the claw-back clause they contain. Both articles indeed provide that the freedom of association and the right of the citizen to freely participate in the public life of his or her country must be exercised "in conformity with the rules laid down by law". That clause does not appear in Article 25 of the Second Covenant which, for its part, provides that the guaranteed rights should be exercised "without discrimination and unreasonable restrictions". This provision consequently allows for "reasonable" restrictions, such as those based on the age of the person for instance. It is our view that Articles 10 and 13(1) of the Charter should be interpreted in the same spirit. The limitations that the lawmaker could provide to the exercise of those guaranteed rights must be reasonable or legitimate, that is, they would need to comply with a number of objective criteria. Since Articles 10 and 13(1) are silent, one could usefully refer to the criteria set out in the second Paragraph of Article 27 of the Charter even though this provision is *a priori* intended to prevent the abuse that the individual might likely commit in the exercise of his or her rights and freedoms rather than to protect the individual from abusive limitations to his or her rights and freedoms by the State, as it is emphatically suggested in the formulation of this Article and its location in the Chapter relating to the duties of the individual.

31. At any rate, in the final analysis, and as stated by the African Commission and confirmed by the Court in Paragraph 112 of the Judgment, this provision may be viewed as a general clause which restricts the margin of maneuver of States Parties as far as limitations are concerned. The only limitations to the exercise of the freedom of

association and the right of citizens to freely participate in the government of their countries would consequently be those required to ensure “respect for the right of others, collective security, morality and common interest”.

32. One can thus conclude that, according to the African Charter, the freedom of association and the right to freely participate in the government of a country are not absolute as the exercise of such rights is subject to limitations by the States Parties. One can equally conclude that the powers of limitation by States Parties are also not absolute in that they must comply with certain requirements: the restrictions must be provided by law and should be necessary to ensure “respect for the rights of others, collective security, morality and common interest”.

33. Consequently, it lies with the Respondent State to show that the restrictions it has applied to the freedom of association and the right to freely participate in the government or the country were not only provided by law but also necessary to ensure “respect for the rights of others, collective security, morality and common interest”.

34. Such proof has, however, not been forthcoming from the Respondent State. That is what the Court ought to have expressed in a clearer manner particularly with regard to the right to freely participate in the government of the country. Paragraphs 109 *in fine*, 111, 113 and 114 of the Judgment indeed suggest that the barring of independent candidates from certain elections and the correlative obligation to belong to a political party are in “themselves” violations of Articles 10 and 13(1) of the Charter, whether or not such limitations are reasonable. The reasoning of the Court would had been clearer if its various sequences and the corresponding paragraphs of the Judgment were positioned in a more coherent manner so as to show that it is the fact that the limitation to the rights concerned were unreasonable that led the Court to the conclusion that the said rights had been violated. Paragraph 109, in particular, is not at its right place in the reasoning of the Court (it should be located upstream) and paragraph 108, for part, addresses issues which are extraneous to the instant case.

35. Having found that Articles 10 and 13(1) of the Charter had been violated, the Court could only have concluded that there was violation of the principles of non-discrimination and of the equal protection of the law as enshrined in Articles 2 and 3(2), respectively.

36. The principle of non-discrimination, on one hand, and the principles of equality before the law and of equal protection of the law, on the other, are in close relationship. They are so to say the two sides of the same coin, the first principle being the corollary of the second ones. Their main difference under the African Charter lies in their respective scope. Indeed, according to Articles 2 and 3 of the Charter, the principle of non-discrimination applies only to the rights guaranteed in the Charter, whereas the principles of equality apply to all the rights protected in the municipal system of a State party even if they are not recognized in the Charter.

37. In the instant case, the Court should have started its reasoning by clearly indicating this distinction and stating that the alleged discriminations actually relate to two rights guaranteed in the Charter.

After having established that there actually exists a violation of these two rights and that various groups of peoples were given a different treatment, the Court should have underlined that any difference of treatment does not necessarily constitute a discrimination. Indeed, as the Human Rights Committee of the United Nations indicated in its General Comment of Article 26 of the Second International Covenant, “differentiation is not discrimination if it is based on objective and reasonable criteria and if the aim is legitimate in light of the Covenant”¹ (see a similar statement of the European Court of Human Rights in the case *Lithgow v United Kingdom*).²

38. It is only after having laid down these premises, that the Court should have dealt, as it did in paragraph 119 of the Judgment, with the objective and reasonable nature of the limitations introduced by the Tanzanian constitutional amendments, and ruled that the aim of the difference of treatment is not legitimate in light of the Charter.

Separate opinion: NGOEPE

1. I agree with the majority judgment, of which I am part, in all respects. It is a judgment which, to any seriously diligent reader, whether they agree with it or not, has been written with sufficient clarity and lucidity of thought. I have, however, felt the need to write a separate opinion on a conundrum which has been vexing this Court for some time and which has manifested itself in this judgment differently from the way it has done in the past. It is this: in writing a judgment, should this Court *always*, in every matter, deal with admissibility first and only thereafter with jurisdiction, or vice-versa? Unlike in previous judgments, this judgment has this time round elected to first deal with the issue of admissibility, and then jurisdiction.

2. There has never been, in any matter, a unanimous decision that the Court must every time start with jurisdiction, or with admissibility. Views have on every single occasion differed on this aspect, with strong arguments advanced in support of each view. I have likened this debate to the infamous age-old one: the chicken or the egg first? Personally I do not, at this stage, subscribe to any one of the two approaches as I do not see the need for rigidity. My problem is therefore not as to which one should be dealt with first, but with a rigid approach that one must always start with the one and never with the other.

1 General Comment No. 8, Non-Discrimination, adopted by the Committee on 10 November 1989 during its 37th Session, Paragraph 13; see also, for example, its Views adopted on 15 July 2002 and relating to Communication No. 932/2000, Human Rights Committee, *Doc. CCPJUC/751J/932/2000*. 26 July 2002, pp. 21-24, paras 12.2-13. 18.

2 According to the European Court, for the purpose of Article 14 of the European Convention, a difference of treatment is discriminatory if it “has no objective or reasonable justification”, that is, if it does not pursue a “legitimate aim”, *Application No 9063180*, Judgment of 8 July 19R6, Series A, No. 102, paras 177, *European Human Rights Report*, 1986. No. 8, p. 329.

3. In wrestling with the above issue, as indeed with others from time to time, it is, admittedly, not only desirable but also necessary for this Court to learn from other international jurisdictions. At the same time though, it must be borne in mind that this Court is not only beginning, as it is entitled to and indeed obliged, to develop its own jurisprudence and practices. It cannot therefore afford to compromise its own capacity to do so by enslaving itself to any form of rigidity or to any mechanical approach; things should not be cast in stone. Being pragmatic is a virtue. I would have grave reservations with a mechanical approach to, and Application of, the law. In my view, heavens would not fall merely because in a given matter, the Court started with admissibility and not with jurisdiction, or vice-versa. A further problem is that adherence to the rigidity sometimes gives rise to a secondary time-consuming debate, namely, whether a particular point falls under admissibility or jurisdiction. This happens when such a point appears to be overlapping. As I do not subscribe to any view that the Court must always start with the one and not the other, I discuss the matter no further.

Separate opinion: NIYUNGEKO

1. I agree with the decision of the Court in the matter of *Tanganyika Law Society and the Legal and Human Rights Centre & Rev. Christopher Mtikila v the United Republic of Tanzania* as set out in paragraph 126 of its judgment of 14 June 2013. I however do not share its views on the two following issues: the order of treatment of the issues regarding the Court's jurisdiction and the admissibility of the Application on the one hand, and the Court's grounds and reasoning in deciding whether or not, it had *ratione temporis* jurisdiction on the other.

1. The order of treatment of issues relating to the jurisdiction of the Court and the admissibility of the Application

2. After summarising the respective submissions of the parties on the admissibility of the Application and on the *ratione temporis* jurisdiction of the Court (paragraphs 80 and 81), the Court ruled in the same order on the two issues (paragraphs 82 to 88). In like manner, the Court presented its decisions on these issues, following the same order (paragraph 126 of the judgment).

3. It should be noted that it is the first time in *the practice of the Court* that it is dealing with a matter by first considering the admissibility of the Application. In all its earlier decisions since 2009, it had always endeavoured to ensure *in limine* that it had jurisdiction to hear the matter, whether or not a party raised an objection in that regard.¹

In the circumstances, one would have expected that, in the judgment on this matter, the Court would have explained, be it in passing, the

1 Decisions of the Court can be found on the Court's website: www.african-court.org.

reasons for this change in approach. Failure to do so would leave the impression of inconsistency and lack of coherence. Unfortunately, nothing is explained in this regard in the judgment. One of the consequences will be that with the unexplained changes or fluctuation in the Court's practice, parties will be in the dark as to which legal issue to begin with henceforth, when they have to file an Application or make submissions before the Court. This may create unnecessary confusion.

4. In any case, this change in approach poses a *problem of principle*: is it possible for the Court to begin with the consideration of the admissibility of an Application before ensuring that it does have the jurisdiction to deal with the Application? In our opinion, the answer to this question is 'no' and for a certain number of reasons.

Firstly, one should not lose sight of the fact *that the jurisdiction of the Court is neither all embracing nor automatic in nature; it is a jurisdiction that has been attributed, subject to conditions, and therefore limited by definition*. A judge vested with such jurisdiction cannot start considering any aspect of an Application without ascertaining whether or not he or she does have jurisdiction.

Secondly, it should be realised that *whereas jurisdiction relates to the powers of the judge, the admissibility of the Application is one limb of the Application same as the merits*. In such circumstances, can a judge embark on the consideration of an aspect of an Application before determining whether he or she is in a position to consider the entire Application? Is there any sense in dealing with what he or she is requested to do before finding out whether he or she can or cannot do it? Logic and common sense would require that the Court should first and foremost ensure that it has jurisdiction before considering the admissibility of the Application.

5. This position is further buttressed, if need be, by *the manner in which Rule 39 of the Rules of Court is crafted*. That Rule prescribes that the Court should deal with these issues in this order: "Preliminary examination of the *competence* of the Court and of *admissibility* of Applications" (italics added). This provision clearly shows what was the initial intent of the Court on the order of consideration of issues relating to jurisdiction and admissibility.

6. In actual fact, the only stage in the procedure which should take precedence over the determination of the Court's jurisdiction is the *receipt and registration of the Application by the Registry*, after ensuring that its contents comply with the provisions of Rule 34 of the Rules of Court. *Receiving* the Application should not however be equated to the *admissibility of the Application* which lies within the jurisdiction of the Court and is therefore considered later by the latter, pursuant to Article 56 of the Charter and Rule 40 of the Rules of Court.

7. In the light of the above considerations, the Court ought to and should in future dispose of its jurisdiction before dealing with the Application submitted for consideration, except cogent reasons exist for it to deviate from that normal procedure.

II. Determining the *ratione temporis* jurisdiction of the Court

8. On the jurisdiction of the Court, the Respondent State had challenged the *ratione temporis* jurisdiction of the Court, drawn from the fact that the alleged violation (prohibition of independent candidates in presidential, legislative and local elections) occurred, in its case, before the entry into force of the Protocol establishing the Court (paragraph 80(3) of the judgment).

9. As stated in the judgment of the Court, the 2nd Applicant objects to the above submissions of the Respondent as follows:

“ ... a distinction has to be made between normative and institutional provisions. The rights sought to be protected were enshrined in the Charter to which Respondent was already a party at the time of the alleged violation; *although the Protocol came into operation later, it was merely a mechanism to protect those rights*. The Charter sets out rights while the Protocol provides an institutional framework for enforcement of those rights. The Applicant stated that it is not the ratification of the Protocol that establishes the rights, rather these rights existed in the Charter and the Respondent has violated them and continues to do so. The issue of retroactivity therefore does not arise” (italics added) (Paragraph 81(3)).

10. Relying apparently on those arguments of the 2nd Applicant to counter that objection, the Court dismissed it notably on the two grounds set out below:

“The rights alleged to be violated are protected under the Charter. By the time of the alleged violation, the Respondent had already ratified the Charter and was therefore bound by it. The Charter was operational and there was therefore a duty on the Respondent as at the time of the alleged violation to protect those rights.

At the time the Protocol was ratified by the Respondent and when it came into operation *in* the respect of the Respondent, the alleged violation was continuing and is still continuing: independent candidates are still not allowed to stand for the position of President or to contest Parliamentary and Local Government elections ...” (paragraph 84 of the judgment).

11. The second reason advanced by the Court (the continuing nature of the violation) is in order and raises no particular difficulty. However, the first reason (the prior ratification of the Charter) is difficult to grasp and creates confusion when considered against the specific objection raised by the Respondent State. In fact, whereas the objection by the Respondent State is based, as far as it was concerned, on *the date of entry into force of the Protocol* to establish the Court, the Court’s response is to invoke *the date of entry into force of the Charter* which was not an issue for the Respondent State. And one does not quite see what the Court draws as conclusion from the date of entry into force of the Charter, regarding the Respondent State’s argument of non-retroactivity of the Protocol.

12. In my opinion, in order to fully address the argument raised by the 2nd Applicant, the Court ought to have been unequivocal on this point and should have indicated that though the Respondent State was already bound by the Charter, the Court lacked temporal jurisdiction with respect to it as long as the Protocol conferring jurisdiction on it was yet to become operational (unless of course the argument of the

alleged continuing violation is invoked). That clarification is all the more necessary as, in regard to the Application of the principle of the non-retroactivity of treaties, the 2nd Applicant seems to be making a distinction between treaties of a normative nature and those of an institutional nature (*supra*, paragraph 9).

13. Such distinction however - which seems to suggest that only the date of entry into force of treaties guaranteeing substantial rights is relevant (as opposed to treaties setting up monitoring institutions) -, is not grounded anywhere in international law. Indeed, to take the instant case as an example, even though the Protocol establishes an institutional mechanism for the protection of substantial rights guaranteed under the Charter, it still remains “a treaty” within the meaning of the Vienna Convention on the Law of Treaties of 23 May 1969. Article 2.1(a) of this Convention provides that “‘treaty’ means an *international agreement concluded between States* in written form and governed by international law, whether embodied in a single instrument or two or more related instruments and *whatever its particular designation*” (italics added). As can be seen, on the one hand, any international agreement in written form between States can be considered as a treaty regardless of whether they set substantive norms or establish institutional mechanisms; on the other, its name is of no consequence.

14. Given that the Protocol establishing the Court is a treaty within the meaning of the Vienna Convention, all provisions of the convention are therefore applicable to it. The relevant provision applicable to the issue under consideration is Article 28 which deals with the principle of non-retroactivity of treaties as follows: “Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party”.

To circumvent the Application of the principle of non-retroactivity of the treaties in the instant case, the 2nd Applicant relies neither on a different intention of the parties arising from the Protocol itself, nor on a different intention otherwise established.

15. In fact, to determine the *ratione temporis* jurisdiction of the Court, in a matter such as this one, there must be *cumulative* consideration of the dates of entry into force in regard to the Respondent State, of the African Charter on Human and Peoples’ Rights, the Protocol establishing the Court and the optional declaration recognizing the jurisdiction of the Court to receive Applications from individuals and non-governmental organizations as provided for in Article 34(6) of the Protocol. If the alleged violation had occurred prior to any of these crucial dates, the principle of non-retroactivity would have applied in full force, regardless of whether the alleged violation took place after the other dates.

16. In the instant case, and in relation to the issue under consideration, the need to take into account the date of entry into force of the Protocol with regard to the Respondent State is all the more crucial as it is indeed the Protocol that specifically conferred the contentious

jurisdiction on the Court (See Articles 3 and 5 of the Protocol). How could one consider an objection challenging the jurisdiction of the Court while disregarding the date of entry into force of the Protocol conferring the said jurisdiction on the Court? To me, that is simply inconceivable.

17. Once again, in my opinion, to adequately respond to the specific argument raised by the 2nd Applicant, the Court ought to have clearly endorsed the Respondent's position, and indicated that the relevant date to be considered with regard to the Respondent in determining its *ratione temporis* jurisdiction in this matter, should be that of the entry into force of the Protocol establishing the Court, then subsequently rely on the continuing nature of the alleged violation in order to determine its jurisdiction.

Reverend Christopher Mtikila v Tanzania (reparations) (2014)
1 AfCLR 72

Reverend Christopher R. Mtikila v The United Republic of Tanzania

Ruling on reparations, 13 June 2014. Done in English and French, the English text being authoritative.

Judges: AKUFFO, NGOEPE, OUGUERGOUZ, TAMBALA, THOMPSON, ORE, GUISSÉ, KIOKO and ABA

Recused under Article 22: RAMADHANI

Reparation ruling following on previous finding on merits in relation to violation of the right to stand for election. Among other things, the Court held that a judgment can constitute a sufficient form of reparation for moral damages.

Reparations (nexus between claim and facts of the case, 29-37; legal costs and expenses, 39-41; guarantees of non-repetition, duty to report back to Court on compliance with its ruling, 43; measures of satisfaction, publication and dissemination of judgment, 44-45)

I. The parties

1. Reverend Christopher R Mtikila (hereinafter referred to as the “Applicant”) is a national of the United Republic of Tanzania. He brings this Application in his personal capacity.

2. The Respondent is the United Republic of Tanzania and is brought before this Court because it has ratified the African Charter on Human and Peoples’ Rights (hereinafter referred to as the “Charter”), as well as the Protocol. Furthermore, the Respondent has made a declaration in terms of Article 34(6) of the Protocol, accepting to be brought before this Court by an individual or, a Non-Governmental Organisation (NGO) with Observer Status before the African Commission on Human and Peoples’ Rights (hereinafter referred to as the “Commission”).

II. Nature of the Application

3. The original Application being Consolidated Applications Nos 009 of 2011 *Tanganyika Law Society and the Legal and Human Rights Centre v The United Republic of Tanzania* and 011 of 2011 *Reverend Christopher R Mtikila v The United Republic of Tanzania* was in respect of the Eighth Constitutional Amendment Act passed by the United Republic of Tanzania, which received Presidential assent in the same year. This Act required that any candidate for Presidential, Parliamentary and Local Government elections had to be a member of,

and be sponsored by, a political party. In the said Consolidated Applications, the Applicant herein was the 2nd Applicant.

4. The brief background of that Application was that:

- i. In 1993, the Applicant filed a Constitutional case in the High Court, being Miscellaneous Civil Cause No 5 of 1993 challenging the amendment to Articles 39, 67 and 77 of the Constitution of the United Republic of Tanzania and to Section 39 of the Local Authorities (Elections) Act 1979, as later amended by the Local Authorities (Elections) Act No.7 of 2002 through the Eighth Constitutional Amendment Act, claiming that it conflicted with the Constitution and was therefore null and void.
- ii. On 16 October 1994, the Respondent tabled a Bill in Parliament (the Eleventh Constitutional Amendment Act No. 34 of 1994) seeking to nullify the right to independent candidates to contest Presidential, Parliamentary and Local Government elections.
- iii. On 24 October 1994, the High Court issued its judgment in Miscellaneous Civil Cause No 5 of 1993 in favour of the Applicant and declaring that independent candidates for Presidential, Parliamentary and Local Government elections are legally allowed.
- iv. On 2 December 1994, the Tanzanian National Assembly passed the Bill (Eleventh Constitutional Amendment Act No 34 of 1994) whose effect was to maintain the Constitutional position before Miscellaneous Civil Cause No 5 of 1993, by amending Article 21(1) of the Constitution of the United Republic of Tanzania. This Bill became law on 17 January 1995 when it received Presidential assent thus negating the High Court's judgment in Miscellaneous Civil Cause No 5 of 1993.
- v. In 2005, the Applicant instituted Miscellaneous Civil Cause No 10 of 2005, *Christopher Mtikila v Attorney General* in the High Court of Tanzania, challenging the amendments to Articles 39, 67 and 77 of the Constitution of the Republic of Tanzania as contained in the Eleventh Constitutional Amendment Act of 1994. On 5 May 2007, the Court again found in his favour, holding that the impugned amendments violated the democratic principles and the doctrine of basic structures enshrined in the Constitution. By this judgment, the High Court allowed independent candidates.
- vi. In 2009, in Civil Appeal No 45 of 2009, the Attorney General of the Respondent challenged this judgment in the Court of Appeal of the United Republic of Tanzania (the Court of Appeal). In its judgment of 17 June 2010, the Court of Appeal reversed the High Court's judgment of 5 May 2007, thereby disallowing independent candidates for elections to Local Government, Parliament or the Presidency.
- vii. The Court of Appeal ruled that the matter was a political one and therefore had to be resolved by Parliament.

5. As the municipal legal order currently stands in the United Republic of Tanzania, candidates who are not members of, or sponsored by a political party cannot run in the Presidential, Parliamentary or Local Government elections.

6. On 14 June 2013, this Court delivered its judgment in the Consolidated Applications herein before referred to and held that:

- "1. In respect of the 1st Applicants the Court holds:
 - Unanimously, that the Respondent has violated Articles 10 and 13(1) of the Charter.

- By majority of 7 to 2, (Judges Modibo Tounty GUINDO and Sylvain ORÉ dissenting), that the Respondent has violated Articles 2 and 3 of the Charter.
- 2. In respect of the 2nd Applicant, the Court holds:
 - Unanimously, that the Respondent has violated Articles 10 and 13(1) of the Charter.
 - By majority of 7 to 2, (Judges Modibo Tounty GUINDO and Sylvain ORÉ dissenting), that the Respondent has violated Articles 2 and 3 of the Charter.
- 3. The Respondent is directed to take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations found by the Court and to inform the Court of the measures taken.
- 4. In accordance with Rule 63 of the Rules of Court, the Court grants leave to the 2nd Applicant to file submissions on his request for reparations within thirty (30) days hereof and the Respondent to reply thereto within thirty (30) days of the receipt of the 2nd Applicant's submissions.
- 5. In accordance with Rule 30 of the Rules of Court, each Party shall bear its own costs."

III. Procedure

7. By a letter dated 25 July 2013, the Applicant filed his submissions on compensation and reparations pursuant to the Court's Judgment of 14 June 2013 which granted his Application, that the United Republic of Tanzania had violated his right to participate in public affairs, his right to freedom of association, and the right not to be discriminated against. By the same Judgment, the Court directed that, in accordance with Rule 34(5) of the Rules, the Applicant must file his submissions on reparations within thirty (30) days of the Judgment.

8. Pursuant to Rule 35(2) of the Rules of Court, the Applicant's submissions were served on the Respondent by a letter dated 29 July 2013 in which the Respondent was advised to file its Response within thirty (30) days of receipt thereof.

9. By a letter dated 8 July 2013, the Applicant's Counsel made an Application for legal aid from the Court, to enable them to draft conclusions on remedies prayed for and to present the Applicant's arguments. By a letter dated 2 August 2013, the Registrar advised the Applicant's Counsel that the Court had refused the request for legal aid.

10. By a letter dated 29 August, 2013, the Respondent filed its Response to the Application for reparations submitted by the Applicant.

11. The Respondent's response was served on the Applicant by the Registrar's letter of 30 August 2013.

12. By an electronic mail of 2 September 2013, Counsel for the Applicant requested for the annexes to the Respondent's Response and by an electronic mail of 3 September 2013, the Registry advised the Counsel for the Applicant that the Respondent indicated that it would be sending the hard copies of the said annexes in due course.

13. By a letter dated 11 December 2013, the Registry informed the Applicant's Counsel of the Court's directive that he should file the Reply to the Respondent's Response within thirty (30) days of receipt of the letter.

14. On 31 January 2014, the Registrar wrote to the Counsel for the Applicant reminding him that he is yet to file the Reply to the Respondent's Response to the Application. This Reply was filed on 10 February 2014 and served on the Respondent by the Registrar's letter dated 13 February 2014.

15. By a letter dated 18 March 2014, the Parties were informed that pleadings are closed and that the Court is proceeding to determine the matter on the pleadings before it.

IV. Remedies sought

16. The Applicant alleges that the violations by the Respondent led him to join different political parties in order to participate in elections and later to set up his own party for the same purpose. Consequently the Applicant alleges that these violations have also led him to engage in litigation at various levels including before this Court.

17. The Applicant is claiming moral damages occasioned by stress and subsequent moral harm worsened by various instances of police searches on him and loss of the opportunity to participate effectively in the affairs of his country. The damages he claims in this regard, amount to 831, 322, 637.00 TSH, (Eight Hundred and Thirty One Million, Three Hundred and Twenty Two Thousand, Six Hundred and Thirty Seven Tanzania Shillings).

18. The Applicant is also claiming costs and expenses arising from the human rights violations by the Respondent, including costs of setting up his political party and participating in elections and costs of litigation at the national level. This amounts to 4,168, 667, 363. 00 TZS, (Four Billion, One Hundred and Sixty Eight Million, Six Hundred and Sixty Seven Thousand, Three Hundred and Sixty Three Tanzania Shillings).

19. Further, the Applicant claims Attorney's fees in respect of litigation at the Court amounting to US\$ 60,250.00 (Sixty Thousand, Two Hundred and Fifty United States Dollars).

20. The Applicant also asks that the Court sets a timeline for the Respondent to comply with the Court's Judgment and that the Respondent reports every three months on such compliance until the Court is satisfied that the Judgment has been fully complied with.

21. As a consequence, the Applicant prays the Court:

- i. "To set its reparation claims at 5,000,000,000 TSH;
- ii. To set his lawyer's fees for the international litigation at the scale of the legal aid established by the Court both for the main case and for the subsidiary case on reparation; and
- iii. To order the Government of the United Republic of Tanzania to report every three months to the Court on the implementation of the Court's orders."

V. Respondent's Response to the Application

22. The Respondent raised objections to the Applicant's Application for reparation on the grounds that:

On the procedure:

- i. The granting of the extension of time *ex parte* to the Applicant to file the submissions on reparations was not in line with the principle of equality of arms and natural justice as it was not served on the Respondent and the Respondent was not allowed to submit observations on the request or to indicate its agreement, or otherwise, thereto.
- ii. There was no need for the Applicant to be granted an extension of time to file its submissions on reparations. The request for reparations was included in the main Application and he was only required to submit the amount of reparations and evidence thereafter. The Applicant's Counsel were present in Court on 14 June 2013 when the Judgment was delivered, therefore, they need not have waited to receive the Judgment and the Separate Opinions thereto to enable them file their submissions on reparations. In any event, the Rules of Court do not require that an Applicant be served with the Judgment and Separate Opinions first before making submissions on reparations.
- iii. Even after the Applicant was granted up to 25 July 2013 to file the submissions, the date of receipt by the Registry stamped on the submissions is 29 July 2013, therefore, since the submissions were filed out of time, they should be dismissed.

23. On the substance of the Application, the Respondent argues thus:

- i. The issue of violations of the provisions of Articles 2, 3, 10 and 13(1) of the Charter did not arise at all since the Applicant had in fact decided to divert to the system of independent candidature after his party, the Democratic Party, was refused registration. The Democratic Party was not registered because the Applicant refused to submit to verification of its members, contrary to the provisions of Sections 10(b) and (c) of the Political Parties Act and also restricted its activities only to the Mainland to the exclusion of Zanzibar, contrary to the Constitution of the United Republic of Tanzania. The Applicant cannot therefore claim to have been prevented from participating in public affairs or to have been forced to join a political party in order to participate in elections. The Applicant's non-compliance with the Political Parties Act and the Constitution was therefore connected to his litigation at the domestic level therefore equity demands that he should not seek reparations for his failure to comply with the law.
- ii. The Applicant is put to strict proof on the alleged stress and subsequent moral harm worsened by the various instances of Police searches on him. The Applicant did not claim for these damages, either in his Application, or in his litigation at the national courts, and in respect of the latter, he therefore has not exhausted the local remedies as required, and the Court cannot therefore entertain this claim.
- iii. The amount claimed for moral prejudice and loss of opportunity to participate effectively in public affairs is exaggerated. The loss of opportunity to participate in public affairs is premised on very varied and unpredictable political, social and economic factors obtaining in the Respondent State. Furthermore, the Applicant participated voluntarily in the political processes.

- iv. The inclusion of the 25,000.00 TZS (Twenty Five Thousand Tanzania Shillings). for provisional registration of the Democratic Party, which was a statutory requirement for anyone wishing to register a Political Party, to the figure in the Applicant's reparation claims is disputed for reasons that the Applicant had to follow the legal procedure for registering a Political Party. Therefore the Respondent submits that the loss should not be attributed to the Respondent as this is a legal requirement.
 - v. The Applicant should be put to strict proof on the exaggerated amount of costs and expenses amounting to 4,168, 667, 363.00 TZS (Four Billion, One Hundred and Sixty Eight Million, Six Hundred and Sixty Seven Thousand, Three Hundred and Sixty Three Tanzania Shillings)..
 - vi. The cost item in the Income and Expenditure Account on independent presidential campaign expenses amounting to 93, 835, 000.00 TZS, (Ninety Three Million, Eight Hundred and Thirty Five Thousand Tanzania Shillings). should be disallowed as the law in Tanzania does not provide for independent candidature.
 - vii. The itemisation of the expenses in the Applicant's Income and Expenditure Account is contrary to the Political Parties Act and the Election Expenses Act and is fabricated and exaggerated. The expenses are also not itemised in a detailed manner to facilitate detailed responses by the Respondent; and the evidence of the breakdown ought to have been provided with the submissions on reparations within the time limit provided. The Respondent should be given ample opportunity to participate effectively to challenge, verify and authenticate all specific documents related to the transactions.
 - viii. Generally, the claim for costs of litigation before the domestic courts is contested and is against the order of the Court that each Party shall bear its own costs. Furthermore, the Applicant has not detailed what these costs are and has not submitted evidence to prove that he incurred them. In addition, the Applicant has never been awarded costs by the national courts and the Court cannot award him these particular costs as it will be usurping the jurisdiction of the national courts in this regard.
 - ix. The current Constitutional review process is sufficient reparation for the non-pecuniary damage claimed.
 - x. The Respondent strongly disputes the Applicant's claim for costs of litigation before the Court amounting to US\$ 60,250.00 (Sixty Thousand, Two Hundred and Fifty United States Dollars). The Respondent contends that this claim is misplaced and contrary to the arrangement between the Applicant and his Counsel. The Respondent states that this is an attempt by the Applicant for "the retrospective acquisition of funds from the Court yet his Counsel acted for him on a *pro bono* basis."
- 24.** On the basis of the foregoing, the Respondent prays that:
- i. "The Applicant's claim that reparations be set at Five Billion Tanzania Shillings (5,000,000,000.00 Tsh) are strongly disputed for being fabricated, exaggerated and blown up. The Respondent prays for the Court to dismiss the claim with costs".
 - ii. "The Applicant be ordered to submit to the Court and the Respondent a breakdown of the alleged claims and detailed analysis and evidence related thereto for authentication and verification before the hearing of the case".

- iii. The Respondent prays for dismissal of the Applicant's claims that his lawyer's fees for the international litigation before this Court should be set at the scale of the legal aid scheme established by the Court both for the main case and the subsidiary case on reparation. The Respondent maintains that this is an extraneous matter in the Application.
- iv. The Respondent prays for the dismissal of the Applicant's prayer on the order to be issued to the Respondent to report every three months, to the Court regarding the implementation of the Court's orders. The Respondent states that this is mere speculation and imaginations on the part of the Applicant.
- v. That the Court orders that the Respondent is not required to repair the supposed losses claimed by the Applicant".
- vi. That the Court orders that the current Constitutional review process constitutes enough remedy for the Applicant.
- vii. "The Respondent prays for the dismissal of the reparations claim by the Applicant in its entirety, with costs".
- viii. The Respondent prays for any other relief(s) that the Court may deem fit to grant."

The Applicants' Reply to the Respondent's Response to the Application is as follows:

A. On the Procedure

25.

- i. The Applicant maintains that he filed the submissions on reparations on 25 July 2013 and that in any event, the Respondent has in the past benefitted from extensions of time granted by the Court without the Applicant having had a chance to make observations on the same.
- ii. The Applicant also maintains that he did not have access to the annexes to the Respondent's Response, as he could not find them, particularly the cases referred to therein though he was involved in these cases. It is up to the Respondent State which referred to the said cases to produce the documents and is in a position to do so since they are a product of national institutions. In this regard therefore, the Applicant is unable to respond fully to the Respondent's Response.

B. On the substance

- iii. the Applicant states that the creation of the Democratic Party and the subsequent cost of running the party for all these years resulted exclusively from the strategy adopted by the Respondent to prevent any independent candidate from standing for election, in violation of the Charter. Litigation before the African Court on this matter is also a natural consequence of this state of affairs consolidated by the decision of the Court of Appeal, and it can also be said that it is the result of the shortcoming of the Respondent State, as pointed out by the Court in its Judgment of 14 June 2013.
- iv. Regarding the claim for compensation for stress and moral harm occasioned to the Applicant, he maintains that this stress is a matter of common sense arising out of the management of any structure of a federal nature (involving Tanganyika and Zanzibar). This is particularly where such a structure is involved in carrying out political and electoral campaigns at different levels and in all the regions, as this can only lead to considerable stress, especially as it was full time work which

prevented the Applicant from carrying out any other professional activity. In the instant case, only the Applicant's religious duties were compatible with the management of his political party.

- v. Furthermore, the Applicant states that the Accounts Clerks who certified the accounts he submitted to the Court are available and may be called to testify before the Court. It is also up to the Respondent State to show proof of errors, if any, in the Applicant's claim for damages.
- vi. Regarding the Attorney's fees for the litigation before the Court, the Applicant submits that the expenses must be imputed on the Respondent State as the Court held it responsible for the violation of its obligations under the Charter, particularly as the Applicant's request for legal aid from the Court was not granted.
- vii. The Applicant contends that the Court's Judgment means that the Respondent should be liable for paying the damages, as the Court stated that the electoral laws of the Respondent State are a violation of the Charter in relation to the rights of the Applicant. Article 30 of the Protocol obliges State Parties thereto to implement the decisions of the Court.
- viii. The Applicant stated that the position of the Respondent which maintains that the law as it currently is in Tanzania prohibits independent candidates for electoral positions, highlights the need for the Court to draw up a precise calendar to ensure that the Respondent State complies with the Judgment of the Court.
- ix. For these reasons, the Applicant prays the Court to reject all the arguments presented by the Respondent and to grant his prayers as per his Application.

VI. The Court's Ruling on the *Ex Parte* extension of time for the Applicant to file its submissions

26. Based on the fact that the Applicant received the Judgment of the Court of 14 June 2013 in Consolidated Applications Nos. 009 of 2011 *Tanganyika Law Society and The Legal and Human Rights Centre v The United Republic of Tanzania* and 011 of 2011 *Reverend Christopher R Mtikila v The United Republic of Tanzania* and the Separate Opinions thereto, on 26 June 2013, the Court decided that the thirty (30) days for the Applicant to file submissions on reparations would be reckoned from 26 June 2013. Therefore, the Court gave the Applicant up to 25 July 2013 to file the submissions on reparation. The Registrar communicated this decision of the Court with a copy to Respondent. The electronic mail forwarding the submissions to the Registry was dated 25 July 2013 but the date of receipt stamped on the document was 29 July 2013, therefore the Applicant filed the submissions on reparations within the time directed by the Court. Though the Respondent was not given an opportunity to be heard before the Court decided to grant the Applicant up to 25 July 2013 to file its submissions, the Respondent has had an opportunity to state its position on the matter and did nothing. The Court finds that there has been no miscarriage of justice occasioned. Accordingly the Application for reparation is properly before the Court.

VII. The Court's Ruling on the Merits of this Application

27. One of the fundamental principles of contemporary international law on State responsibility, that constitutes a customary norm of international law, is that, any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation. The *locus classicus* in this regard is the *Germany v Poland (Factory at Chorzów)* Case where the Permanent Court of International Justice (PCIJ) stated the principle thus:

“... the Court observes that it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation. In Judgment No. 8, when deciding on the jurisdiction derived by it from Article 23 of the Geneva Convention, the Court has already said that reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself. The existence of the principle establishing the obligation to make reparation, as an element of positive international law, has moreover never been disputed in the course of the proceedings in the various cases concerning the Chorzów factory.”¹

28. This principle of international law is reflected in the Protocol. Article 27(1) of the Protocol provides that: “If the Court finds that there has been violation of a human or peoples’ rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.”

A. Compensation

i. Pecuniary damages

29. The Applicant is claiming pecuniary damages allegedly arising from the human rights violations by the Respondent, including costs of setting up his political party and participating in elections and costs of litigation at the national level. The Commission has recognised the importance of restitution and has held that a State that has violated the rights enshrined in the Charter should “take measures to ensure that the victims of human rights abuses are given effective remedies, including restitution and compensation.”² Though the Commission recognises a victim’s right to compensation, it has not yet identified which factors States should take into account in their assessment of the compensation due. Rather, the Commission has recommended that a State compensate a victim for the torture and trauma suffered,³ “adequately compensate the victims in line with international

1 Merits 1928 PCIJ *Series A*, Judgment of the Permanent Court of International Justice No 17 of 13 September 1928, at 29.

2 Consolidated Communications 279/03 and 296/05 *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan* Twenty Eighth Activity Report: November 2009- May 2010 para 229(d).

3 Communication 288/04 *Gabriel Shumba v Zimbabwe* 2 May 2012 para 194(1).

standards”⁴ and ensure payment of a compensatory benefit.⁵ The Inter-American Court of Human Rights has held that with regard to pecuniary damages and the circumstances under which compensation is appropriate, pecuniary damages involve “the loss of or detriment to the victims’ income, the expenses incurred as a result of the facts, and the monetary consequences that have a causal nexus with the facts of the case sub judice.”⁶ In the *Factory at Chorzów* case the Permanent Court of International Justice stated that reparation may take the form of compensation “involving payment of a sum corresponding to the value which a restitution in kind would bear.”⁷

30. In this case, the Court notes that, though the Applicant submitted his Income and Expenditure Statement, and raised arguments on the same, there were no sufficient evidentiary elements presented to establish that these damages directly arose from the facts of this case and the violations declared in the Judgment of 14 June 2013. Furthermore, the Applicant insisted that he would present his evidence at a yet to be determined hearing and therefore did not adduce cogent evidence in the course of the procedural opportunities the Court granted for this purpose. The Applicant did not produce any receipts to support the expenses he claims to have incurred so there is no evidence of any pecuniary loss as alleged. In addition, by virtue of Rule 27(1) of the Rules, the Court’s procedure consists primarily of written proceedings with public hearings being the exception rather than the rule. Therefore, the Applicant, being aware of the Court’s procedure failed to provide the evidence of the expenses he claims in his submissions.

31. It is not enough to show that the Respondent State has violated a provision of the Charter; it is also necessary to prove the damages that the State is being required by the Applicant to indemnify. In principle, the existence of a violation of the Charter is not sufficient, *per se*, to establish a material damage.

32. In view of the foregoing, the Court does not have the evidentiary elements to prove a causal nexus of the facts of this case to the damages claimed by the Applicant in relation to the violations declared in its Judgment of 14 June 2013. As such, it considers that it cannot grant any compensation for pecuniary damages.

4 Communication 334/06 *Egyptian Initiative for Personal Rights and Interights v Egypt* Thirty First Activity Report: May 2011 – November 2011 *dispositif* para 2.

5 Consolidated Communications 54/91, 61/91, 96/93, 98/93, 164/97, 196/97 and 210/98 *Malawi African Association and Others v Mauritania* Thirteenth Activity Report: 1999 – 2000 *dispositif* para 3.

6 Inter American Court of Human Rights (IACHR) Case of *Bámaca Velásquez v Guatemala*. Reparations and Costs. Judgment of 22 February, 2002. Series C No 91, para 43, and Case of *García Cruz and Sánchez Silvestre*. Merits, Reparations and Costs. Judgment of 26 November 2013, Series 273, para 212.

7 See Note 1 at 47.

ii. Non-pecuniary damages

33. The Applicant is also claiming moral damages occasioned by stress and subsequent harm worsened by various instances of police searches on him, and loss of the opportunity to participate effectively in the affairs of his country. This claim amounts to 831, 322, 637.00 TZS, (Eight Hundred and Thirty One Million, Three Hundred and Twenty Two Thousand, Six Hundred and Thirty Seven Tanzania Shillings).

34. The term “moral” damages in international law includes damages for the suffering and afflictions caused to the direct victim, the emotional distress of the family members and non-material changes in the living conditions of the victim, if alive, and the family. Moral damages are not damages occasioning economic loss.

35. In its jurisprudence, the Commission has recommended compensation for torture and trauma suffered.⁸ The Inter-American Court has developed the concept of non-pecuniary damage and has established that it “may include both the suffering and distress caused to the direct victims and their next of kin, and the impairment of values that are highly significant to them, as well as changes of a non-pecuniary nature in the living conditions of the victims or their family.”⁹

36. The European Court of Human Rights will award non-pecuniary damages (or moral damages) on the basis of equitable consideration. This head covers such issues as pain and suffering, anguish and distress, and loss of opportunity. This has been awarded in some cases¹⁰ while in others the Court has refused to speculate whether there were such losses.¹¹

37. With regard to his claim for non-pecuniary damages, the Applicant has failed to produce any evidence to support the claim that these damages were directly caused by the facts of this case. The Court will not speculate on the existence, seriousness and magnitude of the non-pecuniary damages claimed. In any event, in the view of the Court, the finding of a violation by the Respondent in the Court’s Judgment of 14 June 2013 and the orders contained therein are just satisfaction for the non-pecuniary damages claimed.¹²

B. Legal costs and expenses

38. The Applicant claims Attorney’s fees in respect of litigation at the Court amounting to US\$ 60,250.00 (Sixty Thousand, Two Hundred and Fifty United States Dollars). These fees are for the three (3) Counsel

8 See Note 3 above.

9 IACHR *Case of Villagrán Morales et al. v Guatemala – Case of “Street Children”, Reparations and Costs* Judgment of 26 May 2001. Series C No 77, para 84.

10 *Bonisch v Austria* 13 EHRR 409 and *Weeks v UK* 13 EHRR 435 para 13.

11 *Perks and Others v UK* 30 EHRR 33.

12 See also International Court of Justice *United Kingdom of Great Britain and Northern Ireland v People’s Republic of Albania (Corfu Channel Case)*, *Merits*, Judgment of 9 April 1949, ICJ Reports 1949 at 36 and IACHR *Case of Garrido and Baigorria v Argentina. Reparations and Costs*. Judgment of 27 August 1998, Series C No 39 para 79.

and their three (3) assistants. The Applicant claimed that, from early May 2011 to June 2011 when *Application 011 of 2011* was filed, each of the Counsel spent thirty (30) hours each on the case with the assistants spending forty (40) hours each on the case. Regarding the Reply, the Applicant claims that the Counsel spent a total of fifteen (15) hours and the assistants a total of fifteen (15) hours. For the public hearing, the Applicant claims that the Counsel spent a total of fifteen (15) hours for preparation and attendance by one of them. For the reparation claim, the Applicant claims that each Counsel has spent twenty (20) hours for preparation of the brief. The Applicant claims that the hourly rate is US\$ 250.00 (Two Hundred and Fifty United States Dollars) for Counsel and US\$150.00 (One Hundred and Fifty United States Dollars) for the assistants. The Applicant claims that this comes to a total of One Hundred and Eighty (180) hours for the Counsel, amounting to (US\$ 45,000.00 (Forty Five Thousand United States Dollars) and a total of One Hundred and Thirty Five (135) hours for the Assistants amounting to US\$ 20,250.00 (Twenty Thousand Two Hundred and Fifty United States Dollars). Counsel for the Applicant have stated that “though they believe in the Court, they should not bear the cost of the litigation especially when the Respondent could have avoided further litigation had it implemented the decision of the High Court of Tanzania at Dar es Salaam in Miscellaneous Civil Cause No. 5 of 1993”. In the alternative, Counsel for the Applicant stated that they would accept reimbursement of their costs in line with the scales set out in the Legal Aid Policy of the Court.

39. The Court notes that expenses and costs form part of the concept of “reparations”. Therefore, where the international responsibility of a State is established in a declaratory judgment, the Court may order the State to compensate the victim for expenditure and costs incurred in his or her efforts to obtain justice at the national and international levels.¹³

40. Notwithstanding the foregoing, the Court is of the view that the Applicant has to remit probative documents and to develop arguments relating the evidence to the facts under consideration and, when dealing with alleged financial disbursements, clearly describe the items and justification thereof.¹⁴ As the Applicant bears the burden of proof regarding the reparations claimed and having failed to develop the arguments relating the evidence to the facts under consideration, the Court cannot grant his claims. Furthermore, considering that this Application arises from Consolidated Applications Nos. 009 of 2011 *Tanganyika Law Society and The Legal and Human Rights Centre v The United Republic of Tanzania* and 011 of 2011 *Reverend Christopher R Mtikila v The United Republic of Tanzania* in respect of which the Court decided that each Party should bear its own costs, then it follows that the costs for the current Application should be borne by each Party.

¹³ IACHR Case of *Garrido and Baigorria v Argentina*. Reparations and Costs. Judgment of 27 August 1998. Series C No 39 para 79.

¹⁴ IACHR Case of *Chaparro Álvarez and Lapo Iñiguez v Ecuador* Preliminary Objections, Merits Reparations and Costs Judgment of 21 November 2007 Series C No 170 para 277.

41. In consideration of the above-mentioned, the evidence presented by the Applicant and the corresponding arguments relating to the Attorney's fees do not allow for a complete justification of the amounts requested, therefore this claim is refused.

C. Guarantees of non-repetition

i. Request to adopt measures under domestic law

42. The Court reiterates the obligation of the Respondent State, as set out in Article 30 of the Protocol, to comply with the Court's Judgment. In its Judgment of 14 June 2013, the Court ordered that: "The Respondent is directed to take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations found by the Court and to inform the Court of the measures taken."

43. The Court notes that in its Reply to the Applicant's submissions on reparations, the Respondent maintains that the Court's Judgment of 14 June 2013 was wrong since the law in the Respondent State prohibits independent candidature for election to the Presidency, to Parliament and to Local Government. This was despite the Court's judicial finding that this prohibition is not in conformity with the Charter. This stance by the Respondent State is of concern to the Court and more so since the Respondent has never reported to the Court on the measures it is taking to adopt the constitutional, legislative and all other measures necessary to bring its law on candidature for elections to the Presidency, Parliament and to Local Government in conformity with the Charter. In this regard, therefore, the Court grants the Applicant's prayer but orders the Respondent State to report to the Court, within six (6) months from the date of this Ruling, on the implementation of the Court's judgment of 14 June 2013.

D. Measures of satisfaction

i. Publication and dissemination of the Judgment of 14 June 2013

44. Though none of the Parties made submissions on measures of satisfaction, pursuant to Article 27 of the Protocol and the inherent powers of the Court, the Court is considering this measure.

45. The Court affirms its position as set out in paragraph 37 hereof, that judgment, *per se*, can constitute a sufficient form of reparation for moral damages.¹⁵ In the light of the concerns of the Court, as expressed in paragraph 43 hereof, the Court orders that the Respondent State must, within six (6) months of the date of this Ruling, publish:

- i. the official English summary developed by the Registry of the Court, of the Judgment of the Court of 14 June 2013 which must be translated to Kiswahili at the expense of the Respondent State and published in

15 For instance, see IACHR *Case of Neira Alegria et al v Perú. Reparation and Costs*. Judgment of 19 September 1996 *Series C* No 29, para 56.

both languages, once in the official gazette and once in a national newspaper with widespread circulation; and

- ii. the Judgment of the Court of 14 June 2013, in its entirety in English, on an official website of the Respondent State, and remain available for a period of one (1) year.

ii. For these reasons

46. The Court unanimously holds:

1. That the Judgment of the Court of 14 June 2013 in Consolidated Applications Nos. 009 of 2011 *Tanganyika Law Society and The Legal and Human Rights Centre v The United Republic of Tanzania* and 011 of 2011 *Reverend Christopher R. Mtikila v The United Republic of Tanzania* constitutes *per se* a sufficient form of reparation for non-pecuniary damages.

2. The Applicant's claims for pecuniary damages, having not been proved, are hereby dismissed.

3. The Applicant's claims for legal costs having not been proved are hereby dismissed.

4. The State is hereby ordered to submit to the Court, within six months starting from the date of this Ruling, a report on the measures it has taken in compliance with the Judgment of the Court of 14 June 2013 in Consolidated Applications Nos. 009 of 2011 *Tanganyika Law Society and The Legal and Human Rights Centre v The United Republic of Tanzania* and 011 of 2011 *Reverend Christopher R Mtikila v The United Republic of Tanzania*.

5. The State is hereby ordered to issue the publications indicated in paragraph 45 of this Ruling, within a period of six (6) months from the date of this Ruling. These publications are:

- i. the official English summary developed by the Registry of the Court, of the Judgment of the Court of 14 June 2013 which must be translated to Kiswahili at the expense of the Respondent State and published in both languages, once in the official gazette and once in a national newspaper with widespread circulation;

- ii. the Judgment of the Court of 14 June 2013, in its entirety in English, on an official website of the Respondent State, and remain available for a period of one (1) year.

6. Within nine (9) months of the date of the Ruling, the State shall submit to the Court a report describing the measures taken under paragraph 4 above.

7. In accordance with Rule 30 of the Rules of Court, each Party shall bear its own costs.

**Ekollo Moundi Alexandre v Cameroon and Nigeria (jurisdiction)
(2011) 1 AfCLR 86**

Ekollo Moundi Alexandre v Republic of Cameroon and Federal Republic of Nigeria

Decision, 23 September 2011. Done in English and French, the French text being authoritative.

Judges: NIYUNGEKO, AKUFFO, MUTSINZI, NGOEPE, GUINDO, OUGUERGOUZ, TAMBALA, ORE

Recused under Article 22: THOMPSON

The Court rejected the Application due to one of the Respondent States not having ratified the Court Protocol and the other not having filed the Declaration under Article 34(6) allowing individuals and NGOs to file cases directly before the Court.

Jurisdiction (party to Protocol; Article 34(6) declaration, 9)

Procedure (transfer to Commission)

Separate opinion: OUGUERGOUZ

Jurisdiction (6)

Procedure (referral to the Commission, 12; reasons, 21)

1. By an Application dated 20 May 2011, Ekollo Moundi Alexandre, domiciled in Douala (Cameroon), brought before the Court, a case against the Republic of Cameroon and the Federal Republic of Nigeria, alleging violation of Articles 3, 5, 6, 7 and 13(3) of the African Charter on Human and Peoples' Rights.
2. Pursuant to 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 8(2) of the Rules of Court (hereinafter referred to as the Rules), Judge Elsie N Thompson, a member of the Court, of Nigerian nationality, recused herself.
3. Pursuant to Rule 34(1) of the Rules, the Registry acknowledged receipt of the Application in a letter dated 26 May, 2011.
4. By letter dated 10 June, 2011, the Registry sought to ascertain from the Legal Counsel of the African Union Commission, if the Respondent States had made the declaration envisaged under Article 34(6) of the Protocol.

5. By letter dated 13 June 2011, the Legal Counsel of the African Union Commission informed the Registry that neither Cameroon nor Nigeria had made the above-mentioned declaration; and at the same time attached a list on the status of ratification of the Protocol which indicates that Cameroon had not even ratified the Protocol.

6. The Court notes that Nigeria, a party to the Protocol, has not made the declaration and Cameroon has not even ratified the Protocol.

7. Article 5(3) of the Protocol provides that: “the Court may entitle relevant non- governmental organizations (NGOs) with observer status before the Commission and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol”,

8. Article 34(6) on its part provides that: “At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration”.

9. Read together, the above provisions allow for the Court to be seized directly by an individual only when a Respondent State has made the declaration authorizing such seizure.

10. It therefore follows from Article 34(6) of the Protocol that the Court manifestly lacks jurisdiction to receive the Application filed by Ekollo Moundi Alexandre against Cameroon and Nigeria.

11. Article 6(3) of the Protocol provides that the Court may consider cases or transfer them to the Commission. The Court considers from the allegations set out in the Application that it would be appropriate to transfer the matter to the African Commission on Human and Peoples’ Rights.

12. For these reasons,

THE COURT,

i. Unanimously,

Decides, that in Application of Article 34(6) of the Protocol, it manifestly lacks jurisdiction to receive the Application filed by Ekollo Moundi Alexandre against Cameroon and Nigeria.

ii. By seven votes to one,

Decides, in Application of Article 6(3) of the Protocol, to transfer the matter to the African Commission on Human and Peoples’ Rights.

Dissenting opinion: OUGUERGOUZ

1. The purpose of the present dissenting opinion is to explain the reasons which led me to vote against the Court’s decision to transfer the matter to the African Commission on Human and Peoples’ Rights, pursuant to Article 6(3) of the Protocol; incidentally, it seeks to clarify

my position in regard to the statement made in the first operative paragraph which I voted for.

2. I am of the opinion that the Court manifestly lacks jurisdiction to consider Mr Ekollo Moundi Alexandre's Application and I therefore voted for the first operative paragraph of the decision. However, on the Court's manifest lack of jurisdiction, I am of the view that the Court ought not to have considered the Application judicially and should not have adopted a decision on the matter. I have already expounded amply on this issue of procedure which touches on the judicial policy of the Court in my separate opinion attached to the 15 December 2009 judgment in the matter of *Michelot Yogogombaye v The Republic of Senegal*.

3. The instant decision of the Court is formally distinct from a "judgment" by virtue of the fact that it was signed by only the President and the Registrar of the Court and adopted by way of a "simplified" procedure without any involvement of the two States against which the Application was brought.

4. The adoption of the format of a "decision" on its lack of jurisdiction, rather than a judgement, was decided by the Court at its 21^o Ordinary Session (6-17 June 2011), when it considered Application No. No 002/2011 (*Soufiane Ababou v Republic of Algeria*), from which I abstained in compliance with the requirements of Article 22 of the Protocol and Rule 8(2) of the Rules of Court. When it considered this Application, the Court had specifically decided that when an Application does not seem, *prima facie*, to stand any chance of success, it should not be referred to the State against which it has been filed.

5. In the present case, the Court decided not to transmit Mr Ekollo Moundi Alexandre's Application to Cameroon and Nigeria, not even to inform them of the filing of this Application. The Court also decided not to inform the President of the African Union Commission and other States parties to the Protocol about the filing of the Application.

6. I am of the view that in the present case the Application ought to have been dismissed *de plano* through a simple letter from the Registry to the Applicant as of the day after 13 June 2011, when the Legal Counsel of the African Union Commission confirmed to the Court that the Republic of Cameroon was not party to the Protocol and that the Federal Republic of Nigeria, though party to the Protocol, had not made the Declaration as provided in Article 34(6) of the Protocol.

7. Indeed, the issue of the Court's jurisdiction ought to be devoted, on its own, a formal decision of the Court only in case of a "dispute" within the meaning of Article 3(2) of the Protocol, in other words when an objection based on jurisdiction is raised pursuant to Rule 52 of the Rules of Court. In all cases of a "manifest" lack of jurisdiction of the Court, found after a judicial hand of the Application by a small team of judges (judge-rapporteur or a committee of two or three judges) or which may, *de lege ferenda*, be arrived at after a strictly administrative handling of the Application by the Registry, a simple letter addressed by the latter to the Applicant should suffice. That would enable the Court to spare its resources and, considering that it does not sit on a full-time basis, to expedite action on such Applications.

8. Furthermore, the adoption by the Court, as in the instant case, of a decision on the lack of jurisdiction whereas the States concerned have not been served with copies of the Application nor have they been informed of its filing is challengeable in principle; all the more so in the instant case as the Application was mentioned on the Court's website upon receipt. The failure to transmit the Application to the States concerned further deprived Nigeria (Cameroon not being party to the Protocol) of the possibility of accepting the jurisdiction of the Court by way of a *forum prorogatum* (on this matter, see my separate opinion above).

9. In this respect, any Application filed against a State party to the Protocol which has not yet made the optional declaration, should be transmitted, for information purposes, to that State to enable it to accept the jurisdiction of the Court to hear the matter.¹ Since the current practice of the Registry is to register on the general list all cases submitted to the Court, logically all Applications relating to those cases should systematically be communicated to the States concerned and published on the website of the Court. The registration of a case on the general list of a court means that the latter is validly "seized" and that the case is pending before the said jurisdiction (on this matter, see paragraphs 14, 15 and 16 of my above-mentioned separate opinion).

10. Having declared that it manifestly lacks jurisdiction to consider the Application, the Court decided to transfer the latter to the African Commission relying on Article 6(3) of the Protocol, which provides that "the Court may consider cases or transfer them to the Commission".

11. The practice of such a transfer was established by the Court in its decision regarding its jurisdiction in respect of the abovementioned Application No 002/2011. The Court upheld the practice when, at the same session, it dealt with Applications No 005/2011 (*Daniel Amare & Mulugeta Amare v Mozambique Airlines & Mozambique*) and No 006/2011 (*Association des Juristes d'Afrique pour la Bonne Gouvernance v Côte d'Ivoire*), and also declared that it manifestly lacks jurisdiction to consider such Applications.

12. In my view, the transfer to the African Commission of an Application in respect of which the Court found that it manifestly lacks jurisdiction is not founded in law. I hold that this transfer does not appear to be consistent with Article 6 of the Protocol, when interpreted according to the general rules of interpretation as set out in the 1969 Vienna Convention on the Law of Treaties.

13. Indeed, the heading of this Article 6 ("Admissibility of Cases") strongly suggests that the action available to the Court, in paragraph 3, applies primarily to the consideration of the admissibility of a case over which the jurisdiction of the Court has already been established. Unfortunately, the "*travaux préparatoires*" of the Protocol do not shed

1 In that scenario, the Registry would inform the Applicant that (1) since the State against which the Application was filed did not make the optional declaration, the Court cannot entertain his Application; (2) the Application has been forwarded to this State, for information purposes; (3) the Court may examine the Application if the State concerned decides to accept the Court's jurisdiction.

any light on the meaning to be attributed to the said paragraph 3; the first version of this paragraph read that “the Court may itself consider cases or transfer them to the Commission”.²

14. When read in that context, this paragraph allows the Court either to consider, on its own, the admissibility of an Application which is within its jurisdiction or to entrust consideration of the said admissibility to the African Commission. In the latter assumption, the Court would be assigning to the Commission a broader responsibility beyond that envisaged in Article 6(1).

15. Indeed, Article 6(1) only allows the Court to “request the opinion of the Commission” on the admissibility of a “case instituted under Article 5(3)” of the Protocol. Article 6(3), for its part, authorizes the Court to ask the Commission to itself make a determination on the admissibility of an Application. Absence of any reference to Article 5(3) of the Protocol further suggests that consideration of admissibility could apply not only to cases filed by an individual or a non-governmental organization but also to those filed by a State Party to the Protocol or an African inter-governmental organization.

16. Apart from this latter proposition, my interpretation of Article 6(3) is corroborated by Rule 119 of the Rules of the Commission, entitled “Admissibility under Article 6 of the Protocol”, and worded as follows:

- “1. Where, pursuant to Article 6 of the Protocol, the Commission is requested to give its opinion on the admissibility of a communication pending before the Court or where the Court has transferred a communication to the Commission, it shall consider the admissibility of this matter in accordance with Article 56 of the Charter and Rules 105, 106 and 107 of the present Rules.
2. Upon conclusion of the examination of the admissibility of the communication referred to it under Article 6 of the Protocol, the Commission shall immediately transmit its opinion or its decision on the admissibility to the Court”.

17. This provision of the Rules of the Commission leaves no doubt as to the fact that in both situations envisaged in Article 6(1) and (3) of the Protocol, the Commission considers that it is in duty bound to establish the admissibility of an Application relating to a matter over which the Court has declared that it had jurisdiction; otherwise it would be difficult to understand why Rule 119(2) provides for the prompt transmission to the Court of the Commission’s opinion or “decision”. The prompt transmission to the Court of the Commission’s decision on the admissibility of an Application would indeed be meaningless if the Court were no longer to play any role in the handling of the case; the underlying idea is that once it has deemed an Application admissible, the Court may then embark on a consideration of its merits.

2 Article 6 of the Draft Protocol, as adopted by the first meeting of Governmental Legal Experts (Cape Town, South Africa, 6-12 September 1995), see Draft Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court of Human and Peoples’ Rights, adopted by the Meeting of Government Legal Experts on the Establishment of an African Court on Human and Peoples’ Rights, 6-12 September 1995, Cape Town, South Africa, DOC OAU/LEG/EXP/AFCHPR/PRO (I) Rev. 1.

18. Unlike those of the Commission, the Rules of the Court do not provide real clarification on the purpose of the transfer envisaged in Article 6(3) of the Protocol. Rule 29(5) of the Rules of the Court indeed reads:

- a) Where the Court decides to transfer a case to the Commission pursuant to Article 6(3) of the Protocol, it shall transmit to the Commission a copy of the entire pleadings so far filed in the matter accompanied by a summary report. At the request of the Commission, the Court may also transmit the original case file.
- b) The Registrar shall immediately notify the parties who were before the Court about the transfer of the case to the Commission”.

19. The language used in this provision (“case”, “parties”, “the entire pleadings”, “summary report”) suggests that there is a case pending before the Court. One would also note that where the Court manifestly lacks jurisdiction, there should not be much in the case file. Furthermore, even if the Court’s jurisdiction *ratione personae*, *ratione materiae*, *ratione loci* or *ratione temporis* were highly questionable and that said jurisdiction had been considered in detail by the Court, the part of the case file pertaining to the establishment of the Court’s jurisdiction would be of no particular interest for the Commission and should not therefore be communicated to it.

20. My conclusion is therefore that, by relying on Article 6(3) of the Protocol in transferring to the African Commission a case over which it has declared it manifestly had no jurisdiction, the Court deviated from the initial purpose of that provision; that same conclusion applies even more to the possible transfer to the Commission of an Application in respect of which the Court would find, by way of a judgement, that it lacks jurisdiction following a classical contradictory procedure (see Rule 52(6) of the Rules of the Court).

21. It is however not on the basis of that conclusion alone that I voted against the decision to transfer the case to the Commission. More fundamental in my view is the fact that the Court gave no reasons to justify its decision in the instant case; the requirement that reasons shall be given for the Court’s decisions is indeed consubstantial with its judicial function.

22. In the instant case, as in the three cases mentioned above, the Court was of the opinion that it was “appropriate” to transfer the case in light of the allegations set out in the Application”, without further clarification. It ought to have set out the reasons which led it to consider that the allegations made in the Application warranted such a transfer or to explain why the latter was appropriate”.

23. Article 6(3) of the Protocol no doubt provides the Court with a choice between two possible solutions but that choice should nonetheless comply with objective criteria. Though it lies within the discretionary powers of the Court, such a choice cannot be made in an arbitrary manner, in other words in a hazardous and unpredictable way or in a manner bereft of any apparent logical approach.

24. The integrity of the Court’s judicial function indeed requires that reasons be provided for decisions adopted under the above-mentioned provision so as to comply with the requirements of predictability and

consistency which are the essential ingredients that underpin the principle of legal certainty which should be guaranteed by the Court at all times.

25. In the absence of such objective criteria for the referral to the Commission of cases over which the Court declares that it manifestly has no jurisdiction, there is the huge risk that such a referral would become systematic, which approach seems to be fostered by the current practice.

26. Furthermore, in the absence of objective criteria for transfers of cases to the Commission, a dissenting Judge would not be afforded the opportunity to clarify the reasons for which he objects to the grounds for a transfer unless he mentions elements of fact or of law, which do not appear in the Court's decision and, in so doing, betrays the secrecy of the deliberations of the Court.

27. If the Court were to persevere in the practice of referring to the Commission matters over which it finds that it manifestly lacks jurisdiction, it would be necessary for it to set out clear criteria for such referrals. In so doing, it could for instance be guided by the nature or gravity of the violations brought to its attention in the Application in question and thus transfer to the Commission, those Applications which "apparently reveal the existence of a series of serious or massive violations of human and peoples' rights", to use the wording of Article 58(1) of the African Charter.

28. It must be recalled that the criterion of "serious or massive violations of human rights" is one of those that the African Commission used to submit a case to the Court under Article 5 of the Protocol (see Rules 84(2) and 118(3) of the Rules of the Commission). Once the case is referred by the Court, it would then lie with the Commission to consider the Application and make the findings arising therefrom in accordance with the above-stated provisions of its Rules.

29. If the Court were to embark on this path, it would be following a reasoning that it had recently applied in its practice of transferring to the Commission matters over which it found that it manifestly lacks jurisdiction. It would even be attaching some significance to that practice by setting it aside for exceptional circumstances. Hence, the Court would more or less be playing the role of "an early warning mechanism" for the Commission, similar to the one that may now play individuals and non-governmental organizations before the Commission, as evidenced in the circumstances that led to the submission by the Commission of its own Application against the Great Arab Socialist Peoples' Libyan Jamahiriya.

30. This is obviously a matter of judicial policy requiring mature reflection on the part of the Court. The response to that question will depend on the role that the Court intends to play in the human rights protection system provided in the African Charter and the Protocol establishing the Court; it will depend in particular on the manner in which the Court views synergies with the African Commission based on Articles 2, 4, 5, 6(1 & 3), 8 and 33 of the Protocol.

31. The Court could in that regard continue to explore the options available under Article 6(3) of the Protocol and try to ascertain if the transfer of an Application to the Commission could not occur after the Court has declared that it “has jurisdiction”; the ultimate goal of the transfer being for the Commission to consider not only the admissibility of the Application but also the merits of the case.

32. The verb “consider” used in paragraph 3 and the positioning of that paragraph in Article 6 (immediately after paragraph 2 dealing with the issue of ruling on the admissibility of cases by the Court), indeed suggests that the Court may consider cases on their merit or transfer them to the Commission.

33. Guided by criteria which it would have to determine, the Court could thus choose not to rule on the merits of a case over which it has jurisdiction. This system, known as “pick and choose”, is for instance, applied by the US Supreme Court. Rule 10 of the Rules of that Court indeed allows it to exercise its appellate jurisdiction in a discretionary manner, in other words when it feels that there are compelling reasons to exercise such a jurisdiction; the same Rule provides criteria for the selection of cases subject to appeal before the Supreme Court (e.g. major federal issues, conflicts of jurisprudence between two courts of appeal).

34. In deciding not to rule on the merits of a case over which it has jurisdiction, the African Court could however be opening the door to a veritable denial of justice; the referral of the case to the Commission for determination on the merits would not suffice to forestall such a denial of justice since only the Court does have powers of a judicial nature. That impediment may be surmounted; it would be up to the Court and the Commission to initiate joint discussions on the matter.

35. Here again, it is a matter of judicial policy which arises for the Court touching on the role it intends to play within the African system of protection of human and peoples' rights. Indeed, one cannot rule out the fact that in the not too distant future, the Court may be flooded with a whole range of Applications which it would not be able to dispose of satisfactorily because of the limited material and human resources at its disposal. In that event, the Court would then need to make a choice: either to continue with the systematic consideration of all Applications filed before it, with the risk of bottlenecks and the inherent paralysis of its services or to sift the Applications using a set of criteria and thus transforming itself into some kind of judicial body regulating the entire African system of human rights protection.

36. To sum up, I am of the view that in the instant case:

- the lack of jurisdiction *ratione personae* of the Court being manifest, the Application ought to have been dealt with administratively by the Registry and should accordingly not have given rise to a decision of the Court;
- since this is a case where the Court manifestly lacks jurisdiction, this Application should not have been transferred to the African Commission under Article 6(3) of the Protocol and, at any rate, reasons should have been duly provided for such a transfer;

- it was eventually for the Registry to “direct” the Applicant to the African Commission either in the letter in which it informs the Applicant that the matter is outside the jurisdiction of the Court or, as in the instant case, in the letter under cover of which it transmits to the Applicant the Court’s decision on its lack of jurisdiction.

**Efoua Mbozo'o Samuel v The Pan African Parliament
(jurisdiction) (2011) AfCLR 95**

Efoua Mbozo'o Samuel v The Pan African Parliament

Decision, 30 September 2011. Done in English and French, the English text being authoritative.

Judges: NIYUNGEKO, AKUFFO, MUTSINZI, NGOEPE, GUINDO, OUGUERGOUZ, TAMBALA, THOMPSON, ORE

The Court rejected the Application due to the subject matter and also because it was submitted against a non-state entity.

Jurisdiction (material jurisdiction, breach of employment, 6)

Separate opinion: OUGUERGOUZ

Jurisdiction (personal jurisdiction should be determined first, 6)

1. By an Application dated 6 June 2011, Efoua Mbozo'o Samuel, domiciled in Yaoundé, Cameroon, brought before the Court, a case against the Pan African Parliament, alleging breach of paragraph 4 of his contract of employment and of Article 13(a) and (b) of the OAU Staff Regulations, and improper refusal to renew his contract and to re-grade him.
2. Pursuant to Rule 34(1) of the Rules of Court, the Registry acknowledged receipt of the Application by letter dated 7 June 2011.
3. By letter dated 4 August 2011, the Registry requested the Applicant to specify the human rights violations he alleges, to disclose the evidence he intends to adduce as well as evidence of exhaustion of local remedies in accordance with Rule 34(1) and (4) of the Rules of Court.
4. By letter dated 22 August 2011, the Applicant responded to the Registry by making further submissions underlining allegations of breach, by the Pan African Parliament, of: a. Paragraph 4 of his contract of Employment and Article 13(a) and (b) of the OAU Staff regulations by refusing to renew his contract and advertising his post even though he had satisfactory evaluation reports; and b. Executive Council Decision EX.CL/DEC 348 (XI) of June 2007 with regard to the remuneration and grading of his employment
5. Article 3(1) of the Protocol provides that "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."

6. On the facts of this case and the prayers sought by the Applicant, it is clear that this Application is exclusively grounded upon breach of employment contract in accordance with Article 13(a) and (b) of the OAU Staff Regulations, for which the Court lacks jurisdiction in terms of Article 3 of the Protocol. This is therefore a case which, in terms of the OAU Staff Regulations, is within the competence of the Ad hoc Administrative Tribunal of the African Union. Further, in accordance with Article 29(1)(c) of its Protocol, the Court with jurisdiction over any appeals from this Ad hoc Administrative Tribunal is the African Court of Justice and Human Rights. The present Court therefore concludes that, manifestly it doesn't have the jurisdiction to hear the Application.

7. For these reasons,

THE COURT, unanimously

Finds that, in terms of Article 3 of the Protocol, it has no jurisdiction to hear the case instituted by Efoa Mbozo'o Samuel against the Pan African Parliament.

Separate opinion: OUGUERGOUZ

1. Like my colleagues, I am of the opinion that the Application filed by Mr Efoa Mbozolo Samuel against the Pan-African Parliament must be dismissed. However, since this is a case of manifest lack of jurisdiction of the Court, I consider that the Application should not have given rise to a ruling by the Court; it should have been dismissed *de plano* by a simple letter from the Registry (on this point, see my separate opinion attached to the 15 December 2009 Judgement in the case *Michelot Yogogombaye v Republic of Senegal*, as well as my dissenting opinion attached to the recent decision in the case *Ekollo Moundi Alexandre v Republic of Cameroon and Federal Republic of Nigeria*).

2. Considering that Mr Efoa Mbozolo Samuel's Application has been considered judicially by the Court, it should, in any event, have been dismissed on a more explicit legal basis.

3. The reasons of the decision are contained in paragraph 6 which reads as follows:

"On the facts of this case and the prayers sought by the Applicant, it is clear that this Application is exclusively grounded upon breach of employment contract in accordance with Article 13(a) and (b) of the OAU Staff Regulations, for which the Court lacks jurisdiction in terms of Article 3 of the Protocol. This is therefore a case which, in terms of the OAU Staff Regulations, is within the competence of the Ad hoc Administrative Tribunal of the African Union. Further, in accordance with Article 29(1)(c) of its Protocol, the Court with jurisdiction over any appeals from this Ad hoc Administrative Tribunal is the African Court of Justice and Human Rights. The present Court therefore concludes that, manifestly it doesn't have the jurisdiction to hear the Application."

4. The Court is thus first concerned with the material basis of the Application, i.e. with the nature of the right allegedly violated, rather than with the entity against which the Application is lodged. By so doing,

the Court starts by examining the Application first from the angle of its material jurisdiction and not, as it ought to, from that of its personal jurisdiction.

5. Indeed, the Court recalls the “terms of Article 3 of the Protocol” to state that it “lacks jurisdiction” to deal with an Application “exclusively grounded upon breach of employment contract in accordance with Article 13(a) and (b) of the OAU Staff Regulations”. It thus concludes implicitly that the matter submitted to it does not concern, as required under Article 3(1) of the Protocol, “the interpretation and Application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned”.

6. However, the Court should first of all consider its personal jurisdiction or *ratione personae*; it is only after establishing its personal jurisdiction that it can look at its material jurisdiction (*ratione materiae*) and/or, if the case arises, its temporal (*ratione temporis*) and geographical (*ratione loci*) jurisdiction. Since its jurisdiction is not compulsory,¹ the Court must first of all ascertain that it has jurisdiction *ratione personae* to consider the Application.²

7. This personal jurisdiction of the Court must in its turn be looked at from two different angles: at the level of the defendant (against whom an Application may be lodged?) and at the level of the Applicant (who may lodge an Application?).

8. Under the Protocol, Applications may be filed only against a “State” and such a State must of course be party to the Protocol. Article 2 of the Protocol provides that the Court shall complement the protective mandate that the African Charter on Human and Peoples’ Rights has conferred upon the African Commission. However, the African Charter clearly stipulates that only “States”, which are party to the Charter, may be the subject of a communication lodged before the African Commission. The Protocol does not intend to derogate from this principle, as it provides in Articles 3(1), 5(1)(c), 7, 26, 30, 31 and 34(6), none of which refers to an entity other than the “State” (“States concerned”,³ “State against which a complaint has been lodged”, “States Parties”).

9. In addition to the State, Article 5 of the Protocol clearly mentions the African Commission, African Intergovernmental Organizations, the individuals and non-governmental organizations, but only to authorize

1 The States concerned must indeed be parties to the Protocol and, where necessary, must have deposited the optional declaration.

2 For example see the approach followed by the International Court of Justice, which does not have either compulsory jurisdiction, in its judgement of 11 July 1996 in the case relating to the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, ICJ Report 1996, pp 609, 612, 613, 614 and 617, paras 16, 23, 26, 27 and 34.

3 The expression “Etats intéressés” in the French version of Article 26(1) of the Protocol is translated by “States concerned” in the English version of the same provision.

them to institute proceedings against a State Party and not to make them potential “defendants.” before the Court.⁴

10. As an organ of the African Union (see Article 5 of the Constitutive Act of the African Union), the Pan-African Parliament is therefore not, in the current state of the Protocol, an entity against which a complaint can be lodged before the Court. That is simply what the Court should have clearly indicated.

11. That is in fact what the Court seems to say, but in a tortuous way, in the second and third sentences of paragraph 8 of its decision, which read as follows: “This is therefore a case which, in terms of the OAU Staff Regulations, is within the competence of the Ad hoc Administrative Tribunal of the African Union. Further, in accordance with Article 29(1)(c) of its Protocol, the Court with jurisdiction over any appeals from this Ad hoc Administrative Tribunal is the African Court of Justice and Human Rights”.

12. It does not seem that the Court intended to conclude that a breach of an employment contract per se does not fall within its material scope of jurisdiction. That would indeed be a hasty conclusion given that such an issue is closely related to the right of every individual “to work under equitable and satisfactory conditions”, guaranteed in particular by Article 15 of the African Charter. It is only because this breach relates to an employment contract concluded between the Applicant and the Pan-African Parliament that the Court considers that the matter does not fall within its scope of jurisdiction, without however specifying whether that is a case of material or personal lack of jurisdiction.

13. In the present case, the Court should have adopted the approach it has always followed in examining Applications, namely to start by verifying that it has personal jurisdiction.

14. By focussing right from the start on its material jurisdiction, as it did in the present case, the Court runs the risk of addressing issues the answer of which is not necessary for the purpose of establishing its jurisdiction to consider the case. Indeed, if the Court were to start by examining the question, not always easy to elucidate, whether an alleged violation actually concerns a human right guaranteed by the African Charter or another relevant international human rights instrument and that its answer turns out to be affirmative, its research and conclusions on the matter could prove to be vain if it later realizes that the entity against which the complaint is lodged cannot be brought before the Court, either because it is not party to the Protocol, or because it has not made the declaration provided for in Article 34(6) of the Protocol, or because it is not party to the relevant international treaty referred to.

4 To my knowledge, the European Union is the only non-State entity that could, in the near future, be dragged before a human rights court; talks are indeed underway to allow the European Union to become party to the European Convention on Human Rights and, consequently, be subject of complaints before the European Court of Human Rights (see the website: <http://www.touteurope.eu/fr/organisation/droit-communautaire/charte-des-droitsfondamentaux/presentation-copie-1.html>; site consulted on 3 October 2011).

15. May I also note that the Court makes an incomplete examination of its material jurisdiction because it seems to me peremptory to say, as the Court says in paragraph 6 of the decision, that the Application "is exclusively grounded upon breach of employment contract in accordance with Article 13(a) and (b) of the OAU Staff Regulations".

16. In his Application, as supplemented by his letter of 22 August 2011, the Applicant indeed draws the attention of the Court to an appeal which he reportedly lodged before the Ad Hoc Administrative Tribunal of the African Union on 29 January 2009. On 15 April 2009, this appeal is reported to have been declared admissible by the Acting Secretary of the Tribunal and on 29 September 2010, after many reminders addressed to the latter, the Applicant is said to have been informed that the Tribunal "had not been able to sit for the last 10 (ten) years due to inadequate financial means and due to the fact that the Tribunal did not have any Secretaries". The Applicant purports that two years and four months after his appeal was declared admissible, the Tribunal was still to sit and that it is due to the "silence" of the latter that he decided to refer the matter to the Court.

17. Although the Applicant did not explicitly make allegations of violation of his "right to have his cause heard", the Court could also have tried to find out if such a right falls within its jurisdiction; this is indeed a right guaranteed by the African Charter (Article 7), instrument referred to in Article 3(1) of the Protocol. The Court could not however answer this question without first identifying the debtor or passive subject of the right in question; by so doing, it would have been compelled to address the question of its personal jurisdiction.

18. For all the above-mentioned reasons, I consider that in the present case the Court should have clearly declared: 1) that the Protocol authorizes the lodging of complaints only against States Parties thereto, 2) that the Pan-African Parliament cannot therefore be brought before it, and 3) that it consequently manifestly lacks jurisdiction *ratione personae* to consider the Application. At any rate, the lack of jurisdiction of the Court being manifest, the Application should not have been considered judicially by the Court but should have been dismissed *de plano* by a simple letter from the Registry.

Convention Nationale des Syndicats du Secteur Education
(CONASYSED) v Gabon (2012) 1 AfCLR 100

*Convention Nationale des Syndicats du Secteur Education
(CONASYSED) v The Republic of Gabon*

Decision, 11 December 2011. Done in English and French, the French text being authoritative.

Judges: AKUFFO, MUTSINZI, NGOEPE, GUINDO, OUGUERGOUZ, RAMADHANI, TAMBALA, THOMPSON and ORE

The Court rejected the Application due to the Respondent State not having filed the Declaration under Article 34(6) allowing individuals and NGOs to file cases directly before the Court.

Jurisdiction (observer status of the Applicant before the African Commission; Article 34(6) declaration, 10)

Separate opinion: OUGUERGOUZ

Jurisdiction (rejection by Registry, 1)

1. By Application dated 3 August 2011, the teachers, trade union leaders of the National Convention of Teachers Trade Union (CONASYSED) domiciled in Libreville in the Republic of Gabon, seized the Court with a petition against the Republic of Gabon, for violations of trade union rights enshrined in the Universal Declaration of Human Rights and Articles 10 and 15 of the African Charter on Human and Peoples Rights.
2. Pursuant to the provisions of Rule 34 of the Rules of Court, the Registry, by letter dated 4 August 2011, acknowledged receipt of the Application and registered it as Application No 012/2011.
3. By letter dated 2 August 2011, the Registry of the Court inquired from the Legal Counsel of the African Union Commission if the Respondent State has made the Declaration required under Article 34(6) of the Protocol establishing the Court.
4. By letter dated 16 August 2011, the Legal Counsel of the African Union Commission informed the Registry that the Republic of Gabon had not yet made the Declaration required under Article 34(6), and forwarded to the Registry the updated list of Member States of the African Union which have ratified the Protocol and made the Declaration.
5. By letter dated 28 October 2011, the Registry inquired from the African Commission on Human and Peoples' Rights (hereinafter called the "Commission") if the Applicant has observer status with the said Commission.

6. By letter dated 1 December 2011, the Registry wrote to CONASYSED to provide the Court with its statutory documents and specify its legal status.

7. By email of 8 December 2011, the African Commission on Human and Peoples' Rights informed the Registry of the Court that CONASYSED does not have observer status with the Commission.

8. The Court notes in the first instance that in terms of Article 5(3) of the Protocol "The Court may entitle relevant Non-Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol".

9. The Court notes further that Article 34(6) of the Protocol provides that: "At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration."

10. The Court observes that CONASYSED does not have observer status before the Commission and furthermore, the Republic of Gabon has not made the declaration required under Article 34(6).

11. In view of Articles 5(3) and 34(6) of the Protocol it is evident that the Court manifestly lacks jurisdiction to receive the Application submitted by CONASYSED against the Republic of Gabon.

12. For these reasons

THE COURT

Unanimously

Decides that pursuant to Articles 5(3) and 34(6) of the Protocol, it manifestly lacks jurisdiction to receive the Application submitted by CONASYSED against the Republic of Gabon, and the Application is accordingly struck out.

Separate opinion: OUGUERGOUZ

1. I believe that the Application lodged against the Republic of Gabon by *Convention Nationale des Syndicats du Secteur Education* (CONASYSED) must be rejected. However, the lack of jurisdiction *ratione personae* of the Court being manifest in this case, this Application should not have been dealt with by a decision of the Court, rather, it should have been rejected *de plano* by a simple letter of the Registrar (on this point, see my argumentation in my separate opinion appended to the judgment in the case *Michelof Yogogombaye v Republic of Senegal*, as well as in my dissenting opinion appended to the decision in the case *Ekollo Moundi Alexandre v Republic of Cameroon and Federal Republic of Nigeria*).

2. I am not favorable to the judicial examination of a complaint against a State Party to the Protocol which has not made the optional

declaration accepting the compulsory jurisdiction of the Court to receive complaints from individuals or non-governmental organizations, or against an African State not party to the Protocol or not member of the African Union, as was the case of several Applications already dealt with by the Court. I am even less favorable to such a judicial examination when the State concerned has not even been notified of the filing of the Application against it, such as it is again the case here.

3. The Court has indeed decided not to notify Gabon of the Application lodged by CONASYSED, nor even to inform Gabon of its filing. The adoption by the Court of a decision of lack of jurisdiction in such conditions is a violation of the adversarial principle (*Audiatur et altera pars*), a principle which should apply at any stage of the proceedings. This breach of fairness and equality of arms is all the more remarkable given that the Application lodged by CONASYSED was, upon receipt, publicized on the website of the Court.

4. The non-transmittal of the Application to Gabon further deprived the latter of the latitude to accept the jurisdiction of the Court by way of *forum prorogatum* (on this matter, see my separate opinion above).

Delta International Investments SA, Mr AGL de Lange and Mrs M de Lange v South Africa (jurisdiction) (2012) 1 AfCLR 103

Delta International Investments SA, Mr AGL de Lange and Mrs M de Lange v the Republic of South Africa

Decision, 30 March 2012. Done in English and French, the English text being authoritative.

Judges: NIYUNGEKO, AKUFFO, GUINDO, OUGUERGOUZ, RAMADHANI, TAMBALA, THOMPSON and ORE

Recused under Article 22: NGOEPE

The Court rejected the Application due to the Respondent State not having filed the Declaration under Article 34(6) allowing individuals and NGOs to file cases directly before the Court.

Jurisdiction (Article 34(6) declaration, 9)

Separate opinion: OUGUERGOUZ

Jurisdiction (rejection by Registry, 1)

1. By an Application dated 4 February 2012, received at the Registry on 8 February 2012, the Applicants, Delta International Investments SA, Mr AGL De Lange and Mrs M De Lange, seized the Court with a petition against the Republic of South Africa, for alleged torture and violation of their rights to dignity, property, information, privacy and discrimination, contrary to the South African Constitution and the African Charter on Human and Peoples' Rights.
2. In accordance with the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights (hereafter referred to as the Protocol) and Rule 8(2) of the Rules of Court (hereafter referred to as the Rules), Judge Bernard M Ngoepe, member of the Court, of South African nationality, recused himself.
3. Pursuant to the provisions of Rule 34(1) of the Rules of Court, the Registrar, by letter dated 14 February 2012, acknowledged receipt of the Application.
4. The Court first observes that in terms of Article 5(3) of the Protocol, it "may entitle relevant Non-Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol".
5. The Court further notes that Article 34(6) of the Protocol provides that "At the time of the ratification of this Protocol or any time thereafter, the

State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration”.

6. By letter dated 30 March 2012, the Registrar inquired from the Legal Counsel of the African Union Commission if the Republic of South Africa has made the Declaration required under Article 34(6) of the Protocol.

7. By email dated 12 April 2012, the Legal Counsel of the African Union Commission informed the Registrar that the Republic of South Africa had not made such a declaration.

8. The Court observes that the Republic of South Africa has not made the Declaration under Article 34(6).

9. In view of Articles 5(3) and 34(6) of the Protocol, it is evident that the Court manifestly lacks jurisdiction to receive the Application submitted by Delta International Investments SA, Mr AGL De Lange and Mrs M De Lange, against the Republic of South Africa.

10. For these reasons,

THE COURT,

Unanimously:

Decides that pursuant to Articles 5(3) and 34(6) of the Protocol, it manifestly lacks jurisdiction to receive the Application submitted by Delta International Investments SA, Mr AGL De Lange and Mrs M De Lange, against the Republic of South Africa, and the Application is accordingly struck out from the general list of the Court.

Separate opinion: OUGUERGOUZ

1. I am of the opinion that the Application filed by Delta International Investments SA & Mr and Mrs AGL de Lange against the Republic of South Africa must be rejected. However, the lack of jurisdiction *ratione personae* of the Court being manifest, the Application should not have been dealt with by a decision of the Court; rather, it should have been rejected *de plano* by a simple letter of the Registrar (see my reasoning on this matter in my separate opinions appended to the decisions in the cases of *Michelot Yogogombaye v Republic of Senegal*, *Effoua Mbozo Samuel v Pan African Parliament, National Convention of Teachers' Trade Union (CONASYSED) v Republic of Gabon*, as well as in my dissenting opinion appended to the decision rendered in the matter *Ekollo Moundi Alexandre v Republic of Cameroon and Federal Republic of Nigeria*).

2. Indeed, I am not in favour of the judicial consideration of an Application filed against a State Party to the Protocol which has not made the declaration accepting the compulsory jurisdiction of the Court to receive Applications from individuals and non-governmental organizations, or against any African State which is not party to the

Protocol or which is not a member of the African Union, as was the case in several Applications already dealt with by the Court.

3. By proceeding with the judicial consideration of the present Application lodged against the Republic of South Africa, the Court failed to take into account the interpretation, in my view correct, which it initially gave of Article 34(6) of the Protocol in paragraph 39 of its very first judgment in the case concerning *Michelot Yogogombaye v Republic of Senegal*. In that judgment, the Court indeed stated what follows:

“the second sentence of Article 34(6) of the Protocol provides that [the Court] shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration” (emphasis added). The word ‘receive’ should not however be understood in its literal meaning as referring to ‘physically receiving’ nor in its technical sense as referring to ‘admissibility’. It should instead be interpreted in light of the letter and spirit of Article 34(6) taken in its entirety and, in particular, in relation to the expression ‘declaration accepting the competence of the Court to receive Applications [emanating from individuals or NGOs]’ contained in the first sentence of this provision. It is evident from this reading that the objective of the aforementioned Article 34(6) is to prescribe the conditions under which the Court could hear such cases; that is to say, the requirement that a special declaration should be deposited by the concerned State Party, and to set forth the consequences of the absence of such a deposit by the State concerned.”

4. It is evident that by giving a judicial treatment to an Application and delivering a decision on the said Application, the Court actually “received” the Application in the sense that it interpreted the verb “receive” in the abovementioned paragraph 39, that is that the Court has actually examined¹ the Application even though it concluded that it does not have jurisdiction to entertain it; however, according to its interpretation of Article 34(6), the Court should not examine an Application if the State Party concerned has not made the optional declaration.

5. It should further be observed that the Court gave a judicial consideration to the Application filed by Delta International Investments SA & Mr and Mrs AGL de Lange without transmitting it to South Africa, nor even informing this State that an Application had been lodged against it. The adoption by the Court of a judicial decision under such circumstances amounts to a violation of the adversarial principle (*Audiatur et altera pars*), which principle must apply at any stage of the proceedings. This breach of fairness and equality of arms is all the more remarkable given that the Application lodged by Delta International Investments SA & Mr and Mrs AGL de Lange was, upon receipt, publicized on the website of the Court.

6. Failure to transmit the Application to South Africa also deprived that State of the possibility to accept the jurisdiction of the Court by way of

¹ The French text of the last sentence of paragraph 39 of the *Yogogombaye* Judgment, which is the authoritative one, refers to the examination of the Applications (“pour que la Cour puisse connaître de telles requêtes”) and not to the “hearing of the cases” as it is mentioned in the English text (“conditions under which the Court could hear such cases”).

forum prorogatum (on this question, see my separate opinion in the case concerning *Michelot Yogogombaye v Republic of Senegal*).

**Emmanuel Joseph Uko and Others v South Africa (jurisdiction)
(2012) AfCLR 107**

Emmanuel Joseph Uko and Others v the Republic of South Africa

Decision, 30 March 2012. Done in English and French, the English text being authoritative.

Judges: NIYUNGEKO, AKUFFO, GUINDO, OUGUERGOUZ, RAMADHANI, TAMBALA, THOMPSON and ORE

Recused Article 22: NGOEPE

The Court rejected the Application due to the Respondent State not having filed the Declaration under Article 34(6) allowing individuals and NGOs to file cases directly before the Court.

Jurisdiction (Article 34(6) declaration, 10)

Separate opinion: OUGUERGOUZ

Jurisdiction (rejection by Registry, 1)

1. By Application dated 20 February 2012, Mr Emmanuel Joseph Uko, a national of the Federal Republic of Nigeria, seized the Court, on his behalf and on behalf of his family members resident in South Africa, with a petition against the Republic of South Africa, for violations of Articles 2, 3, 4, 5, 6, 7, 10, 11, 18 and 19 of the African Charter on Human and Peoples' Rights, as well as the provisions of the African Charter on the Rights and Welfare of the Child, and Articles 7, 10, 12, 13, 14, 17, 19, 23, 24 and 26 of the International Covenant on Civil and Political Rights.
2. In accordance with the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights (hereafter referred to as the Protocol) and Rule 8(2) of the Rules of Court (hereafter referred to as the Rules), Judge Bernard M Ngoepe, member of the Court, of South Africa nationality, recused himself.
3. Pursuant to the provisions of Rule 34(1) of the Rules of Court, the Registrar, by letter dated 28 February 2012, acknowledged receipt of the Application.
4. In the same letter, the Registrar further sought clarification from the Applicant on the status of his communication lodged before the African Commission on Human and Peoples' Rights (the Commission), since Rule 29(6) of the Rules of Court provides that: "For the purpose of examining an Application brought before it, relating to issues in a communication before the Commission, the Court shall ascertain that the said communication has been formally withdrawn".

5. By letter dated 8 March 2012, the Registrar informed the Applicant that pending clarification from him on the status of his communication before the Commission, the Registry has proceeded to register his Application.

6. As at the time of this decision, the Applicant had not responded to the Registrar's letter of 28 February 2012.

7. Be that as it may, the Court first observes that in terms of Article 5(3) of the Protocol, "it may entitle relevant Non-Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol".

8. The Court further notes that Article 34(6) of the Protocol provides that "At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration".

9. By letter dated 30 March 2012, the Registrar inquired from the Legal Counsel of the African Union Commission if the Republic of South Africa has made the Declaration required under Article 34(6) of the Protocol establishing the Court.

10. By email dated 12 April 2012, the Legal Counsel of the African Union Commission informed the Registrar that the Republic of South Africa has not made the declaration.

11. The Court observes that the Republic of South Africa has not made the Declaration under Article 34(6) of the Protocol.

12. In view of Articles 5(3) and 34(6) of the Protocol, it is evident that the Court manifestly lacks jurisdiction to receive the Application submitted by Emmanuel Joseph Uko and Others, against the Republic of South Africa.

13. For these reasons,

THE COURT,

Unanimously:

Decides that pursuant to Articles 5(3) and 34(6) of the Protocol, it manifestly lacks jurisdiction to receive the Application submitted by Emmanuel Joseph Uko and Others, against the Republic of South Africa, and the Application is accordingly struck out from the general list of the Court.

Separate opinion: OUGUERGOUZ

1. I am of the opinion that the Application filed by Mr Emmanuel Joseph Uko and others against the Republic of South Africa must be rejected. However, the lack of jurisdiction *ratione personae* of the Court being manifest, the Application should not have been dealt with by a decision of the Court; rather, it should have been rejected *de plano* by a simple

letter of the Registrar (see my reasoning on this matter in my separate opinions appended to the decisions in the cases of *Michelot Yogogombaye v Republic of Senegal*, *Effoua Mbozo Samuel v Pan African Parliament*, *National Convention of Teachers' Trade Union (CONASYSED) v Republic of Gabon*, *Delta International Investments SA & Mr and Mrs AGL de Lange v Republic of South Africa*, as well as my dissenting opinion appended to the decision rendered in the matter *Ekollo Moundi Alexandre v Republic of Cameroon and Federal Republic of Nigeria*.

2. Indeed, I am not in favour of the judicial consideration of an Application filed against a State Party to the Protocol which has not made the declaration accepting the compulsory jurisdiction of the Court to receive Applications from individuals and non-governmental organizations, or against any African State which is not party to the Protocol or which is not a member of the African Union, as was the case in several Applications already dealt with by the Court.

3. By proceeding with the judicial consideration of the present Application lodged against the Republic of South Africa, the Court failed to take into account the interpretation, in my view correct, which it initially gave of Article 34(6) of the Protocol in paragraph 39 of its very first judgment in the case concerning *Michelot Yogogombaye v Republic of Senegal*. In that judgment, the Court indeed stated what follows:

“the second sentence of Article 34(6) of the Protocol provides that [the Court] “shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration” (emphasis added). The word ‘receive’ should not however be understood in its literal meaning as referring to ‘physically receiving’ nor in its technical sense as referring to ‘admissibility’. It should instead be interpreted in light of the letter and spirit of Article 34(6) taken in its entirety and, in particular, in relation to the expression ‘declaration accepting the competence of the Court to receive Applications [emanating from individuals or NGOs]’ contained in the first sentence of this provision. It is evident from this reading that the objective of the aforementioned Article 34(6) is to prescribe the conditions under which the Court could hear such cases; that is to say, the requirement that a special declaration should be deposited by the concerned State Party, and to set forth the consequences of the absence of such a deposit by the State concerned”.

4. It is evident that by giving a judicial treatment to an Application and delivering a decision on the said Application, the Court actually “received” the Application in the sense that it interpreted the verb “receive” in the abovementioned paragraph 39, that is that the Court has actually examined¹ the Application even though it concluded that it does not have jurisdiction to entertain it; however, according to its interpretation of Article 34(6), the Court should not examine an

1 The French text of the last sentence of paragraph 39 of the *Yogogombaye* Judgment, which is the authoritative one, refers to the examination of the Applications (“pour que la Cour puisse connaître de telles requêtes”) and not to the “hearing of the cases” as it is mentioned in the English text (“conditions under which the Court could hear such cases”).

Application if the State Party concerned has not made the optional declaration.

5. It should further be observed that the Court gave a judicial consideration to the Application filed by Mr Emmanuel Joseph Uko and others without transmitting it to South Africa, nor even informing this State that an Application had been lodged against it. The adoption by the Court of a judicial decision under such circumstances amounts to a violation of the adversarial principle (*Audiatur et altera pars*), which principle must apply at any stage of the proceedings. This breach of fairness and equality of arms is all the more remarkable given that the Application lodged by Mr Emmanuel Joseph Uko and others was, upon receipt, publicized on the website of the Court.

6. Failure to transmit the Application to South Africa also deprived that State of the possibility to accept the jurisdiction of the Court by way of *forum prorogatum* (on this question, see my separate opinion in the case concerning *Michelot Yogogombaye v Republic of Senegal*).

Amir Adam Timan v Sudan (jurisdiction) (2012) 1 AfCLR 111

Amir Adam Timan v The Republic of the Sudan

Decision, 30 March 2012. Done in English and French, the English text being authoritative.

Judges: NIYUNGEKO, AKUFFO, GUINDO, OUGUERGOUZ, RAMADHANI, TAMBALA, THOMPSON and ORE

The Court rejected the Application due to the Respondent State not having filed the Declaration under Article 34(6) allowing individuals and NGOs to file cases directly before the Court.

Jurisdiction (Article 34(6) declaration, 8)

Separate opinion: OUGUERGOUZ

Jurisdiction (rejection by Registry, 1)

1. By an Application dated 25 February 2012, Barrister Mbu ne Letang, Lawyer residing in Kinshasa, filed a case to the Court on behalf of his client, Amir Adam Timan, a Sudanese national, and a native of Darfur, currently residing in the Democratic Republic of Congo, who has been accused by the Sudanese Government of being a member of an opposing force to the legitimate Government of The Sudan. The Applicant alleges violation of Articles 12(1), 2, 3, 4 and 13 of the International Convention on Civil and Political Rights.
2. Pursuant to the provisions of Rule 34(1) of the Rules of Court, the Registrar, by letter dated 14 March 2012, acknowledged receipt of the Application.
3. The Court first observes that in terms of Article 5(3) of the Protocol, it “may entitle relevant Non-Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol”.
4. The Court further notes that Article 34(6) of the Protocol provides that
“At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration”.
5. By letter dated 30 March 2012, the Registrar inquired from the Legal Counsel of the African Union Commission if the Republic of The Sudan has made the Declaration required under Article 34(6) of the Protocol.

6. By email dated 12 April 2012, the Legal Counsel of the African Union Commission informed the Registrar that the Republic of The Sudan had not made such a declaration.

7. The Court observes that the Republic of The Sudan has not made the Declaration under Article 34(6).

8. In view of Articles 5(3) and 34(6) of the Protocol, it is evident that the Court manifestly lacks jurisdiction to receive the Application submitted on behalf of Amir Adam Timan, against the Republic of The Sudan.

9. For these reasons,

THE COURT,

Unanimously

Decides that pursuant to Articles 5(3) and 34(6) of the Protocol, it manifestly lacks jurisdiction to receive the Application submitted on behalf of Amir Adam Timan, against the Republic of The Sudan, and the Application is accordingly struck out from the general list of the Court.

Separate opinion: OUGUERGOUZ

1. I am of the opinion that the Application filed by Mr Amir Adam Timan against the Republic of Sudan must be rejected. However, the lack of jurisdiction *ratione personae* of the Court being manifest, the Application should not have been dealt with by a decision of the Court; rather, it should have been rejected *de plano* by a simple letter of the Registrar (see my reasoning on this matter in my separate opinions appended to the decisions in the cases of *Michelot Yogogombaye v Republic of Senegal*, *Effoua Mbozo Samuel v Pan African Parliament*, *National Convention of Teachers' Trade Union (CONASYSED) v Republic of Gabon*, *Delta International Investments SA & Mr and Mrs de Lange v Republic of South Africa*, *Emmanuel Joseph Uko and others v Republic of South Africa*, as well as in my dissenting opinion appended to the decision rendered in the matter of *Ekollo Moundi Alexandre v Republic of Cameroon and Federal Republic of Nigeria*).

2. Indeed, I am not in favour of the judicial consideration of an Application filed against a State Party to the Protocol which has not made the declaration accepting the compulsory jurisdiction of the Court to receive Applications from individuals and non-governmental organizations, or against any African State which is not party to the Protocol or which is not a member of the African Union, as was the case in several Applications already dealt with by the Court.

3. By proceeding with the judicial consideration of the present Application lodged against the Republic of South Africa, the Court failed to take into account the interpretation, in my view correct, which it initially gave of Article 34(6) of the Protocol in paragraph 39 of its very first judgment in the case concerning *Michelot Yogogombaye v Republic of Senegal*. In that judgment, the Court indeed stated what follows:

“the second sentence of Article 34(6) of the Protocol provides that [the Court] “shall not *receive* any petition under Article 5(3) involving a State Party which has not made such a declaration” (emphasis added). The word ‘receive’ should not however be understood in its literal meaning as referring to ‘physically receiving’ nor in its technical sense as referring to ‘admissibility’. It should instead be interpreted in light of the letter and spirit of Article 34(6) taken in its entirety and, in particular, in relation to the expression “declaration accepting the competence of the Court to receive Applications [emanating from individuals or NGOs]” contained in the first sentence of this provision. It is evident from this reading that the objective of the aforementioned Article 34(6) is to prescribe the conditions under which the Court could hear such cases; that is to say, the requirement that a special declaration should be deposited by the concerned State Party, and to set forth the consequences of the absence of such a deposit by the State concerned”.

4. It is evident that by giving a judicial treatment to an Application and delivering a decision on the said Application, the Court actually “received” the Application in the sense that it interpreted the verb “receive” in the abovementioned paragraph 39, that is that the Court has actually examined¹ the Application, even though it concluded that it does not have jurisdiction to entertain it; however, according to its interpretation of Article 34(6), the Court should not examine an Application if the State Party concerned has not made the optional declaration.

5. It should further be observed that the Court gave a judicial consideration to the Application filed by Mr Amir Adam Timan without transmitting it to Sudan, nor even informing this State that an Application had been lodged against it. The adoption by the Court of a judicial decision under such circumstances amounts to a violation of the adversarial principle (*Audiatur et altera pars*), which principle must apply at any stage of the proceedings. This breach of fairness and equality of arms is all the more remarkable given that the Application lodged by Mr Amir Adam Timan was, upon receipt, publicized on the website of the Court.

6. Failure to transmit the Application to Sudan also deprived that State of the possibility to accept the jurisdiction of the Court by way of *forum prorogatum* (on this question, see my separate opinion in the case concerning *Michelot Yogogombaye v Republic of Senegal*).

1 The French text of the last sentence of paragraph 39 of the *Yogogombaye* Judgment, which is the authoritative one, refers to the examination of the Applications (“pour que la Cour puisse connaître de telles requêtes”) and not to the “hearing of the cases” as it is mentioned in the English text (“conditions under which the Court could hear such cases”).

Baghdadi Ali Mahmoudi v Tunisia (jurisdiction) (2011) 1 AfCLR 114

Baghdadi Ali Mahmoudi v the Republic of Tunisia

Decision, 26 June 2012. Done in English and French, the French text being authoritative.

Judges: NIYUNGEKO, AKUFFO, MUTSINZI, NGOEPE, GUINDO, OUGUERGOUZ, RAMADHANI, TAMBALA, THOMPSON and ORE

The Court rejected the Application due to the Respondent State not having filed the Declaration under Article 34(6) allowing individuals and NGOs to file cases directly before the Court. The Court held that it could not issue provisional measures as it did not have jurisdiction.

Jurisdiction (observer status of the Applicant before the African Commission; Article 34(6) declaration, 11)

Provisional measures (*prima facie* jurisdiction, 12)

Separate opinion: OUGUERGOUZ

Jurisdiction (rejection by Registry, 1)

1. By a letter dated 31 May 2012, Mr Baghdadi Ali Mahmoudi (hereinafter referred to as “the Applicant”), through his lawyer, informed the Registry of the Court of his intention to submit an Application before the Court with a request for interim measures, against the Republic of Tunisia (hereinafter referred to as “the Respondent”).
2. On 1 June 2012, the Registry of the Court received the Applicant’s Application, together with the request for interim measures.
3. Pursuant to the provisions of Rule 34(1) of the Rules of Court, the Registrar, by a letter dated 7 June 2012, acknowledged receipt of the Application and registered the same. In the same letter, the Registrar requested the Applicant to satisfy the Court that the Application meets the requirements under Rule 34 of the Rules of Court, in particular, the exhaustion of local remedies.
4. By a letter dated 12 June 2012, the Applicant responded to the Registrar’s letter of 7 June 2012, and submitted copies of judgments from the Court of Appeal of Tunis as proof of exhaustion of local remedies.
5. By a letter of 14 June 2012, the Applicant submitted additional information relating to the exhaustion of local remedies.
6. The Court first observes that in terms of Article 5(3) of the Protocol, it “may entitle relevant Non-Governmental organizations (NGOs) with

observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol”.

7. The Court further notes that Article 34(6) of the Protocol provides that

“At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration”.

8. By a letter dated 18 June 2012, the Registrar inquired from the Legal Counsel of the African Union Commission if the Republic of Tunisia has made the Declaration required under Article 34(6) of the Protocol.

9. By an email dated 19 June 2012, the Legal Counsel of the African Union Commission informed the Registry of the Court that the Republic of Tunisia had not made such a declaration.

10. The Court observes that the Republic of Tunisia has not made the declaration under Article 34(6).

11. In view of Articles 5(3) and 34(6) of the Protocol, it is evident that the Court manifestly lacks jurisdiction to receive the Application submitted by Mr Baghdadi Ali Mahmoudi, against the Republic of Tunisia.

12. For the Court to make an order for interim measures, it has to satisfy itself that it has *prima facie* jurisdiction, which as indicated in paragraph 11 above, it does not have.

13. For these reasons, THE COURT,
Unanimously

i. Decides that pursuant to Articles 5(3) and 34(6) of the Protocol, it manifestly lacks jurisdiction to receive the Application submitted by Mr Baghdadi Ali Mahmoudi, against the Republic of Tunisia;

ii. Decides that in view of paragraph (i) above, it cannot grant the Applicant’s request for provisional measures.

Separate opinion: OUGUERGOUZ

1. I am of the opinion that the Application filed by Mr Baghdadi Ali Mahmoudi against the Republic of Tunisia, together with his request for provisional measures, must be rejected. However, the lack of jurisdiction *ratione personae* of the Court being manifest, the Application and the request should not have been dealt with by a decision of the Court; rather, they should have been rejected *de plano* by a simple letter of the Registrar (see my reasoning on this matter in my separate opinions appended to the decisions in the cases of *Michelot Yogogombaye v Republic of Senegal*, *Effoua Mbozo Samuel v Pan African Parliament, National Convention of Teachers’ Trade Union (CONASYSED) v Republic of Gabon*, *Delta International Investments SA & Mr and Mrs de Lange v Republic of South Africa*,

Emmanuel Joseph Uko and others v Republic of South Africa, Amir Adam Timan v Republic of Sudan, as well as in my dissenting opinion appended to the decision rendered in the matter *Ekollo Moundi Alexandre v Republic of Cameroon and Federal Republic of Nigeria*.

2. Indeed, I am not in favour of the judicial consideration of an Application filed against a State Party to the Protocol which has not made the declaration accepting the compulsory jurisdiction of the Court to receive Applications from individuals and non-governmental organizations, or against any African State which is not party to the Protocol or which is not a member of the African Union, as was the case in several Applications already dealt with by the Court.

3. By proceeding with the judicial consideration of the present Application lodged against Tunisia, the Court failed to take into account the interpretation, in my view correct, which it initially gave of Article 34(6) of the Protocol in paragraph 39 of its very first judgment in the case concerning *Michelot Yogogombaye v Republic of Senegal*. In that judgment, the Court indeed stated what follows:

“the second sentence of Article 34(6) of the Protocol provides that [the Court] ‘shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration’ (emphasis added). The word ‘receive’ should not however be understood in its literal meaning as referring to ‘physically receiving’ nor in its technical sense as referring to ‘admissibility’. It should instead be interpreted in light of the letter and spirit of Article 34(6) taken in its entirety and, in particular, in relation to the expression ‘declaration accepting the competence of the Court to receive Applications [emanating from individuals or NGOs]’ contained in the first sentence of this provision. It is evident from this reading that the objective of the aforementioned Article 34(6) is to prescribe the conditions under which the Court could hear such cases; that is to say, the requirement that a special declaration should be deposited by the concerned State Party, and to set forth the consequences of the absence of such a deposit by the State concerned”.

4. It is evident that by giving a judicial treatment to an Application and delivering a decision on the said Application, the Court actually “received” the Application in the sense that it interpreted the verb “receive” in the abovementioned paragraph 39, that is that the Court has actually examined¹ the Application even though it concluded that it does not have jurisdiction to entertain it; however, according to its interpretation of Article 34(6), the Court should not examine an Application if the State Party concerned has not made the optional declaration.

5. It should further be observed that the Court gave a judicial consideration to the Application filed by Mr Baghdadi Ali Mahmoudi without transmitting it to Tunisia, nor even informing this state that an Application had been lodged against it. The adoption by the Court of a judicial decision under such circumstances amounts to a violation of the

1 The French text of the last sentence of paragraph 39 of the *Yogogombaye* Judgment, which is the authoritative one, refers to the examination of the Applications (“pour que la Cour puisse connaître de telles requêtes”) and not to the “hearing of the cases” as it is mentioned in the English text (“conditions under which the Court could hear such cases”).

adversarial principle (*Audiatur et altera pars*), which principle must apply at any stage of the proceedings.

6. Failure to transmit the Application to Tunisia also deprived that State of the possibility to accept the jurisdiction of the Court by way of *forum prorogatum* (on this question, see my separate opinion in the case concerning *Michelot Yogogombaye v Republic of Senegal*).

Femi Falana v African Union (jurisdiction) (2012) 1 AfCLR 118

Femi Falana v The African Union

Judgment, 26 June 2012. Done in English and French, the English text being authoritative.

Judges: NIYUNGEKO, AKUFFO, MUTSINZI, NGOEPE, GUINDO, OUGUERGOUZ, RAMADHANI, TAMBALA, THOMPSON and ORE

The Applicant, a Nigerian national, brought this case against the African Union alleging violation of his rights as a result of Nigeria's failure to make a declaration under Article 34(6) of the Protocol. The Court, by a majority of seven to three votes, held that since the AU is not a party to the Protocol, it could not be subject to its obligations and the Court therefore lacked jurisdiction.

Jurisdiction (international organization as Respondent, 68-72)

Separate opinion: AKUFFO, NGOEPE and THOMPSON

International law (African Union has legal personality 8.1, 8.1.1, 8.1.2; Court has no power to nullify provisions of the Protocol, 16-17)

Separate opinion: MUTSINZI

Jurisdiction (only states can be parties before the Court, 8)

Separate opinion: OUGUERGOUZ

Jurisdiction (Application to be rejected by the Registrar, 1, 3; Applications can only be filed against states 9-12)

Evidence (admission of documents, 25)

I. The subject matter of the Application

1. By an Application dated 14 February 2011, Femi Falana, Esq. (hereinafter referred to as "the Applicant"), a Nigerian national, who describes himself as a human rights lawyer based in Lagos, Nigeria, seized the Court with an Application against the African Union (hereinafter referred to as "the Respondent").

2. In his Application, the Applicant alleges that he has made several attempts to get the Federal Republic of Nigeria (hereinafter referred to as "Nigeria") to deposit the declaration required under Article 34(6) 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") to no avail. He alleges further,

that he has been denied access to the Court because of the failure or refusal of Nigeria to make the declaration to accept the competence of the Court in line with Article 34(6) of the Protocol.

3. He submits in his Application that, since his efforts to have Nigeria make the declaration have failed, he decided to file an Application against the Respondent, as a representative of its, then, 53 Member States (now 54), asking the Court to find Article 34(6) of the Protocol as inconsistent with Articles 1, 2, 7, 13, 26 and 66 of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") as, according to him, the requirement for a State to make a declaration to allow access to the Court by individuals and Non-governmental Organizations (hereinafter referred to as "NGOs") is a violation of his rights to freedom from discrimination, fair hearing and equal treatment, as well as his right to be heard.

II. The procedure

4. The Application was received at the Registry of the Court on 20 February 2011

5. By a letter dated 18 March 2011, the Registrar acknowledged receipt of the Application.

6. At its 20th Ordinary Session held from 14 to 25 March 2011, in Arusha, Tanzania, the Court decided that the Application should be served on the Respondent. The Court also decided that the notifications required under Rule 35 of the Rules of Court (hereinafter referred to as "the Rules") should be sent.

7. In accordance with Rule 35(2)(a) of the Rules, and by a letter dated 28 March 2011 to the Chairperson of the African Union Commission, the Registrar served a copy of the Application on the Respondent by registered post. The Respondent was advised to communicate the names and addresses of its representatives within thirty (30) days and to respond to the Application within sixty (60) days.

8. In accordance with Rule 35(3) of the Rules, and by a letter, also dated 28 March 2011, the Application was notified to the Executive Council of the African Union and State Parties to the Protocol, through the Chairperson of the African Union Commission.

9. By a letter dated 29 April 2011, the Respondent acknowledged receipt of the Application and by a notice of the same date, communicated its representative as being the Legal Counsel of the African Union Commission. The Respondent also filed its response dated 29 April 2011. These documents were received at the Registry of the Court on 18 May 2011 and were sent to the Applicant by a letter of the same date.

10. During its 21st Ordinary Session held from 6 to 17 June 2011, in Arusha, Tanzania, the Court decided that the Applicant should be notified that he could reply to the Respondent's response within thirty (30) days, commencing 8 June 2011.

11. By a letter dated 15 June 2011, the Registrar notified the Applicant of the Court's decision that he could reply to the Respondent's

response. The Applicant's undated, but signed reply to the Respondent's response was received at the Registry of the Court on 23 June 2011.

12. By a letter dated 24 June 2011, the Registrar sent to the Respondent, the Applicant's reply to the Respondent's response, and therein it was indicated that pleadings had been closed and the Parties would be advised of the dates set down for hearing. This letter was copied to the Applicant.

13. By separate letters, both dated 20 October 2011, the Registrar informed the Parties that, at its 22nd Ordinary Session held from 12 to 23 September 2011, in Arusha, Tanzania, the Court decided that the Parties should be invited to a hearing of the Application during its 23rd Ordinary Session to be held from 5 to 16 December 2011. In the said letters, the Registrar informed the Parties that the proposed dates for the hearing were 12 to 13 December 2011 and requested them to confirm their availability for these dates not later than 4 November, 2011.

14. By an email dated 21 October 2011, the Applicant confirmed his availability for the public hearing on the proposed dates.

15. By a letter dated 11 November 2011, The Legal Counsel of the African Union Commission informed the Registry of the Court that the Respondent "could not confirm [its] availability due to intervening circumstances and prior commitments". In the said letter, the Legal Counsel of the African Union Commission further requested that "the hearing of the above matter be postponed/adjourned."

16. By separate letters, both dated 8 December 2011, the Registrar informed the Parties of the Court's decision that, due to the unavailability of the Respondent, the public hearing on the Application would take place from 22 to 23 March, during the 24th Ordinary Session of the Court to be held from 19 to 30 March 2012, in Arusha, Tanzania, even if only one party were to be present.

17. By an email of 7 February 2012, the Office of the Legal Counsel of the African Union Commission informed the Registry of the Court that, at the hearing, the Respondent would be represented by Advocate Bahame Mukirya Tom NYANDUGA, and the latter would be assisted by officers from the Office of the Legal Counsel of the African Union Commission.

18. By an email dated 18 February 2012, the Applicant confirmed his availability for the public hearing on the dates proposed.

19. By a letter dated 19 March 2012, the Registry received a formal letter from the Office of the Legal Counsel appointing Mr Bahame Mukirya Tom NYANDUGA "to assist the Office of the Legal Counsel of the Respondent in this matter".

20. The public hearing on the Application took place from 22 to 23 March 2012, in Arusha, Tanzania, at which the Court heard the oral arguments and replies:

For the Applicant:

Femi FALANA, Esq

For the Respondent:

- (i) Advocate Bahame Mukirya Tom NYANDUGA
- (ii) Mr Bright MANDO, Legal Officer in the Office of The Legal Counsel of the AU Commission.

21. At the hearing, questions were put by Members of the Court to the Parties, to which replies were given.

22. After deliberations, the Registry received additional submissions from the Applicant, dated 27 March 2012, in which he indicated that they were submitted in accordance with Rule 47 of the Rules. The Court decided that the submissions were not acceptable as the request was not competent in terms of the Rules, and the Registrar was instructed to communicate this decision to the Parties accordingly.

23. By a letter dated 24 April 2012 the Registrar informed the parties of the Court's decision.

III. The position of the parties

A. The position of the Applicant

24. The Applicant starts by noting that by virtue of Article 34(6) of the Protocol enacted by the Respondent, a State Party is required to make a declaration to accept the competence of the Court to hear and determine human rights cases filed by individuals and NGOs.

25. With regard to the jurisdiction of the Court, the Applicant submits that, in the present case, it has not been ousted, because the Respondent is not "a Member State of the African Union." The Applicant maintains that it is the Respondent which enacted and adopted the Charter and the Protocol, and that the Respondent has been sued as a corporate community on behalf of its Member States. He adds that it is clear that the African Union as a whole is representing the African people and their governments, and, therefore, it is competent to defend actions brought against the Member States.

26. The Applicant further argues that the ouster of a Court's jurisdiction can only arise if the Court is satisfied by evidence adduced before it, that the right sought to be enforced has been extinguished.

27. The Applicant also contends that it is trite law that a Court has the jurisdiction to determine whether its jurisdiction has been ousted. He points out that the competence of this Court to determine its jurisdiction is guaranteed in Article 3(2) of the Protocol which states that in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide."

28. The Applicant submits finally that, since Article 34(6) of the Protocol does not require the Respondent or any of its institutions to make a declaration to accept the jurisdiction of the Court, the Court is competent to entertain the Application.

29. With regard to the admissibility of the Application, the Applicant asserts that the requirement of exhaustion of local remedies is not applicable in this case since the Respondent cannot be sued in the municipal courts of its Member States. He further submits that the

domestication by Nigeria of the Charter and the Constitutive Act of the African Union should be construed as giving him direct access to the Court.

30. With regard to his locus standi, the Applicant argues that he has standing in public interest litigation since he has a duty to promote public interest litigation in the area of human rights, based on Article 27(1) of the Charter, which provides that every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community, and Article 29(7) of the Charter which provides that the individual shall have the duty to preserve and strengthen positive African cultural values.

31. The Applicant also states that, being a senior lawyer and a civil rights lawyer in his country, he has clients who would like to approach the Court but he is unable to discharge his duties to them because of the requirement of Article 34(6) of the Protocol.

32. The Applicant finally submits that he therefore has locus standi to file this Application.

33. With regard to the merits of the case, the Applicant maintains that Article 34(6) of the Protocol is inconsistent with Articles 1, 2, 7, 13, 26 and 66 of the Charter.

34. Concerning the alleged violation of Article 1 of the Charter (the obligation for State Parties to recognize the rights, duties and freedoms enshrined in the Charter and to adopt legislative or other measures to give effect to them), the Applicant argues that it is undoubtedly clear that Article 34(6) of the Protocol has derogated from Article 1 of the Charter.

35. Regarding the alleged violation of Article 2 of the Charter (the right to freedom from discrimination), the Applicant contends that, unlike nationals of States that have made the declaration, he cannot drag his country to the African Court on account of human rights violations, and that, by denying him access to the Court, his right to freedom from discrimination on the basis of his national origin has been violated.

36. Concerning the alleged violation of Article 7 of the Charter (right to a fair hearing), the Applicant maintains that, by limiting access to the Court to the making of a declaration by Member States of the Respondent, his right to have complaints of human rights violations heard and determined by the Court has been violated.

37. Regarding the alleged violation of Article 13(3) of the Charter (the right of access to public property and services in strict equality of all persons before the law), the Applicant states that, it is not in dispute that the Court is a public property to which every individual shall have the right of access in strict equality of all persons. He therefore submits that by denying access to the Court to persons whose countries of origin have not made a declaration to accept the competence of the Court, his right to access a public property in strict equality of all persons before the law has been violated without any legal justification.

38. With respect to the alleged violation of Article 26 of the Charter (duty of State Parties to guarantee the independence of the Courts), the Applicant avers that by basing the jurisdiction of the Court on the

Respondent's Member States' discretion to accept such jurisdiction, the Respondent has compromised the Court's independence.

39. With regard to the alleged violation of Article 66 of the Charter (the power to adopt special protocols or agreements to supplement the provisions of the Charter), the Applicant states that, in supplementing the provisions of the Charter, any protocol, like the Protocol on the Court, can only enhance the rights guaranteed in the Charter, and that any provision of a supplementary protocol which derogates from the provisions of the Charter shall be declared null and void by the Court.

40. In conclusion; in his prayer in the Application, the Applicant asks for:

- a. A declaration that Article 34(6) of the Protocol on the Establishment of the African Court is illegal, null and void as it is inconsistent with Articles 1, 2, 7, 13, 26 and 66 of the African Charter on Human and Peoples' Rights.
- b. A declaration that the Applicant is entitled to file human rights complaints before the African Court by virtue of Article 7 of the African Charter on Human and Peoples' Rights.
- c. An order annulling Article 34(6) of the Protocol on the Establishment of the African Court forthwith."

In his Reply to the Respondent's response, the Applicant concludes as follows:

15. "In the light of the foregoing, the Applicant avers that the Respondent has no reply to the Applicant's claim. The reliefs sought by him ought to be granted by this Honourable Court...."
16. In view of this Reply the Applicant avers that the Respondent has no defence whatsoever to the claim of the Applicant."

In his oral submissions, the Applicant prays the Court:

"... to hold that this case is well founded; it is properly constituted and therefore to grant the relief sought by the Applicant, by annulling Article 34(6) of the Protocol so that all victims of human rights violations in the African continent can access this Court in the interest of justice and fair play."

B. The position of the Respondent

41. In general terms, the Respondent avers that the Application, and each and every allegation thereof, fails to state a claim against the Respondent, either in law or in fact, upon which any relief may be granted.

42. With regard to the jurisdiction of the Court, the Respondent denies that the Protocol as well as the Charter and the Constitutive Act of the African Union were adopted by the African Union and submits that these instruments were adopted by Member States of the African Union as is evident from their preambles. He adds that according to Article 63(1) of the Charter and Article 34(1) of the Protocol, the two instruments are open to signature, ratification or accession by African States only.

43. The Respondent states that, in Article 34(6), the Protocol talks about a State and therefore submits that the African Union not being a State cannot ratify the Protocol and that the Protocol cannot be

interpreted in a manner which calls in a corporate entity to assume obligations on behalf of the State.

44. The Respondent maintains that it is not a party to the Charter, nor to the Protocol and that therefore, no case can be brought against it for obligations of Member States under the Charter and the Protocol, in its corporate capacity.

45. The Respondent contends that, in the case at hand, ratification of treaties by Member States of the African Union has never been ceded to the African Union by its Member States, that the African Union cannot be held liable for failure by the Member States to ratify them, or failure to make the requisite declaration.

46. In addition, the Respondent avers that the Applicant has not shown any traceable causal connection whatsoever between the African Union and his lack of access to the Court. Therefore, the Respondent submits that there is no case or controversy between the Applicant and the Respondent to be decided by the Court.

47. Finally, the Respondent maintains that the Applicant is not entitled to submit cases to the Court both under the Protocol and the Rules and urges the Court to determine as a preliminary issue, whether the Court can exercise jurisdiction *ratione personae* and *ratione materiae* with respect to the Application.

48. With regard to the admissibility of the Application, the Respondent contends that even if the Applicant had a right of access to the Court, which he does not have, he should have exhausted the local remedies in Nigeria, as required by Article 6(2) of the Protocol, Article 56 of the Charter and Rule 40(5) of the Rules, which he has not done.

49. With regard to the merits of the case, that is, the issue of inconsistency of Article 34(6) of the Protocol with some provisions of the Charter, the Respondent states in general terms that it is the sovereign right of its Member States to make a declaration at the time of ratification of the Protocol; that the Protocol is valid in all respects under the 1969 Vienna Convention on the Law of Treaties and under customary international law and can only be void if there is a conflict with a peremptory norm of general international law (*jus cogens*); and that as a consequence, the Respondent denies that Article 34(6) of the Protocol is illegal or invalid.

50. Concerning the alleged violation of Article 1 of the Charter, the Respondent avers that it has no obligations under this Article which is exclusively for Member States to recognize the rights, duties and freedoms enshrined in the Charter and to adopt legislative or other measures to give them effect.

51. Regarding the alleged violation of Article 7 of the Charter, the Respondent submits that this Article does not in any way offer the Applicant unrestricted access to the Court, as alleged, or at all.

52. Concerning the alleged violation of Article 13 of the Charter, the Respondent contends that this Article is on the Applicant's participation in the government of his country, the Applicant's right of equal access to the public service in his country and the right to access to public

property and services and it has nothing to do with the obligations of the African Union or access to the Court.

53. On the alleged violation of Article 26 of the Charter, the Respondent avers again that it is not a State Party to the Charter.

54. Finally, with regard to the alleged violation of Article 66 of the Charter, the Respondent submits that this Article applies only to State Parties to the Charter and not to the Respondent.

55. In conclusion;

In its response “the Respondent prays the Court to dismiss the Applicant’s Application in its entirety.” In its oral submissions, the Respondent urges “the Court to determine as a preliminary issue whether the Court can exercise jurisdiction *ratione personae* and *ratione materiae* under the Application”, “prays that the Application should be dismissed for lack of jurisdiction” and, “denies that Articles 1, 2, 7, 13, 26 and 66 of the Charter have been violated and therefore prays that the Application be dismissed.”

IV. The jurisdiction of the court

56. At this stage, the Court has, in accordance with Rules 39(1) and 52(7) of the Rules, to consider the preliminary objections raised by the Respondent and in particular the objection relating to the Court’s jurisdiction over the present Application.

57. Article 3(2) of the Protocol and Rule 26(2) of the Rules provide that “in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.”

58. In order to determine the preliminary objection, it has to be noted that, for the Court to hear an Application brought directly by an individual there must be compliance with, *inter alia*, Article 5(3) and Article 34(6) of the Protocol.

59. Article 5(3) of the Protocol provides that: “The Court may entitle relevant Non-Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol.”

60. For its part, Article 34(6) of the Protocol provides that: “At the time of ratification of this Protocol or anytime thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration.”

61. As the Court stated in *Michelot Yogogombaye v The Republic of Senegal*, Application No 001/2008, paragraph 34, “[t]he effect of the foregoing two provisions, read together, is that direct access to the Court by an individual is subject to the deposit by the Respondent State of a declaration authorizing such a case to be brought before the Court.”

62. As mentioned earlier, the Applicant submits first that the requirement of the declaration provided for in Article 34(6) of the Protocol applies only to Member States and not to the African Union itself. He concludes that since the Article does not require the

Respondent or any of its institutions to make a declaration to accept the jurisdiction of the Court, the Court is competent to entertain his Application. For its part, the Respondent does not specifically address this argument.

63. In the view of the Court, the fact that a non-state entity like the African Union is not required by Article 34(6) of the Protocol to make the declaration does not necessarily give the Court jurisdiction to accept Applications brought by individuals against such entity; there may be other grounds on which the Court may find that it has no jurisdiction. In the present instance, what is specifically envisaged by the Protocol and by Article 34(6) in particular is precisely the situation where Applications from individuals and NGOs are brought against State Parties. In this regard, Article 3(1) of the Protocol which deals with the jurisdiction of the Court is referring to interpretation and Application of human rights instruments ratified by the “States concerned.” Similarly, Article 34(6) of the Protocol itself refers only to a “State Party”.

64. Secondly, the Applicant submits that the African Union can be sued before the Court because it was the one which enacted and adopted the Protocol, as a corporate community on behalf of its Member States.

65. On its part, as mentioned earlier, the Respondent submits:

- That the Protocol was not adopted by the African Union as such, but by its Member States, as evidenced in the preamble to the Protocol
- That the Respondent is not a party to the Protocol and that the Protocol in Article 34(6), talks about a State, and the African Union not being a state, cannot ratify the Protocol.
- That the ratification of treaties by Member States of the African Union has never been ceded to the African Union by its Member States and that the African Union cannot be held liable for failure by the Member States to ratify the Protocol or to make the requisite declaration, and therefore, no case can be brought against it for obligations of Member States under the Charter and the Protocol in its corporate capacity.
- That the African Union cannot assume obligations of sovereign Member States which have sovereign rights when ratifying the Protocol and making the declaration.

66. Concerning the Applicant’s submission that the African Union can be sued before the Court, because it was the one which enacted and adopted the Protocol, the Court notes that the Protocol was adopted by the Assembly of Heads of State and Government of the African Union. The Court also notes however that the Protocol was agreed upon by the Member States of the African Union as is evidenced by the preamble of the Protocol which states as follows: “The Member States of the Organization of African Unity ... State Parties to the African Charter on Human and Peoples’ Rights ... Have agreed as follows.”

67. In the practice of the African Union, although the adoption of treaties is done formally by the Assembly of Heads of State and Government, their signature and ratification are still the exclusive prerogative of its Member States. This is confirmed, *inter alia*, by Article 34(1) of the Protocol which provides that “it shall be open for signature and ratification or accession by any State Party to the Charter” (see also Article 63(1) of the Charter). Thus, in the view of the Court, the mere

fact that the Protocol has been adopted by the Assembly of Heads of State and Government does not establish that the African Union is a party to the Protocol and therefore can be sued under it.

68. Regarding the Applicant's contention that the African Union can be sued as a corporate community on behalf of its Member States, it is the view of the Court that, as an international organization, the African Union has a legal personality separate from the legal personality of its Member States. As the International Court of Justice stated in its Advisory Opinion on Reparation for injuries suffered in the service of the United Nations:

"It must be acknowledged that its Members [United Nations], by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.

Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. ... What it does mean is that it is a subject of international law and capable of possessing international rights and duties"¹

69. In this regard, however, in principle, international obligations arising from a treaty cannot be imposed on an international organization, unless it is a party to such a treaty or it is subject to such obligations by any other means recognized under international law.

70. In the present case, the African Union is not a party to the Protocol. As a legal person, an international organization like the African Union will have the capacity to be party to a treaty between States if such a treaty allows an international organization to become a party. As far as an international organization is not a party to a treaty, it cannot be subject to legal obligations arising from that treaty. This is in line with Article 34 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations which provides:

"A treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization." (see also, Article 34 of the 1969 Vienna Convention on the Law of Treaties).

71. Therefore, in the present case, the African Union cannot be subject to obligations arising from the Protocol unless it has been allowed to become a party to the Protocol and it is willing to do so, both of which do not apply. In the same vein, the mere fact that the African Union has a separate legal personality does not imply that it can be considered as a representative of its Member States with regard to obligations that they undertake under the Protocol.

72. It is therefore the opinion of the Court that the African Union cannot be sued before the Court on behalf of its Member States.

¹ *Reparations for injuries suffered in the service of the United Nations, Advisory Opinion*, ICJ Reports, 1949, p 179.

73. At this juncture, it is appropriate to emphasize that the Court is a creature of the Protocol and that its jurisdiction is clearly prescribed by the Protocol. When an Application is filed before the Court by an individual, the jurisdiction of the Court *ratione personae* is determined by Articles 5(3) and 34(6) of the Protocol, read together, which require that such an Application will not be received unless it is filed against a State which has ratified the Protocol and made the declaration. The present case in which the Application has been filed against an entity other than a State having ratified the Protocol and made the declaration, falls outside the jurisdiction of the Court. Therefore, the Court has no jurisdiction to entertain the Application.

74. Since the Court has concluded that it does not have jurisdiction to hear the Application, it does not deem it necessary to examine the question of admissibility of the Application and the merits of the case.

75. In view of the foregoing,

THE COURT by a majority of seven votes to three:

Holds that in terms of Articles 5(3) and 34(6) of the Protocol, read together, it has no jurisdiction to hear the case instituted by Femi Falana, Esq against the African Union.

Separate Dissenting Opinion by Judges AKUFFO, NGOEPE and THOMPSON

1. We have read the majority judgment; regrettably, we are unable to agree with it. The history of the case until the conclusion of the hearing is set out in the majority judgment; there is no need to repeat it here.

I. The Parties

2. The Applicant is a Nigerian national, describing himself as a human rights activist. He says he has received some awards in the field of human rights. He is a practicing lawyer, based in Lagos, Federal Republic of Nigeria.

3. The Respondent is the African Union (the AU), established in terms of Article 2 of the Constitutive Act of the African Union (the Act). It comprises all states in Africa, barring one. In terms of Article 33, the Act replaces the Charter of the Organization of African Unity (the OAU) and makes the AU a successor to the OAU in all relevant material respects. One of the consequences of such a succession is that instruments such as Charters and Protocols thereto adopted, ratified and acceded to under the OAU, are binding on the AU and Member States unless repudiated; these include the African Charter on Human and Peoples' Rights (the Charter) and the protocols to it such as the Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol). The Charter and the Protocol are central to this case.

II. The Applicant's case and the remedies sought

4. The Applicant challenges the validity of Article 34(6) of the Protocol. The Article bars individuals and Non-Governmental organizations (NGOs) from accessing this Court, except where a Respondent State has made a special declaration accepting to be cited by an individual or an NGO. The Applicant contends that the Article violates various Articles of the Charter and therefore prays the following remedies:

- “(a) A DECLARATION that Article 34(6) of the Protocol on the Establishment of the African Court is illegal, null and void as it is inconsistent with Articles 1, 2, 7, 13, 26 and 66 of the African Charter on Human and Peoples' Rights.”
- (b) A DECLARATION that the Applicant is entitled to file human rights complaints before the African Court by virtue of Article 7 of the African Charter on Human and Peoples' Rights.”
- (c) AN ORDER annulling Article 34(6) of the Protocol on the Establishment of the African Court forthwith.”

III. Respondent's case

5. The Application is opposed by the Respondent on the grounds which, broadly stated are, firstly, lack of jurisdiction over the Respondent as well as the Applicant's lack of *locus standi*, and, secondly, that the impugned Article is in any case not in conflict with the provisions of the Charter. Under the first point, a number of subsidiary grounds are advanced; they will be dealt with later.

6. Although the Respondent raised as a preliminary objection lack of jurisdiction, the parties were requested by the Court to argue both the preliminary objections and the merits together at the hearing; that was how the hearing was conducted. This was to avoid parties having possibly to come back after the preliminary stage, the intention being to save time, costs and also to avoid inconvenience to the parties.

7. We are aware that not being a signatory to a treaty, a third party may not be sued under that treaty. However, for the reasons which will become apparent later, this case is, in our view, different.

8. As said earlier, a number of related points are raised under lack of jurisdiction.

8.1 It is argued that the Respondent cannot be cited as representing Member States. That may be true; however, Respondent is cited herein on its own, as a legal person, having been established in terms of the Act, Article 2 thereof. The Article reads “The African Union is hereby established with the provisions of this Act”. We agree with the majority judgment that the Respondent has international legal personality, separate from the legal personality of its Member States. It is therefore not necessary for us to deal with this aspect. We, however, disagree with the majority judgment that the Respondent could not be cited in the case before us.

8.1.1 After holding that the United Nations Organization is an international person, the International Court of Justice, in *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, went on to say; “What it does mean is that it is a subject of

international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims". It is our view that the right to bring international claims carries with it, as a natural legal consequence, the capacity to be sued. We point out later that one of the duties imposed upon the Respondent, through the Charter, is to protect human and peoples' rights; such an obligation would mean nothing if it could not be enforced against the Respondent.

8.1.2 After establishing the Respondent as a legal entity Member States went further and conferred certain powers on it; these include the power to deal with the protection of human rights on the Continent. Article 3(h) of the Act states the following as being one of the Respondent's objectives, namely to: "Promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and the relevant human rights instruments".

Furthermore, Article 4 of the Act states:

"The Union (Respondent) shall function in accordance with the following principles:

...

(h) The right of the Union to intervene in a member state of the Assembly in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity ...

(m) Respect for democratic principles, human rights, the rule of law and good governance ..."

The Respondent's predecessor, the OAU, had likewise been empowered, and charged with the obligation, by Member States to ensure the protection of human and peoples' rights. The Act, the Charter, as well as the Protocol, have empowered the Respondent to exercise the powers, and to execute obligations, conferred on it. These powers can be conferred expressly by a constitutive instrument, or may be implied.¹ Once so empowered, the legal organization is able to carry out the authorized duties and functions independently of the Member States as it is a legal person. It is our view that such has been the case here; accordingly, there was no need to cite individual Member State, which is also why Article 34(6) is not applicable.

8.1.3 One of the indications that an international legal person has been empowered to carry out certain functions independently of Member States is its capacity to take decisions by majority.² Such a decision would therefore bind even those Member States who voted against it. In terms of Article 7(1) of the Act, the Respondent does take decisions by majority, consensus failing: "The Assembly shall take its decisions by consensus or, failing which, by a two- third majority of member states of the Union. However, procedural matters, including the question whether a matter is one of procedure or not, shall be decided by a simple majority."

1 *Legality of the Use by State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports (1996) 79.

2 ND White *The Law of International Organisations* 2nd Edition (2005) 72.

8.1.4 As further indication that Respondent has been empowered to deal with human and peoples' rights issues itself, organs such as the African Commission on Human and Peoples' Rights (the Human Rights Commission) and this Court, have been created within it to enable it to carry out these duties. The Respondent itself, and not individual Member States, does for example, manage and conduct the election of officials to these organs; approves and provides budgets for their activities relating to the protection of human rights and receives periodic reports from these organs.

8.1.5 As yet a further demonstration of the Respondent's legal personality and that it has been empowered to deal with human rights issues itself, independently of Member States, the Respondent can seize this Court for an advisory opinion in respect of these matters in terms of Article 4 of the Protocol.

8.2 Importantly, none of the remedies sought by the Applicant seeks to impose any obligations on either the Respondent or Member States, particularly the prayer we may be inclined to grant.

8.3 In light of the totality of paragraphs 8.1 and 8.2 above, the argument that the Respondent cannot be cited as it is not a party to either the Charter or the Protocol, or that no case can be brought against it in respect of obligations of Member States and therefore that the Applicant has not shown any traceable causal connection between the Respondent and the Applicant's lack of access to the Court, is irrelevant; so too is the submission that no case can be brought against the Respondent in respect of obligations of Member States. We therefore hold that the Respondent has been properly cited.

8.4 It is also argued that Applicant did not exhaust local remedies before approaching this Court, as required by Article 6(2) of the Protocol, read together with Article 56(5) of the Charter. In this respect, it is argued that the Applicant, being a Nigerian national, should have taken his country to his national courts to compel his country to make the declaration in terms of Article 34(6) of the Protocol. Respondent's argument is wrong in two respects. Firstly, the Applicant is not approaching the court as a Nigerian national, nor is he seeking a remedy for himself or Nigerian nationals only. Even if he had succeeded through Nigerian Courts to cause his own country to make the declaration, millions of nationals of the other State Parties to the Protocol which have not made the declaration would still remain barred. That only five State Parties have so far made the declaration, means that the multitude of individuals on the Continent remain barred by Article 34(6). Nigeria's declaration would hardly have made any difference. The logic of Respondent's argument is that nationals of each State Party which has not made the declaration should bring Applications in every single national jurisdiction before approaching this court. This is a very theoretical approach, virtually impracticable, as opposed to the pragmatic one adopted by the Applicant. The protection of human rights is too important to be left to the vagrancies of such theoretical solutions.

8.5 Furthermore, the Respondent contends that, by virtue of Article 34(6) of the Protocol, the Applicant, being an individual, is barred from

approaching this Court. Surely, one cannot disqualify the Applicant from approaching this Court by invoking the very Article the validity of which the Applicant is seeking to challenge. The Court must first hear the matter and only thereafter, (emphasis) decide whether the impugned Article is valid or not. Article 3(2) of the Protocol provides that in “the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.” For the Court to decide, it must first be seized by an Applicant. It is precisely the person who has been shut out who will knock at the door to be heard on the validity of the ouster clause. This Court therefore has jurisdiction to adjudicate on the validity of Article 34(6) at the instance of an individual Applicant. The Applicant’s answer to the Respondent’s argument is that since he is not citing a member state, but rather the Respondent, Article 34(6) has no Application. There is merit in this argument. The Article only requires that State Parties make the declaration, and not non-State Parties. The law is not against an individual *per se*, but is aimed at protecting a State Party which has not made the declaration; that is why even a foreign individual can sue a State Party that has made the declaration.

8.6 Again, it is argued that the Court has, in any event, no power to set aside Article 34(6) of the Protocol. As this argument is capable of being divorced from the strict issue of jurisdiction, it will be dealt with later.

9. By reason of it having been empowered, and charged with the obligation, by Member States to administer, apply and enforce the Charter and the Protocol, both of which form the subject matter of this case, the Respondent has in any case a material and direct interest in the matter and therefore had to be cited.

10. For the reasons given above, the preliminary objections are overruled. That being the case, attention now turns to the merits of the case.

IV. Whether Article 34(6) of the Protocol is inconsistent with the Charter

11. As already stated, the protection of human and peoples’ rights is one of the objectives of the Act, as was indeed the case under the old Charter of the OAU.

12. The Charter: The fundamental objective of the Charter was, and remains, to uphold and protect human and peoples’ rights. This objective appears clearly from its preamble, and is cemented in, amongst others, the following Articles relied upon by the Applicant:

Article 1: “The Member States of the Organisation of African Unity, parties to the present Charter shall recognize the rights, duties and freedom enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them”.

Article 2: “Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour; sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.”

Article 7 “1. Every individual shall have the right to have his cause heard. This comprises:

- a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
 - b) The right to be presumed innocent until proven guilty by a competent court or tribunal;
 - c) The right to defence, including the right to be defended by counsel of his choice;
 - d) The right to be tried within a reasonable time before an impartial court or tribunal;
2. No one may be condemned for an act or omission which did not constitute a legal punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender."

Article 26: "State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

13. The Protocol

13.1 Article 66 of the Charter provides for the making of special protocols, if necessary, to supplement (emphasis) the provisions of the Charter towards the protection of human rights. Pursuant to that, the Protocol was established and adopted on 9 June 1998, and duly ratified, at least by some Member States, and came into operation on 25 January 2004. Being a protocol to the Charter, the Protocol is subservient to the Charter.

13.2 The Protocol aims, through the Court, to give effect to the protection of human rights, including, naturally, the right of individuals, albeit in complementarity with the Human Rights Commission. This is a ringing demand by Article 66 of the Charter.

13.3 The preamble to the Protocol states that Member States are firmly "convinced that the attainment of the objectives of the African Charter on Human and Peoples' Rights requires the establishment of an African Court on Human and Peoples' Rights...". Article 1 establishes the Court. Article 3 provides:

- "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."

13.4 In terms of the Protocol, the mandate of the Court is therefore to protect human rights; and its jurisdiction, which itself decides upon, extends to all cases and disputes concerning human rights.

V. Access to the Court

14. Article 5 of the Protocol determines who can submit cases to the Court; for example the Human Rights Commission, or a State Party.

Article 5(3) further provides: "The Court may entitle relevant Non-Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of the Protocol." Article 34(6) in turn reads: "At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration." Access to the Court is therefore controlled through Articles 5 and 34(6) read together. The latter Article is the one the Applicant contends is inconsistent with the provisions of the Charter. In determining whether or not the Article is inconsistent with the Charter, it falls to be considered alone, and on its own wording and construction. Secondly, a proper understanding of the relationship between the Charter and the Protocol is vital in resolving the issue of alleged inconsistency between them.

VI. The relationship between the Charter and the Protocol

15. From the above expose, it is clear that, firstly, the Charter ranks higher than the Protocol; a point which, not surprisingly, the Respondent did not dispute. Secondly, the Protocol was brought about solely to enhance the protection of human and peoples' rights through the Court, in complementarity with the Human Rights Commission. These are the very rights recognized and entrenched in the Charter.

16. To the extent that Article 34(6) denies individuals direct access to the Court, which access the Charter does not deny, the Article, far from being a supplementary measure towards the enhancement of the protection of human rights, as envisaged by Article 66 of the Charter, does the very opposite. It is at odds with the objective, language and spirit of the Charter as it disables the Court from hearing Applications brought by individuals against a state which has not made the declaration, even when the protection of human rights entrenched in the Charter, is at stake. We therefore hold that it is inconsistent with the Charter. We do so well aware of Article 30 of the Vienna Convention on the Law of Treaties regarding the Application of successive treaties relating to the same subject matter.

VII. Whether Article 34(6) should be declared null and void or set aside

17. The question arises whether this Court has the competence to declare Article 34(6) of the Protocol null and void and/or to set it aside. The Court is a creation of the Protocol and its competencies therefore derive from the Protocol. Determining whether or not Article 34(6) is inconsistent with the Charter is a matter of interpretation which the Court is therefore competent to do in terms of Article 3(1) of the Protocol. So too, in holding that this Court has jurisdiction to hear this Application, the Court derives its competence from Article 3(2) of the Protocol which empowers it to decide whether or not it has jurisdiction in any particular matter before it. In national jurisdictions where the constitution is the supreme law, any law inconsistent therewith would

be liable to be struck down by the Court, the latter deriving the power to do so from the constitution itself. In *casu*, we find no provision in the Protocol empowering the Court to declare null and void and/or to set aside any Article of the Protocol. Therefore, much as such a move may appear to be the logical thing to do in light of our finding of inconsistency, the Applicant's prayer is not competent. It is, however, hoped that the problems raised by Article 34(6) will receive appropriate attention.

18. The following finding is made:

(a) The Court has jurisdiction to hear this Application.

(b) Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights is inconsistent with the African Charter on Human and Peoples' Rights.

(c) The Applicant's prayer that Article 34(6) be declared null and void and/or be set aside is denied.

Separate Opinion: MUTSINZI

1. According to Article 28(7) of the Protocol which established the African Court on Human and Peoples' Rights, "If the judgment of the Court does not represent, in whole or in part the unanimous decision of the Judges, any Judge shall be entitled to deliver a separate or dissenting opinion".

2. The Judgement adopted by the majority of the Members of the Court, was as follows: "Declares that, pursuant to Articles 5(3) and 34(6) of the Protocol, read together, it does not have the jurisdiction to hear the Application filed by Mr Femi Falana against the African Union".

3. In that Judgement, I agree with the conclusion that the Court does not have the jurisdiction to hear the Application filed by Mr Femi Falana against the African Union.

4. My disagreement stems from the legal basis for said lack of jurisdiction, which in my opinion, is not addressed in Articles 5(3) and 34(6) of the Protocol.

5. In fact, the said articles provide as follows: "The Court may entitle relevant non-governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol" (Article 5(3)), "At the time of the ratification of this Protocol or at any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration", (Article 34(6))."

6. A combined reading of the provisions above, points to the fact that they referred to Applications filed by individuals or non-governmental organizations against States parties, in which case, the question raised

is whether the Respondent State has made the declaration accepting the jurisdiction of the Court to hear cases brought before it by individuals or non-governmental organizations, whereas, the African Union is neither a State nor a State party to the Protocol and, consequently cannot make such declaration as provided for in Articles 5(3) and 34(6) of the Protocol.

7. For my part, I hold the view that the basic issue that needs to be resolved and which would dictate subsequent action is one of ascertaining whether, as in the instant case, non-State entities may be brought before the Court as respondents.

8. It is my opinion that the provisions of the Protocol as a whole and Articles 3, 30 and 34(1, 4), in particular, show that, the Respondent before this Court can only be a State party. In that regard, the operative paragraph of the Judgment, ought to have been as follows:

Declares, that in accordance with the Protocol, only State parties may be brought before the Court as respondents for allegations of Human Rights violations and that, accordingly, the Court does not have the jurisdiction to entertain the Application filed by Mr Femi Falana against the African Union.

Separate opinion: OUGUERGOUZ

1. Mr Femi Falana's Application against the African Union raises the issue of access to the Court's jurisdiction by individuals and Non-Governmental Organisations. It does so by challenging the legality of Article 34(6), which subjects such access to the deposit of a declaration accepting the jurisdiction of the Court by States Parties. The importance and crucial significance of that issue notwithstanding, I share the opinion of the Majority according to which the Court has no jurisdiction to entertain Mr Falana's Application. It is however my considered opinion that since the Court manifestly lacks the jurisdiction *ratione personae* to hear and determine the Application, it ought not to have disposed of it by way of a Judgment as provided in Rule 52(7) of the Rules. Rather, the Application ought to have been rejected without the Court itself intervening, that is *de plano* through a simple letter from the Registrar.

2. I have had the opportunity, on numerous occasions to explain my position as a matter of principle, on the way and manner of dealing with individual Applications with regard to which the Court manifestly lacks

personal jurisdiction; which is the case with Applications against States Parties which have not made the optional declaration under Article 34(6) of the Protocol, or against African States which are not Parties to the Protocol or not members of the African Union or even against an organ of the African Union.¹

3. In all cases where the jurisdiction *ratione personae* of the Court is manifestly lacking, I am indeed of the opinion that the Court should not proceed with the judicial consideration of Applications received by the Registry. Such Applications should rather be processed administratively and rejected *de plano* through a simple letter from the Registrar.

4. The Court has rendered decisions (which it formally distinguishes from “judgments”)² in most cases that it has considered to this day, whereas it had formally acknowledged that it was “manifest” that it lacked the jurisdiction to entertain such Applications (see for instance, *Youssef Ababou v The Kingdom of Morocco* (para 12), *Daniel Amare & Mulugeta Amare v Mozambique Airlines & Mozambique* (para 8), *Ekollo Moundi Alexandre v The Republic of Cameroon and the Federal Republic of Nigeria* (para 10), *Convention Nationale des Syndicats du Secteur Education (CONASYSED) v Republic of Gabon* (paras 11 & 12), *Delta International Investments SA, Mr and Mrs de Lange v The Republic of South Africa* (paras 8 & 9), *Emmanuel Joseph Uko v The Republic of South Africa* (paras 10 & 11), *Timan Amir Adam v The Republic of Sudan* (paras 8 & 9)).

5. On occasions, the Court had even admitted, in its own words, that it was “evident” that it “manifestly lacked the jurisdiction” to entertain the Applications in question (see the English version of the Decisions on the *Convention Nationale des Syndicats du Secteur Education (CONASYSED) v The Republic of Gabon*, (para 11), *Timan Amir Adam v The Republic of Sudan* (para 8), *Delta International Investments SA, Mr and Mrs de Lange v The Republic of South Africa* (para 8) and *Emmanuel Joseph Uko v The Republic of South Africa* (para 10)).

6. In the instant case, the Court has also decided to proceed with the judicial consideration of the Application filed by Mr Falana against the African Union. It however decided to do so not by way of an expedited or summary consideration which would result in the adoption of a simple “decision” but rather through the judicial process as provided in the Rules of Court, in other words by rendering a Judgment after an *inter partes* hearing comprising a written and an oral phase. The case

1 See separate opinions attached to the Judgments in the cases of *Michelot Yogogombave v The Republic of Senegal*, *Efoua Mbozo 'o Samuel v The Pan African Parliament*, the *Convention Nationale des Syndicats du Secteur Education (CONASYSED) v The Republic of Gabon*, *Delta International Investments S.A., Mr AGL de Lang and Mme. Lang v The Republic of South Africa*, *Emmanuel Joseph Uko v The Republic of South Africa* and *Timan Amir Adam v The Republic of Sudan*, as well as my dissenting opinion attached to the decision in the Case of *Ekollo Moundi Alexandre v The Republic of Cameroon and the Federal Republic of Nigeria*.

2 On the distinction made by the Court between a “Judgment” and a “Decision”, see paragraphs 3, 4 and 5 of my dissenting opinion attached to the decision in the Case of *Ekollo Moundi Alexandre v The Republic of Cameroon and the Federal Republic of Nigeria*.

of *Michelot Yogogombaye v The Republic of Senegal* is the only other matter dealt with in this manner.

7. In the following paragraphs, I will provide the reasons why I am of the opinion that Mr Falana's Application ought not to have been disposed of by way of a judicial process nor, lesser still, through the "full" judicial consideration which it was accorded as from the time it was filed with the Registry slightly more than sixteen (16) months ago.

8. Subsidiarily, I will also state why, having voted for the operative paragraph of the judgment, I do not subscribe to the motives of the Judges particularly with regard to the legal basis on which the Court relies in determining that it lacked jurisdiction. I will in addition be addressing some issues of procedure which are important in my view.

9. It seems to me obvious that Applications may only be filed against a "State"; which State must as a matter of course be party to the Protocol. This stems from both the letter and the spirit of the Protocol. Thus Article 2 of the Protocol does provide that the Court shall complement the protective mandate of the African Commission on Human and Peoples' Rights conferred upon it by the Charter: whereas, according to the African Charter, only "States" parties to the said Charter may be the subject of communications filed before the African Commission. The Protocol to the African Charter establishing the Court was not meant to deviate from that principle as evidenced in Articles 3(1), 5(1)(c), 7, 26, 30, 31 and 34(6), all of which make no reference to any other entity but the "State" ("States concerned", "State against which a complaint is filed", "States concerned", "States Parties").

10. Article 5 of the Protocol does make reference, other than the State, to the African Commission, African inter-governmental organizations, individuals and non-governmental organizations, but for the sole purpose of authorizing them to file an Application against a State Party and not for them to become potential "Respondents" before the Court.

11. Since the African Union is an Inter-Governmental organization, it is not therefore, according to the Protocol as it is now, an entity against which an Application may be filed before the Court or which might become party to the Protocol. To my knowledge the only international organization which might in the near future, be a party before a Court in a matter regarding human rights violations is the European Union. Talks are indeed underway to allow the European Union to accede to the European Convention on Human Rights and thus be subject to Applications before the European Court of Human Rights.

12. Since the Protocol is unequivocal with regard to entities that may be sued before the Court, it would have sufficed for its provisions to be interpreted in accordance with "the ordinary meaning to be given to the terms (of that instrument) in their context and in the light of its object and purpose" (Article 31(1) of the 1969 Vienna Convention on The Law of Treaties) on the general rule of interpretation provides: A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. and to reject the said Application *de plano* (that is, without the need for a Judicial decision) on the basis of the Court's manifest lack of personal jurisdiction.

13. The Court however chose to hear and rule on the Application by following the process earmarked in the Rules, in other words to consider it via *inter partes* proceedings and rendering a judgment in a public sitting. In so doing, the Court placed itself in a difficult position as evidenced by the relative fragility and circular nature of its reasoning in paragraphs 56 to 73 of the Judgment to which I do not subscribe for the reasons set out in paragraphs 9, 10, 11 and 12 above.

14. Before delving into the reasoning of the Court that led to the finding that it lacked jurisdiction, I would like to consider two issues of procedure which seem of importance to me.

15. From the procedural standpoint, the first important issue which arises is one of ascertaining why the Court did not consider the Application in two separate phases: one devoted to the consideration of its jurisdiction and the admissibility of the Application and the other, to the merits of the case (in the event it had ruled that it had jurisdiction and had considered the Application admissible). Rule 52(3) of the Rules indeed provide that when preliminary objections are raised with the Court, it shall rule on the objections or incorporate its ruling in its decision on the substantive case; it also provides that "... such objections shall not cause the proceedings on the substantive case to be suspended unless the Court so decides".

16. In the instant case, the Court did not decide to suspend proceedings on the substantive case as the written³ as well as the oral submissions⁴ of the parties dwelt both on issues of the jurisdiction of the Court and on the admissibility of the Application and on matters regarding the merits of the case. Though it did not also formally decide to join consideration of the preliminary objections with that of the merits of the case, it would appear that such joinder actually took place because, as I just indicated, the merits of the case were argued by the parties in their written submissions and during the oral pleadings.

17. Rule 52(3) of the Rules does not specify the circumstances in which proceedings on the substantive case may be suspended nor does it spell out the circumstances in which the joinder to the merits of the case may be ordered; it would therefore be proper for the Court to bridge that gap so as to clear any uncertainty in that regard. The practice at the International Court of Justice, for instance requires, that proceedings on the merits of the case be automatically suspended once a preliminary objection is raised⁵ and consideration thereof joined with the merits of the case where such objection "does not, in the circumstances of the case, an exclusively preliminary",⁶ in other words,

3 In its submissions dated 29 April 2011 in answer to Mr Falana's Application, the African Union indeed dwelt on issues regarding the Court's jurisdiction, the admissibility of the Application as well as the merits of the case; the same applies to Mr Falana's brief in reply to the submissions of the African Union dated 23 June 2011.

4 See the Verbatim Records of Hearings of 22 and 23 March 2012.

5 Rule 79(5) of the Rules of the International Court of Justice indeed provide that: "upon receipt by the Registry of a preliminary objection, proceedings on the merits shall be suspended".

6 Rule 79(g) of the Rules of Court.

when the Hague Court cannot rule on the objection without considering the merits of the case. For purposes of interpretation and Application of the second sentence of Rule 52(3) of the Rules, the “not exclusively preliminary” character of an objection could be used as criteria by the Court in deciding on joining or incorporating its ruling on a preliminary objection in its decision on the substantive case.

18. In the instant case, and based on such a criteria, a joinder was not required as the Court could have ruled on the preliminary objections raised by the African Union without delving into the merits of the case. This clearly emerges *a posteriori*; among the grounds for the judgment and specifically in paragraph 73 wherein the Court held the opinion that, having concluded that it does not have the jurisdiction to hear the Application, “it does not seem necessary to examine the [...] merits of the case”.

19. To ensure strict compliance with the stipulations of Rule 52(3) of the Rules, Members of the Court ought therefore to have interrupted its proceedings on the case as allowed by the above Rule, and pronounced itself firstly on its jurisdiction and on the admissibility of the Application. The main consideration of the written⁷ as well as all of the oral submissions ought then to have focused solely on the issue of the jurisdiction of the Court and on the admissibility of the Application.

20. The purpose in having a preliminary phase devoted to the consideration of issues of jurisdiction and admissibility is to avoid arguments on the merits as long as issues regarding the jurisdiction of the Court and the admissibility of the Application had not been resolved. Incidentally, holding such a preliminary phase also allows for the avoidance of a dissenting opinion attached to the Judgment, or deal with issues relating to the merits of the case. It is only when consideration of an objection is not of an exclusively preliminary character and when such consideration is joined to the merits of the case that a dissenting opinion could deal with relevant issues considering the substantive case; in such circumstances, consideration of the substantive case is by definition necessary so as to make a determination on matters of jurisdiction and admissibility.

21. In the light of the foregoing, it seems to me that the Court should revisit Rule 52(3) of the Rules and determine whether its jurisdiction really meet specific demands of its jurisdiction, in other words if they contribute to the proper administration of justice by a judicial organ charged with hearing and ruling on disputes in the field of human rights essentially pitting individuals against States. If the answer is no, then that Rule ought to be amended.

22. The other matter of procedure which the Court does not seem to have resolved satisfactorily in my opinion is that of the legal status to be

7 In its observations in reply to Mr Falana's Application, the African Union actually delved into the merits of the case even though it did raise preliminary objections.

given to some of the documents⁸ tendered by the parties during the oral proceedings.

23. On 20 March 2012, that is two days before the commencement of the public hearings, the Registrar asked the parties to submit “a copy of their oral pleadings” for the purpose of facilitating the work of the Interpreters.⁹ The documents tendered by the parties at the beginning of the public hearings, one of which was titled “Oral Submissions”, did not in any manner reflect the content of the arguments presented orally during the hearings. The Rules of Court do not provide for the filing of such a document during the oral hearings; the only documents relating to the oral proceedings mentioned in the Rules as provided for in Rule 48 and is produced by the Registry; these are “Verbatim Records” which, after being signed by the President and the Registrar, are deemed to be a true reflection of the submissions made by the parties during the public hearings.¹⁰

24. The documents produced by the parties may not in any circumstance be considered as the record of the pleadings made by the parties during the oral proceedings; same as they may not be considered as being materials of the written proceedings in that they were tendered after the pleadings had been closed on 24 June 2011 (see paragraph 12 of the Judgment) and whereas they had been part of the exchange between the parties that form part of the adversarial nature of the proceedings.

25. It therefore seems to me unfortunate that, during its deliberations, the Court made use of documents of uncertain legal status when considering the arguments canvassed by the parties; paragraph 55 of the Judgment further reproduces the conclusions of the Respondent as they appear on pages 2 and 3 of the document submitted on 22 March 2012. I am of the opinion that the tendering by the parties of what appears to be a new written document in the course of the oral proceedings is creating confusion and only complicates the task of the Court. These documents differ in content from the Verbatim Records of the hearing and must also be translated into the working languages of the Court; further, the Judges are not in a position to practically acquaint themselves with their contents during the hearings nor consider them seriously for the purpose of the deliberations which follow immediately the oral proceedings.

8 The Applicant filed a 21-page document titled “Oral submissions” dated 21 March 2012; the Respondent, for its part, a filed 16-page document, undated, as well as another 10-page document dated 23 March 2012 in which it replied to the “Oral submissions” of the Applicant and the questions put by the Judges.

9 See the purport of the email sent by the Registrar to the Parties on 20 March 2012 stating “Please, as we finalize for the hearing, the Registry would be most obliged if we could have a copy of your oral pleadings in the morning of Thursday to facilitate with interpretation”.

10 Rule 48 of the Rules indeed provide that once corrected by the Parties, provided that such corrections do not affect the substance of what was said (para. 2), and signed by the President and the Registrar, the verbatim record shall then “constitute the true reflection of the proceedings” (para.3).

26. Let me now consider the reasoning of the Court which led it to conclude that it lacked the jurisdiction to hear and to determine the Application. I would start by observing that in the instant case the Court did not adopt the approach that had hitherto been the case when it considered the Application filed by Mr Efova Mbozo'o Samuel against an organ of the African Union namely the Pan African Parliament (see its Decision of 30 September 2011); in that case, the Court indeed avoided pronouncing itself on its personal jurisdiction as it ought to have done and rejected the Application by implicitly relying on its lack of material jurisdiction.

27. The Court's reasoning in paragraphs 58 to 63 of the Judgment are intended to establish that Articles 5(3) and 34(6) of the Protocol, when read together, require that direct access to the Court by an individual be subject to the deposit of a special declaration by the Respondent State; these paragraphs are not therefore of particular interest to the issue at hand considering that the Application had not been filed against a State Party. The Court does clearly concede this when it concludes that "there may be other grounds on which the Court may find that it has no jurisdiction" (paragraph 63). That finding did not however prevent the Court from ultimately invoking Articles 5(3) and 34(6) above in concluding that it lacked the jurisdiction to entertain the Application (see paragraph 73 as well as operative paragraph 75 of the Judgment).

28. The rest of the Court's reasoning is intended to address the Applicant's argument according to which the African Union could be brought before the Court "as it is the one which promulgated and adopted the Protocol as a corporate community on behalf of its Member States" (paragraphs 25 and 64). In so doing, the Court establishes 1) that the African Union is an international organization with a legal personality separate from that of its Member States (paragraph 68) and 2) that it cannot therefore be subject to the obligations under the Protocol as it is not party to that instrument (paragraph 71). Those are two conclusions that are self-evident.

29. The Court however deemed it necessary to add, without explaining why, that "the mere fact that the African Union has a separate legal personality does not imply that it can be considered as a representative of its Member States with regard to obligations that they undertake under the Protocol" (paragraph 71). This assertion, in all likelihood, is intended to address the Applicant's argument according to which "it is clear that the African Union as a whole is representing the African people and their governments and therefore is considering to defend the actions brought against the Member States" (paragraph 25).

30. That assertion by the Court is equally self-evident and adds nothing to the reasoning of the Court; on the contrary, it blurs reasoning. It is indeed difficult to imagine how the African Union, an international organization with a legal personality separate from that of its Member States, "could be a representative [of the latter] with respect to the obligations they undertake under the Protocol".

31. The main obligation incumbent on States Parties to the Protocol is that of appearing before the Court to answer to alleged violations of human rights as guaranteed by the African Charter or by any other

instrument dealing with human rights to which they are parties. How can the African Union be brought before the Court on behalf of one or more Member States Parties to the Protocol to answer for alleged violations of their conventional obligations in the field of human rights?

32. The African Union could only be brought before the Court to answer for its own conduct. For that to happen, however, it would be necessary for it to be allowed to become a party to the Protocol and for it to be willing to do so which would require that it be beforehand allowed to accede to the African Charter and for it to have accepted to do so. As party to the Charter and to the Protocol, the African Union could in any circumstance be brought before the Court to answer for the conduct of its Member States parties to the Protocol.

33. In the final analysis, one might wonder about the need for the Court's reasoning in paragraph 66 to 72 of the Judgment because in paragraph 73, it asserts that "its jurisdiction is clearly prescribed by the Protocol" and that "the present case in which the Application has been filed against an entity other than a State having ratified the Protocol and made the declaration, falls outside the jurisdictional ambit of the Court". That actually was all what the Court needed from the outset to reject Mr Falana's Application.

34. I am therefore of the opinion that the Court ought to have spared itself issuing this Judgment which raises more questions than it resolves.

35. Let me further observe that consideration of the "constitutionality" of Article 34(6) of the Protocol, to which the Court was urged by the Applicant so as to declare the said Article "illegal, null and void" as it is inconsistent with Articles 1, 2, 7, 13, 26 and 66 of the African Charter, does indirectly raise the issue of the sovereign right of the States Parties to the Protocol to accept or not the jurisdiction of the Court to entertain Applications from individuals or non-governmental organizations.

36. This debate, no matter how legitimate, should in my view have been raised in some other forum. The Court, for its part, ought not to have accepted to serve as a forum for such debates when it manifestly lacked the jurisdiction to do so; in so doing it took the risk of jeopardizing its credibility.

37. Same as Mr Falana, I am in favour of the automatic access to the Court by individuals and non-governmental organizations; it is my view however that it is a matter that comes within the exclusive jurisdiction of Member States of the African Union. I hold the opinion that this important matter is more like to be discussed by the Court as part of its advisory jurisdiction at the initiative of the entities mentioned in Article 4 of the Protocol or as part of the procedure of amendment of that instrument considering the possibility availed to the Court under Article 35(2) to make proposals in that regard "if it deems it necessary".

38. For all the above reasons, I am of the view that, given the Court's manifest lack of jurisdiction *ratione personae*. Mr Falana's Application ought to have been rejected *de plano* through a simple letter from the Registrar.

39. Subsidiarily, I am also of the view that the Court having decided to hear and rule on this Application, it should have provided clearer reasons for rejecting it (see my reasoning in paragraphs 9, 10, 11 and 12 above) and not by invoking, in a contradictory manner, Article 5(3) and 34(6) of the Protocol.

40. To conclude, I again invite my colleagues to revisit the current practice of the Court which consists in systematically issuing “Judgments” or “Decisions” on its lack of jurisdiction whereas it “manifestly” lacks the jurisdiction to entertain an Application. The only advantage in my view of such a practice of the Court is to draw public opinion to issues as those raised in the instant case or to alleged violations of human rights; but is that truly the mission of the Court?

**African Commission on Human and Peoples' Rights v Libya
(provisional measures) (2013) 1 AfCLR 145**

African Commission on Human and Peoples' Rights v Libya

Order (provisional measures), 15 March 2013. Done in English and French, the English text being authoritative.

Judges: AKUFFO, OUGUERGOUZ, NGOEPE, NIYUNGEKO, RAMADHANI, TAMBALA, THOMPSON, ORE, KIOKO, GUISSSE and ABA

Provisional measures issued by the Court in a case brought on behalf of Saif Al-Islam Kadhafi, the son of the former Libyan leader, who was detained by a non-governmental group in Libya.

Provisional measures (integrity of detainee; access to legal representation and family, 18)

Separate opinion: OUGUERGOUZ

Procedure (*audiatur et altera pars*, 4-5)

Jurisdiction (*ratione materiae*, 6)

1. The Court received, on 31 January 2013, an Application by the African Commission on Human and Peoples' Rights (hereinafter referred to as the Applicant), instituting proceedings against Libya (hereinafter referred to as the Respondent), alleging violations of the rights of Saif Al-Islam Gaddafi (hereinafter referred to as the Detainee), guaranteed under Articles 6 and 7 of the African Charter on Human and Peoples' Rights (hereinafter referred to as the Charter).
2. The Application is brought in terms of Article 5(1)(a) 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), Rule 29(3) of the Rules of Court and Rules 84(2), 118(2) and (3) of the Rules of Procedure of the Applicant;
3. The Applicant submits that, on 2 April 2012, it received a complaint against the Respondent from Ms Mishana Hosseinioun (hereinafter referred to as the Complainant), on behalf of the Detainee, alleging that:
 - i. The National Transitional Council (the Government), which has been recognized as the Government in power in Libya, on 19 November 2011, detained the Detainee in isolation and without access to his family, friends or any lawyer;
 - ii. The Detainee has not been charged with any offence nor been brought before any court;
 - iii. The address of the detention facility, believed to be in Zintan, a town in Libya, is not known;

- iv. The Applicant is concerned that the Detainee faces an imminent trial which carries with it the threat of the death penalty, following a period of arbitrary detention based on interrogations carried out in the absence of a lawyer;
 - v. All these acts amount to a violation of the Detainee's rights under Articles 6 and 7 of the Charter, for which Applicant issued Provisional Measures on 18 April 2012 to stop any irreparable harm to the Detainee, and which provisional measures Respondent has, to date, not responded to."
- 4.** The Applicant concludes by praying the Court to order the Respondent: "Not to proceed further with any actions concerning the legal proceedings, investigation against, or detention that would cause irreparable harm to the Detainee; and To allow the Detainee access to a lawyer immediately and without further delay."
- 5.** On 22 February 2013, the Registry acknowledged receipt of the Application, in accordance with Rule 34(1) of the Rules of Court; and on 12 March 2013, the Registry forwarded copies of the Application to the Respondent, in accordance with Rule 35(2)(a) of the Rules of Court, and requested it to indicate, within thirty (30) days of receipt of the Application, the names and addresses of its representatives, in accordance with Rule 35(4)(a). Furthermore, the Registry invited the Respondent to respond to the Application within sixty (60) days, in accordance with Rule 37 of the Rules.
- 6.** By letter dated 12 March 2013, the Registry informed the Chairperson of the African Union Commission, and through her, the Executive Council of the African Union, and all the other States Parties to the Protocol, of the filing of the Application, in accordance with Rule 35(3) of the Rules.
- 7.** By notice dated 12 March 2013, the Registry informed the parties that, in view of the urgency and gravity of the matter, the Court was considering issuing provisional measures in the matter.
- 8.** The Court notes that the combined reading of Article 27(2) of the Protocol and Rule 51 of the Rules of Court allows it in cases of extreme gravity and urgency, and to avoid irreparable harm to persons, to adopt such provisional measures as it deems necessary.
- 9.** In dealing with any Application, the Court has to ascertain that it has jurisdiction under Articles 3 and 5 of the Protocol.
- 10.** However, before ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to ensure that it has *prima facie* jurisdiction.
- 11.** The Court notes that Article 3(1) of the Protocol provides that "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned".
- 12.** The Court further notes that the Respondent ratified the Charter, which came into force on 21 October 1986, on 19 July 1986 and deposited its instruments of ratification on 26 March 1987, and further that the Respondent ratified the Protocol, which came into force on 25

January 2004, on 19 November 2003 and deposited its instruments of ratification on 8 December 2003 and is therefore party to both instruments.

13. The Court acknowledges that Article 5(1) (a) of the Protocol lists the Applicant as one of the entities entitled to submit cases to the Court, and takes judicial notice that provisional measures, may be a consequence of the right to protection under the Charter, not requiring consideration of the substantive issues.

14. In the light of the foregoing, the Court is satisfied that *prima facie*, it has jurisdiction to deal with the Application.

15. The Court notes that the Applicant, in its own request for Provisional Measures, requested the Respondent to:

- ensure that the Detainee has access to his lawyers;
- ensure that the Detainee can receive visits from family and friends;
- disclose the location of his detention, and
- guarantee the integrity of his person and his right to be tried within a reasonable time by an impartial court.

16. In view of the alleged length of detention of the Detainee without access to a lawyer, family or friends; and with due regard to the Respondent's alleged failure to respond to the Provisional Measures requested by the Applicant, and the requirements of the principles of justice that require every accused person to be accorded a fair and just trial, the Court decided to order provisional measures *suo motu*.

17. In the opinion of the Court, there exists a situation of extreme gravity and urgency, as well as a risk of irreparable harm to the Detainee.

18. In the light of the foregoing, the Court concludes that, pending its ruling on the main Application before it, the circumstances require it to order, as a matter of urgency, provisional measures, *suo motu*, in accordance with Article 27(2) of the Protocol and Rule 51 of its Rules to preserve the integrity of the person of the Detainee and protect his right to access legal representation and family.

19. The Court notes that the measures it will order will necessarily be provisional in nature and would not in any way prejudice the findings the Court might make on its jurisdiction, the admissibility of the Application and the merits of the case.

For these reasons,

THE COURT, unanimously, orders the Respondent:

1. to refrain from all judicial proceedings, investigations or detention, that could cause irreparable damage to the Detainee, in violation of the Charter or any other international instruments to which Libya is a party;
2. to allow the Detainee access to a lawyer of his own choosing;
3. to allow the detainee visits by family members;
4. to refrain from taking any action that may affect the Detainee's physical and mental integrity as well as his health;
5. to report to the Court within fifteen (15) days from the date of receipt of this Order, on the measures taken to implement this Order.

Separate opinion: OUGUERGOUZ

1. Although I voted in favour of the provisional measures ordered by the Court in the operative part of its Order, I would like to make my position known with regard to an important aspect of the procedure followed in dealing with the Application brought by the African Commission against the Republic of Libya as well as to some of the reasons for the Order.

2. First of all, on procedure, I would like to point out that the Application by the Commission should as a matter of fact be considered as a request for provisional measures. It is indeed entitled “Application filed before the African Court on Human and Peoples’ Rights on grounds of failure to comply with a request for provisional measures”. It can be summarised as a request made to the Court to issue two provisional measures whose content is mentioned in paragraph 4 of the Order. In its Application, the Commission contends that the facts it alluded to “amount to a violation of the rights of the victim enshrined in Articles 6 and 7 of the African Charter on Human and Peoples’ Rights”; in its submission it simply however, “prays the Court to issue an Order calling on the Respondent State to take the following measures (...)”. It is clearly therefore a request for provisional measures which the Court should have communicated to the Respondent State immediately after receiving it; in principle, it should equally have invited the latter to communicate any observations it may eventually have on that request, setting a short deadline for that purpose.

3. The Application by the Commission is dated 8 January 2013 and was received at the Registry of the Court on 31 January 2013. It was only on 12 March 2013 that the Registry forwarded a copy of the Application to the Respondent State requesting it *inter alia* to respond within sixty (60) days, pursuant to Rule 37 of the Rules of Court (paragraph 5 of the Order (that same day, the Registry also informed the Parties that “as a result of the extreme gravity and urgency of the situation, the Court was considering issuing provisional measures in the matter” (paragraph 7).

4. Compliance with the adversarial principle (*Audiatur et altera pars*) as well as the urgency which is inherent to the issuing of provisional measures however required that the Application be served on the Respondent State as quickly as possible and the latter be invited, also expeditiously, to submit the observations it might have on the request for provisional measures. In the case of the *African Commission on Human and Peoples Rights v Kenya* (Application No 006/2012), the African Commission had filed a request for provisional measures, received at the Registry of the Court on 31 December 2012 and copied by the latter to the Respondent State on 7 January 2013, inviting it to submit the observations it might have in that regard within a period of thirty (30) days; in this matter, the Court issued its Order for provisional measures on the same day as the present Order.

5. In the present case, the Republic of Libya was not placed in a position to respond to the allegations made in the Application of the African Commission. This could have been justified by the extreme

urgency of the matter if the Court had ruled on it in a relatively brief period after the filing of the Commission's request for provisional measures. However, more than two (2) months elapsed between the date of the Application (8 January 2013) and the date of the Court's Order for provisional measures (15 March 2013). Nothing in the case file can ascertain that, during such a relatively lengthy period, the Respondent State has not yet adopted part or all of the measures sought by the Commission in the present Application to the Court and in the request for provisional measures dated 18 April 2012 sent by the Chairperson of the Commission to the Republic of Libya; the risk is therefore that part or all of the measures ordered by the Court be purposeless. As the Court did with regard to Application No. 006/2012 mentioned above, the Court should have therefore requested the Republic of Libya to submit the observations it may have in order for the Court to ascertain that all or part of the measures to be ordered to the latter have not yet been implemented by the Respondent State; the Court would therefore have been able to decide on the basis of the most recent information possible on the situation for which provisional measures are sought.

6. Now, on the reasons for the Order, the Court dealt with the issue of its *prima facie* jurisdiction at the personal level (*ratione personae*) only (paragraphs 12 to 14) but did not ensure that it also had *prima facie* jurisdiction at the material level (*ratione materiae*), that is, that the rights to which it is necessary to avoid irreparable harm are *prima facie* guaranteed by the legal instruments to which the Respondent State is a party to. It only sufficed for the Court to state that, in the present case, the rights in question are actually guaranteed under Articles 6 and 7 of the African Charter of which the Republic of Libya is party and the violation of which is alleged by the African Commission and thereby conclude that the Court's material jurisdiction is also established *prima facie*.

7. Finally, in paragraph 17 of the Order, the Court is of the opinion that "there exists a situation of extreme gravity and urgency, as well as a risk of irreparable harm to the Detainee", without really demonstrating it. Whereas these are important cumulative conditions as provided for in Article 27(2) of the Protocol and to which more elaborate developments should have been devoted beyond what is stated in paragraph 16 alone.

8. Notwithstanding all the above observations, I fully subscribe to the measures ordered by the Court in favour of Mr Saif Al-Islam Gaddafi.

**African Commission on Human and Peoples' Rights v Libya
(provisional measures 2) (2015) 1 AfCLR 150**

African Commission on Human and Peoples' Rights v Libya

Order for provisional measures, No 2, 10 August 2015. Done in Arabic, English and French, the English text being authoritative.

Judges: RAMADHANI, THOMPSON, NIYUNGEKO, OUGUERGOUZ, TAMBALA, ORE, GUISSÉ, KIOKO, BEN ACHOUR, BOSSA and MATUSSE

Provisional measures issued by the Court in case brought on behalf of Saif Al-Islam Kadhafi, the son of the former Libyan leader, who was detained by a non-governmental group in Libya.

Provisional measures (binding nature, 10)

1. On 15 March 2013, the Court issued an Order of Provisional Measures in the matter of *African Commission on Human and Peoples' Rights v Libya* - Application 002/2013 - in which it ordered Libya to:
 - i. Refrain from all judicial proceedings, investigations or detentions that could cause irreparable damage to the Detainee, in violation of the Charter or any other international instrument to which Libya is a party;
 - ii. Allow the Detainee access to a lawyer of his own choosing;
 - iii. Allow the Detainee visits by family members;
 - iv. Refrain from taking any action that may affect the Detainee's physical and mental integrity as well as his health; and
 - v. Report to the Court within fifteen (15) days from the date of receipt of this Order on the measures taken to implement this Order. (See order attached).
2. The Libyan Government was notified of the Order, through its Embassy in Addis Ababa, Ethiopia, by letter dated 26 March 2013.
3. In accordance with Rule 51(3), a copy of the Order was transmitted to the Executive Council and the Assembly of the African Union, through the Chairperson of the African Union Commission, by letter dated 18 March 2013.
4. Libya was supposed to file its response no later than 10 April 2013.
5. After the 15 days had elapsed and upon Libya not informing the Court of the measures it had taken to implement the Order, the Court, on its own motion, decided, on 12 April 2013, to extend by another fourteen (14) days the deadline required for Libya to respond to the Order. The said letter of reminder was served on Libya through its Embassies in Addis Ababa, Ethiopia and Dar es Salaam, Tanzania, on 22 April, 2013 and 16 April, 2013, respectively. After this reminder,

Libya was supposed to file her response no later than 30 April 2013, but Libya, once again, failed to respond.

6. Rule 51(4) of the Rules of Court provides that “In the Annual Report submitted to the Assembly pursuant to Article 31 of the Protocol, the Court shall disclose the interim measures it ordered during the period under review. In the event of non-compliance with these measures by the State concerned, the Court shall make all such recommendations as it deems appropriate”.

7. Following Libya’s failure to comply with the Court Order, and in conformity with Rule 51(4) of its Rules, the Court decided to bring the matter to the attention of the Assembly, through the Executive Council. To this end, the Court reported Libya’s non-compliance with its Order to the 24th (January, 2014), 25th (June, 2014), 26th (January, 2015) and 27th (June 2015) Ordinary Sessions of the Executive Council. In its decisions, the Executive Council urged Libya to cooperate with the Court and comply with the Court’s Order.

8. To date, the Libyan Government has still not complied with the Order of the Court, nor has it informed the Court of the measures it has taken or could take to comply with the said Order.

9. The Court is now concerned about recent reports that, on 28 July 2015, the Assize Court of Tripoli, Libya tried Mr Saif Islam Gaddafi *in absentia* and sentenced him to death, in spite the Order of the Court. The United Nations Support Mission in Libya (UNSMIL) said the verdict was a “cause of strong concern as the trial did not meet international standards of fair trial in a number of ways”. Several international organisations, including the International Bar Association (IBA), Human Rights Watch, Amnesty International and the International Federation for Human Rights (FIDH) also made fierce criticisms about the trial.

10. Given that an Order of Provisional Measures issued by the Court is binding like any judgment of the Court, the Court notes that an execution of the death sentence by the Libyan government would constitute a violation of its international obligations under the Charter, the Protocol and other human rights instruments that it has duly ratified.

11. The Court reiterates the terms of its Order of 15 March 2013 and recalls Decisions Nos. EX.CL/Dec.806(XXIV), EX.CL/Dec.842(XXV), EX.CL/Dec.865 (XXVI) and EX.CL/Dec.888(XXVII) of the Executive Council, which urges Libya to comply with the Order of provisional measures issued on 15 March 2015.

In the light of the foregoing,

The Court, unanimously,

i. Orders Libya to take all necessary measures to preserve the life of Mr Saif Gaddafi and refrain from taking any action that may cause him irreparable harm and jeopardize the case before the Court

ii. Orders Libya to ensure that the accused has a fair trial in accordance with internationally recognized standards of fair trial, such as the independence of the judiciary, impartiality of the procedure, as well as the possibility for Counsel for the Accused, his family and witnesses, where necessary, to participate in the trial;

- iii. Orders Libya to take urgent steps to arrest and prosecute those illegally holding Mr Saif Gaddafi; and
- iv. Orders Libya to report to the Court within 15 days from the date of receipt of this Order, on the measures it has taken to implement the Order.

African Commission on Human and Peoples' Rights v Libya (merits) (2016) 1 AfCLR 153

African Commission on Human and Peoples' Rights v The Republic of Libya

Judgment, 3 June 2016. Done in English, French and Arabic, the French text being authoritative.

Judges: RAMADHANI, THOMPSON, NIYUNGEKO, OUGUERGOUZ, TAMBALA, ORE, GUISSÉ, KIOKO, BEN ACHOUR, BOSSA and MATUSSE

The case was brought by the African Commission on behalf of Saif Al-Islam Kadhafi who was detained by a 'revolutionary brigade' in Libya. The Application alleged violation of articles 6 and 7 of the Charter in relation to the detention and trial of Mr Kadhafi. The Application also alleged a violation of his rights by reason of Libya's failure to comply with the Order for provisional measures. The Court held that Libya had violated articles 6 and 7 of the African Charter and ordered the termination of the criminal procedure against Mr Kadhafi.

Provisional measures (non-compliance, 18)

Judgment in default (40-42)

State responsibility (liability of non-state actor, 49)

Admissibility (exhaustion of local remedies, exception to the requirement, 69, 70)

Personal liberty and security (incommunicado detention, 84)

Fair trial (extra-ordinary court, 90, 91; legal counsel, 93-96)

Separate opinion: OUGUERGOUZ

Judgment in default (submissions must be well founded in fact and law, 6, 16, 17, 27; duty of Court when one party is absent, 18, 20, 26, 28)

I. The Parties

1. The Applicant is the African Commission on Human and Peoples' Rights (hereinafter referred to as the "Commission" or "the Applicant"). The Applicant seized the Court following a communication filed before it on behalf of Saif Al Islam Kadhafi, a citizen of Libya, detained in a secret location.

2. The Respondent is the State of Libya which ratified the African Charter on Human and Peoples' Rights (hereinafter referred to as "the

Charter”) on 19 July 1986, and 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”) on 19 November 2003; and acceded to the International Covenant on Civil and Political Rights (hereinafter referred to as “ICCPR”) on 15 May 1970.

II. Subject of the Application

3. The Court was seized of this matter through an Application dated 28 February 2013, brought by the Applicant, pursuant to Rule 34 of the Rules of Court (hereinafter referred to as “the Rules”).

4. The Application was filed following a Communication submitted on 2 April 2012 before the African Commission on Human and Peoples’ Rights by Ms Mishana Hosseinoun on behalf of Mr Saïf Al-Islam KadhafI (hereinafter referred to as “the Detainee”), alleging violation of the rights of the latter by Libya (hereinafter referred to as the “Respondent”), which rights are guaranteed by Articles 6 and 7 of the Charter.

5. Following that Communication, the Applicant submitted an Application to the Court dated 8 January 2013, (received at the Court’s Registry on 31 January 2013 and registered as No. 002/2013), seeking provisional measures. The Application is grounded on Article 5(1) of the Protocol, Rule 29(3) of the Rules of Court (hereinafter referred to as “the Rules”) and Rule 3 of the Rules of Procedure of the African Commission on Human and Peoples’ Rights.

6. Subsequently, the Court was seized of other Applications, namely:

- i. An Application dated 28 February 2014, received at the Registry on 3 March 2014, bringing to the Court’s attention Libya’s failure to enforce the Order for Provisional Measures issued by the Commission on 15 March 2013;
- ii. An Application referred to as “the motion to institute proceedings” bearing the same date and received at the Registry on 3 March 2014, in which the Applicant “prays the Court to rule that the Respondent State violated Articles 6 and 7 of the Charter”;
- iii. Lastly, an Application dated 15 March 2015, received at the Registry on 28 May 2015, submitted pursuant to Rule 55 of the Rules praying the Court to “deliver a judgment in default”.

A. Facts of the Matter

7. According to the aforementioned Communication, on 19 November 2011, the National Transitional Council which was then recognised as the Government of Libya, arrested the Detainee and kept him in isolation without access to his family, friends or any lawyer. The Detainee who was not charged with any offence and, worse still, was not brought before any court, is reportedly being kept in a secret location. It alleges that “the victim’s life is in danger and his physical integrity and health exposed to the risk of irreparable harm”.

8. In the circumstances, on 18 April 2012, as requested by the author of the Communication, the Court issued an Order for Provisional

Measures to pre-empt any irreparable harm to the Detainee. However, the Respondent State ignored the provisional measures despite reminders addressed to the latter by the Court.

B. Alleged Violations

9. According to the Application, Libya allegedly violated Articles 6 and 7 of the Charter, relating respectively to, the right of every individual to liberty and to the security of his person and the right to have one's cause heard, due to the fact that the Detainee was deprived of his fundamental rights, as he was kept continuously in secret detention since 19 November 2011, without the possibility of getting himself assisted by a counsel of his choice.

10. The Applicant further alleges that Libya violated the rights of the Detainee by failing to comply with the Order for Provisional Measures issued by the Court on 15 March 2013.

C. The Applicant's Prayers

11. In the Application for a judgment in default dated 15 May 2015, the Court is requested to take the following measures:

- (a) pass a judgment in default against Libya pursuant to Rule 55 of the Rules of Court and rule that Libya has violated, and continues to violate, Mr Gadhafi's rights guaranteed under Articles 6 and 7 of the African Charter on Human and Peoples' Rights (the "Charter");
- (b) grant all the reliefs sought under paragraphs 2(4) of the substantive Application filed on 24 February 2014;¹
- (c) declare and rule that Libya has failed to comply with the Order for Provisional Measures issued by the Court pursuant to Rule 51(4) of its Rules;
- (d) notify the Executive Council and the parties of the above-mentioned Decisions, and publish them pursuant to Rules 51(4), 64(2) and 65 of the Rules of Court;
- (e) take such other measures as it may deem appropriate and necessary to secure the rights of Mr Saif Al-Islam Gadhafi to a fair trial".

¹ "Consequent upon the violations, and as effective remedies in the circumstances, the Applicant seeks orders directing the Respondent State to fully secure to Mr Gadhafi his rights as guaranteed under the Charter by staying the domestic criminal proceedings and immediately ensure:

- (a) that he retains a lawyer of his choice;
- (b) that the lawyer of his choice has contact with him in confidence;
- (c) that the lawyer of his choice is allowed reasonable time to consider the pre-trial steps made so far, and afforded adequate opportunity without hindrances to seek to challenge any or all of such steps;
- (d) that Mr Gadhafi is visited by his friends and family subject to justifiable security considerations and his wishes;
- (e) that the lawyer of his choice and witnesses are duly accorded the necessary protection;
- (f) that the Respondent State submits to the Court on the measures it has taken to comply with the Court's Order in this case within sixty (60) days.

III. Procedure before the Court

12. On 31 January 2013, the Court received an Application from the Applicant against the Respondent.

13. Pursuant to Rule 35(2) of its Rules, the Registrar, by letter dated 12 March 2013, addressed to the Ministry of Foreign Affairs of Libya and copied to the Libyan Embassy in Addis Ababa, transmitted a copy of the Application to the Respondent. In the same letter, the Registrar requested the Respondent to indicate within thirty (30) days of receipt of the Application, the names and addresses of its representatives, pursuant to Rule 35(4) of the Rules and to respond to the Application within sixty (60) days, pursuant to Rule 37 of the Rules.

14. Pursuant to Rule 35(3) of the Rules, the Registrar, by letter dated 12 March 2013, transmitted a copy of the aforesaid Application to the Chairperson of African Union Commission, and through her, to the Executive Council of the African Union and other States Parties to the Protocol establishing the Court.

15. Pursuant to Article 27(2) of the Protocol and Rule 51(1) of its Rules, the Court used its discretionary power to issue provisional measures, and by an Order dated 15 March 2013, the Court unanimously ordered the Respondent State to take the following measures:

- “1. Refrain from all judicial proceedings, investigations or detention that could cause irreparable damage to the Detainee, in violation of the Charter or any other international instruments to which Libya is a party;
2. Allow the Detainee access to a lawyer of his own choosing;
3. Allow the Detainee visits by family members;
4. Refrain from taking any action that may affect the Detainee’s physical and mental integrity as well as his health.
5. Report to the Court within fifteen (15) days from the date of receipt, on the measures taken to implement this Order.”

16. Pursuant to Rule 51(3) of the Rules, the Order of Provisional Measures was on 15 March 2013, transmitted to the Parties and to the Chairperson of African Union Commission.

17. The Respondent was required to file its report on compliance with the Order not later than 10 April 2013. However, when the Respondent failed to do so, the Court, on 12 April 2013, decided *proprio motu*, to grant the latter additional fifteen (15) days. A letter in this regard was served on the Respondent, through its Embassies in Addis Ababa, Ethiopia, and Dar es-Salaam, United Republic of Tanzania, on 16 and 22 April 2013, respectively. With the extended time limit, the Respondent was required to file its Response, indicating the measures it has taken to implement the Court’s Order for Provisional Measures, not later than 30 April 2013. Despite the extension of the time limit, the Respondent failed to file any response.

18. For this reason and pursuant to Rule 51(4) of its Rules, the Court brought the issue of Libya’s non-compliance with its Order for provisional measures to the attention of the Assembly of Heads of State and Government of the African Union, through the Executive Council,

at the latter's Twenty-Fourth,² Twenty-Fifth,³ Twenty-Sixth,⁴ Twenty-Seventh⁵ and Twenty-Eight⁶ Ordinary Sessions. In its Decisions, the Executive Council urged Libya to work with the Court and to comply with its Order. Despite all that, the Respondent has continued to ignore the Court's Order and the Decisions of the policy organs of the African Union.

19. On 29 May 2013, that is, beyond the prescribed time limit, the Respondent addressed a *Note Verbale*⁷ to the Legal Counsel of the African Union, a copy of which was received by the Applicant on 17 June 2013 and by the Court on 9 July 2013. In the *Note Verbale*, the Respondent did not adduce any defence and merely forwarded the following documents to the Court and to the Applicant:

- i) a "Note" comprising two pages of comments;
- ii) an undated Note from the Investigation and Review Committee at the Office of the Attorney General of Libya, recommending a joinder of proceedings instituted at domestic level against Mr Gadhafi with the proceedings against other accused persons in case No. 630/2012;
- iii) Order No. 2/1371 of the Attorney General, which notes that under Act No. 3/1371 W.R. the Prosecutor's Office may request the Court to extend the period of remand in custody where the initial period expires before investigations are finalised, provided that the total period of detention does not exceed ninety (90) days. The Order further makes it an obligation for the Attorney General or his Deputy to request for extension of the period of remand in custody;
- iv) the Attorney General's Decision No. 03/1435 dated 2 January 2013 mandating Mr Ibrahim Ashour Al-Ijaili to seek leave of the Appellate Judge at the Court of First Instance to extend the period of detention of the persons accused in the matter being investigated by the Committee established pursuant to Decision No. 98/2011;
- v) a letter from the Deputy Prosecutor of the Investigation Committee dated 2 January 2013, forwarding Resolution No. 03/2013 to extend the period of detention of the accused persons in the matter being investigated by the Committee;⁸

2 January 2014, see the Report of the Twenty-Fourth Ordinary Session of the Executive Council of the African Union held in Addis Ababa, Ethiopia, from 21 to 28 January 2014, p 38.

3 June 2014, see the Report of the Twenty-Fifth Ordinary Session of the Executive Council of the African Union held in Malabo, Equatorial Guinea, from 20 to 24 June, p 42.

4 January 2015, see the Report of the Twenty-Sixth Ordinary Session of the Executive Council of the African Union held in Addis Ababa, Ethiopia, from 23 to 27 January 2015, p 36.

5 June 2015, see the Report of the Twenty-Seventh Ordinary Session of the Executive Council of the African Union held in Johannesburg, South Africa, from 7 to 12 June 2015, p 34.

6 January 2016, see the Report of the Twenty-Eighth Ordinary Session of the Executive Council of the African Union held in Addis Ababa, Ethiopia, from 23 to 28 January 2016, p 1.

7 No.2445-2013, the reference number of the *Note Verbale* of 29 May 2013 addressed to the Legal Counsel of the African Union.

8 The Resolution 03/2013 was not attached to the letter.

- vi) a letter from the Deputy Prosecutor dated 8 October 2012, addressed to all State Prosecutors directing them to abide by Decision No. 42/2003 relating to the powers of Prosecutors with respect to extension of the period of provisional remand in custody;
- vii) a Pre-Trial Detention Order issued for case No. 229-2012, in respect of the charge of “issuing orders with no legal basis” by which a State Counsel in the Attorney General’s Office issued a pre-trial detention warrant against Mr Gadhafi, and the accompanying Report states that “the pre-trial detention period for the accused shall start on 18 June 2012, that is, the date of his acquittal in the case of corruption”;
- viii) a series of Orders to extend the period of Pre-trial Detention dated 1 August 2012, 13 September 2012, 30 October 2012, 13 December 2012, 27 January 2013, 26 February 2013, 26 March 2013 and 24 April 2013, all signed by the Attorney General of Libya, and indicating that “the authorization of the judge with jurisdiction” had been obtained;
- ix) a series of requests for extension of the period of remand in custody in case No. 299-2012, signed by Mr Ibrahim Ashour of the Attorney General’s Office and addressed to the Appellate Judge of the South Tripoli Court dated 23 January 2013, 25 February 2013, 25 March 2013 and 23 April 2013, all seeking extension of the period of remand in custody on the grounds that investigations are “still ongoing”, and so as to “allow the investigation and the review of the exhibits of the case to continue”; and
- x) a series of minutes of hearings dated, 1 August 2012, 13 September 2012, 30 October 2012, 13 December 2012, 27 January 2013, 26 February 2013, 26 March 2013 and 24 April 2013 in which the Court decided to extend Mr Gadhafi’s provisional detention.⁹

20. By letter dated 2 August 2013, the Registrar forwarded the letter of the Legal Counsel of the African Union Commission dated 29 May 2013 to the Applicant, communicating the Respondent’s *Note Verbale*. The Applicant was given thirty (30) days upon receipt of the notification to file its observations.

21. By letter dated 28 July 2013, the Applicant requested for a one (1) year extension of the deadline to file its brief. The letter was sent on the same day to Respondent, through the Libyan Embassy in Addis Ababa, Ethiopia, with copy to the Executive Secretary of the Commission.

22. By letter dated 12 August 2013, addressed to the Registrar, the Applicant, while recalling the terms of the Interim Report by which the AU Executive Council was notified of Libya’s non-compliance with the Order for Provisional Measures, attached a letter from the authors of the Communication alleging an imminent threat of execution of the victim and requested urgent intervention by the Court.

23. By letter dated 27 August 2013, to the Applicant and copied to the Embassy of Libya in Addis Ababa, Ethiopia, the Registrar indicated that, following the request by the Applicant for one (1) year extension of the deadline for submission of the observations on the merits of the case, the Court had decided to extend the date of submission of

⁹ The said minutes do not contain any indication that the Detainee has had any form of legal representation at any of the hearings.

observations to 28 February 2014, in view of the nature of the matter and the remedies sought.

24. By letter dated 28 February 2014, the Applicant filed an “Interlocutory Application” regarding the failure to implement the Court’s Order for Provisional Measures of 15 March 2013.

25. On the same date, that is, 28 February, 2014, another document entitled “Application to institute proceedings”, was submitted by the Applicant. It outlines the facts, nature of the matter, proof of exhaustion of local remedies, the alleged violations, admissibility of the Application and the remedies sought from the Court.

26. By letter dated 20 March 2014, addressed to the Minister of Foreign Affairs of Libya, the Registry forwarded to the Respondent, copies of the Interlocutory Application as well as the Applicant’s submissions on the merits of the matter, indicating that the Respondent had thirty (30) days from the date of notification to submit its Response.

27. By *Note Verbale* dated 16 May 2014,¹⁰ received at the Registry on 17 May 2014, the Respondent affirmed having submitted to the Court a report on the implementation of the Order for Provisional Measures issued by the Court on 15 March 2013. In that *Note Verbale*, the Embassy of Libya in Addis Ababa, Ethiopia and its Permanent Mission to the African Union wrote as follows:

“The Office of the Public Prosecutor of the State of Libya is very keen and determined to ensure that the trial of Saif al-Islam and the other accused is fair and just, in accordance with the legal norms.

The Office of the Public Prosecutor of the State of Libya is ready to cooperate with any legal institution to satisfy itself, through a field visit to the reform and rehabilitation facility, about the location where he is being kept, as well as enable it to verify and confirm the information provided.

The Office of the Public Prosecutor of the State of Libya is ready to allow any legally accredited organization to attend the trial sessions of Saif Al-Islam Al-Gadhafi before the competent Criminal Chamber of the Tripoli Court of Appeal.

The Office of the Public Prosecutor of the State of Libya reiterates its readiness to respond to any question or inquiry or information request with regard to the information provided.”

28. At its Thirty-Third Ordinary Session held from 26 May to 13 June 2014, the Court examined the aforementioned *Note Verbale* and found that it did not represent the report on compliance requested by the Court in its Order of 15 March 2013.

29. By *Note Verbale* dated 6 June 2014, copied to the Applicant, the Registrar informed the Respondent that the Court had noted the Respondent’s failure to respond to the two Applications and that, of its own motion, it had granted the Respondent an extension of fifteen (15) days within which to submit its response on the substantive and interlocutory Applications. The Respondent was also informed that the

¹⁰ Ref. 3/4/548, *Note Verbale* on Libya’s response following the Court’s request for a report on the measures taken regarding the circumstances of Saïf al Islam Kadhafi’s detention.

response contained in its *Note Verbale* referenced 3/4/548, did not meet the requirements set forth in the Order for Provisional Measures. The Court requested the Respondent to file before it a report on the implementation of the Provisional Measures it had ordered.

30. By letter dated 16 June 2014, addressed to the Minister of Foreign Affairs of the Respondent State, with copies to the Embassy of Libya in Addis Ababa, Ethiopia and to the Executive Secretary of the Commission, the Registrar indicated that, at its Thirty-Third Ordinary Session, the Court had noted that Libya had still not responded to neither the Interlocutory Application nor to the Application on the merits contained in the Application transmitted to the Respondent on 20 March 2014, and that in the absence of such response, the Court would be compelled, without further notification, to apply the provisions of Rule 55 of its Rules relating to the procedure for rendering judgment in default.

31. The Registry once again drew the Respondent's attention to its non-compliance with the Order for Provisional Measures of 15 March 2013, and this, through *inter alia* a letter dated 14 July 2014 addressed to Mr Salim Maouloud Alfighi, Deputy Director of Judicial Affairs in the Libyan Ministry of Foreign Affairs and International Cooperation with copies to the Applicant, and to the Libyan Embassy in Ethiopia.¹¹

32. By letter dated 18 March 2015,¹² addressed to the Applicant and copied to the Respondent, through the Ministry of Foreign Affairs of Libya, and to the Embassies of Libya in Dar-es-Salaam, Tanzania and Addis Ababa, Ethiopia, the Registry confirmed that the Respondent had responded neither to the Application on the merits nor to the Interlocutory Application; and that the Court, at its 36th Ordinary Session held from 9 to 27 March 2015, had instructed it to draw the Applicant's attention to the relevant provisions of Rule 55 of the Rules with a view to initiating a procedure in default within thirty (30) days of receipt.

33. By letter dated 16 April 2015, the Applicant informed the Court of its intention to initiate proceedings, pursuant to Rule 55 of the Rules, and that an Application to that effect would be filed within thirty (30) days.

34. By letter dated 15 May 2015, the Applicant filed at the Court an Application for judgment in default.

35. By letter dated 3 July 2015, and pursuant to Rule 35(3) of the Rules, the Registry notified the Respondent of the filing of the aforementioned Application and transmitted to the latter the Application, its annexes as well as the Charter, the Protocol, the Rules and the Practice Directions of the Court.

36. However, in July 2015, it was reported that the Assize Court of Tripoli, Libya, had sentenced the Detainee to death in absentia, in spite of the Order of the Court.

¹¹ FEDEX/Arusha indicated that the letter could not be delivered to its addressee because of the events at Tripoli International Airport on that date. The Registry therefore redirected the letter to the Libyan Embassy in Ethiopia where it was duly receipted on 18 August 2014 at 14.00 hours.

¹² Referenced AFCHPR/Reg./APPL/002/2013/022.

37. Highly concerned by the said reports, the Court on 10 August 2015, and pursuant to Article 27(2) of the Protocol and Rule 51(1) of its Rules, issued a second Order in which it:

“Notes that the execution of capital punishment by the Libyan Government would be a violation of its international obligations under the Charter, the Protocol and other Human Rights instruments it has ratified.” (§ 10) and:

- i Orders Libya to take all necessary measures to preserve the life of Mr Saïf Gadhafi and refrain from taking any action that may cause irreparable harm to the accused and jeopardize the matter pending before the Court;
- ii Orders Libya to ensure that the accused is given fair trial in accordance with internationally recognized fair trial standards, including the independence of the judiciary and impartial proceedings as well as the possibility for counsel for the accused, his family or witnesses, if any, to attend the hearing;
- iii Orders Libya to take urgent steps to arrest and prosecute those illegally holding Mr Saïf Gadhafi; and
- iv Orders Libya to submit a report to the Court within fifteen (15) days of receipt of the Order on the measures it has taken to implement it.”

IV. Merits of the Application to enter a Judgment in Default

38. The Applicant prays the Court to: “Render a judgment in default against Libya under Article 55 of the Rules of Court and notes that Libya has violated and continues to violate Mr Gadhafi’s rights guaranteed by Articles 6 and 7 of the African Charter on Human and Peoples’ Rights (the “Charter”).”

39. In addressing the Applicant’s request, the Court recalls the relevant provisions of Rule 55 of its Rules regarding “judgment in default” and must ascertain whether all the requirements of this Rule have been met in the case before it.

40. Rule 55 of the Rules provides that:

“Whenever a party does not appear before the Court, or fails to defend its case, the Court may, on the Application of the other party, pass judgment in default after it has satisfied itself that the defaulting party has been duly served with the Application and all other documents pertinent to the proceedings. Before acceding to the Application of the party before it, the Court shall satisfy itself that it has jurisdiction in the case, and that the Application is admissible and well founded in fact and in law.”

41. Regarding the requirement of ascertaining “that the defaulting party has been duly served with the Application and all other documents pertinent to the proceedings”; it appears from the account of the different stages of the aforesaid proceedings that both the Applicant and Registry communicated all the pleadings to the Respondent, including the request for provisional measures dated 8 January 2013, and received at the Court on 31 January 2013, the interlocutory motion of 28 February 2013, praying the Court to note the failure by the Respondent to implement the Court Order, the “motion to institute proceedings” of 28 February 2013, and finally the motion for a judgment

in default; as well as two orders issued by the Court, on 15 March 2013 and 10 August 2015, respectively.

42. The Court therefore holds that the first condition for the passing of a “judgment in default” has been met. Not only had all the pleadings been served on the Respondent, but the latter, while it sent the Court two *Notes Verbales* 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.

V. The Court’s Jurisdiction

44. Under Rule 39(1) of its Rules, the Court has to conduct preliminary examination of its jurisdiction. In that regard, the Court notes that even where the Respondent has not raised preliminary objections to its jurisdiction, the Court should *proprio motu*, ensure that it has personal (*ratione personae*), material (*ratione materiae*), temporal (*ratione temporis*) and territorial (*ratione loci*) jurisdiction to hear the case.

45. The Court recalls that, in its Order for Provisional Measures dated 15 March 2013, it had declared that it had *prima facie* jurisdiction to examine the Application and consequently ordered the provisional measures requested.

46. However, the Order for Provisional Measures issued by the Court does not in any way prejudice its competence to examine the merits of the case. The Court will now proceed to conduct an exhaustive examination of its jurisdiction.

A. Personal Jurisdiction

47. In the instant case, the Applicant is, as earlier indicated, the African Commission on Human and Peoples’ Rights. Under Article 5(1) of the Protocol, the Commission is one of the entities/institutions entitled to submit cases to the Court. Consequently, the Court has personal jurisdiction vis-à-vis the Applicant to hear the case.

48. As has also been indicated above, the Respondent in the instant case is Libya, a State which ratified the Charter on 19 July 1986, and the Protocol on 19 November 2003, both texts of which are in force with respect to Libya. According to Article 3(1) of the Protocol, “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*” (italics added). Consequently, the Court has personal jurisdiction, vis-à-vis the Respondent, to hear the instant case.

49. It is clear from the Application that Saïf Al-Islam Kadhafi is detained in Libya by a “revolutionary brigade”. That notwithstanding, the Court holds the view that the Respondent is responsible for the latter’s action as well as its acts of omission. The State is indeed under the obligation

to take measures to ensure, in its territory, the Application of the laws guaranteed under the Charter.

50.As provided for in the Draft Articles of the International Law Commission of the United Nations on the responsibility of States for internationally wrongful¹³ acts: “Every internationally wrongful act of a State entails the international responsibility of that State”. According to Article 9 of these same Draft Articles: “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority”. It is incumbent on “the State responsible for the internationally wrongful act ... to put an end to such acts” The International Criminal Court (ICC) adopted the same position as this Court when it held that the upheavals affecting Libya cannot exonerate the Respondent from its obligation to cooperate with the ICC in surrendering Saif Al-Islam Kadhafi to it. The Pre-trial Chamber I affirmed that: “The Chamber is aware of the volatile political and security situation in Libya and is sensitive to the serious difficulties that its authorities are currently facing as well as the need on their part to focus efforts and resources on restoring stability and order, as submitted by Libya. Nonetheless, the Chamber cannot ignore its own responsibilities in the proceedings and its duty to deploy all efforts to protect the rights of the parties and the interests of victims”.¹⁴

51. The Court notes, in this regard, that when the Commission brings a case before it pursuant to Article 5(1) of the Protocol, the question as to whether the Respondent must have made the declaration accepting the competence of the Court as required under Article 34(6) of the said Protocol,¹⁵ does not arise. As is clearly shown in that Article read jointly with Article 5(3) of the Protocol,¹⁶ the requisite declaration of acceptance of competence is applicable only where individuals and non-governmental organisations to bring cases before the Court.

52. In view of the foregoing considerations, the Court is competent *ratione personae* to hear the instant case.

13 Document annexed to United Nations General Assembly Resolution 56/83 of 12 December 2001.

14 (ICC-01/11-01/11 Date: 10 December 2014) (https://www.icc-cpi.int/CourtRecords/CR2014_09999.PDF) para 32.

15 Article 34(6) of the Protocol provides that “At the time of ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration.”

16 Article 5.3 of the Protocol stipulates that “The Court may entitle relevant Non-Governmental organisations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol”.

B. Material Jurisdiction

53. With respect to the Court's material jurisdiction (*ratione materiae*), Article 3(1) of the Protocol provides that "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."

54. In the instant case, the Applicant alleges violation of Articles 6 and 7 of the Charter by the Respondent. As such, the matter submitted by the Applicant falls within the material jurisdiction of the Court, and the issue at stake actually concerns the Application of the relevant provisions of the Charter to which Libya is a Party.

C. Temporal Jurisdiction

55. As regards jurisdiction *ratione temporis*, the Court notes that, in the instant case, the relevant dates to be considered are those of the entry into force of the Charter with respect to the Respondent (26 March 1987) and the Protocol (8 December 2003).

56. The Court notes that, according to the Application, the alleged violation of the Charter occurred for the first time in 2011 and has continued to this day.

57. Consequently, and since the purported facts occurred after the entry into force of the Protocol, the Court finds that it has temporal jurisdiction to examine the alleged violation of the right to liberty and the right to a fair trial raised in this case.

D. Territorial Jurisdiction

58. Lastly, the Court notes that with regard to territorial jurisdiction (*ratione loci*), there is no shadow of doubt that the facts of the case occurred in the territory under the authority of Libya.

59. The Court therefore finds that at the time of occurrence of the facts of this matter and up to this date, Libya being a Party to the Charter and to the Protocol, both instruments are in force with respect to Libya and on its territory; and that the Court's territorial jurisdiction has consequently been established.

60. It therefore follows from the above considerations that the Court has jurisdiction to examine the human rights violations alleged by the Applicant.

VI. Admissibility of the Application

61. The Court recalls that under Rule 39 of its Rules: "The Court shall conduct preliminary examination of its jurisdiction and the admissibility of the Application in accordance with Articles 50 and 56 of the Charter and Rule 40 of these Rules".

62. According to Article 6(2) of the Protocol: "The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter".

63. Rule 40 of the Rules of Court, which in substance restates the content of Article 56 of the Charter, provides that:

“Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) refers, Applications to the Court shall comply with the following conditions:”

- “1. Indicate their authors even if the latter requests anonymity;
2. Are compatible with the Charter of the Organization of African Unity or with the present Charter;
3. Are not written in disparaging or insulting language;
4. Are not based exclusively on news disseminated through the mass media;
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter; and
7. Do not deal with cases which have been settled by the States involved in accordance with the principles of the Charter of the United Nations or the Charter of the Organization of African Unity or the provisions of the present Charter.”

64. The Court notes that the conditions regarding the identity of Applicants, the Application’s compatibility with the Constitutive Act of the African Union and the Charter, the language used in the Application, the nature of the evidence and the principle of *non bis in idem*, (sub-rules 1, 2, 3, 4 and 7 of Rule 40 of the Rules of Court), are not in dispute. The Court also notes that nothing in the records submitted by the Parties suggests that any of the conditions has not been met in the instant case.

65. Furthermore in the instant case and as the Court has indicated (*supra*, paragraph 41), by failing to reply to the Application addressed to it and despite extensions of the allowed time limit, the Respondent State did not submit any observations on the question of exhaustion of local remedies and on the time line for seizure of the Court.

66. As regards the exhaustion of local remedies, the Applicant maintains that Libya’s Criminal Procedure Code contains several provisions “which in principle govern detention, and make it a right for a Detainee to complain about his/her detention”. In particular, in the Application instituting proceedings, it cites Articles 33, 176 and 177. The Applicant further maintains that the first year of Mr Kadhafi’s detention was governed by the laws in force before the people’s court which were declared unconstitutional. According to the said laws, the State Prosecutor could unilaterally extend the period of detention without the prior authorisation of a judge. It was only after a year in detention that the laws prescribed in the Libyan Penal Code were made available. However, in practice, the accessibility and effectiveness of the said measures were questionable.

67. In paragraph 82.1 of its Judgment of 14 June 2013, in the Matter of Consolidated Applications 009/2011 *Tanganyika Law Society and the Legal and Human Rights Centre* and 011/2011 *Reverend Christopher R Mtikila v The United Republic of Tanzania*, the Court held that the

local remedies to be exhausted prior to bringing a case before it are primarily judicial remedies which are the only ones that meet the criteria of availability, effectiveness and sufficiency. Furthermore, “a remedy is considered available if the complainant can pursue it without impediment.” In the same vein, in the Matter of Application 013/2011 *the Beneficiaries of Late Norbert Zongo and Others v Burkina Faso*, Judgment of 28 March 2014, paragraph 68, the Court held that an effective remedy refers to “that which produces the expected result, and hence, the effectiveness of a remedy is therefore measured in terms of its ability to solve a problem raised by the Applicant”.

68. It is obvious from the facts of the case that the secret detention, isolation by the revolutionary brigade, the fact of not having access to a counsel or to a judge during the procedures for extension of his detention were such that Mr Gadhafi could not use the provisions applicable in seeking a remedy. Besides, the documents adduced by the Applicant show that the Detainee was unable to avail himself of the said remedies even when they were available.

69. Indeed, he was first arraigned before a special court called the “*People’s Court*” which on 23 December 2012, was declared unconstitutional by the Supreme Court of Libya. Despite that, the fact that Mr Gadhafi is being detained in a secret location by a revolutionary brigade and completely isolated from his friends and family, without access to a lawyer of his choice and sentenced to death in absentia, constitutes sufficient grounds for the Court to conclude that the Detainee has been prevented from legally seeking local remedies as prescribed by Libyan law and that, consequently, it was impossible for him to fulfil the condition regarding exhaustion of local remedies.

70. In view of the aforesaid, the Court finds that the requirement to exhaust local remedies is not strictly applicable in the instant case given that such local remedies are not available and are not effective; and even if they were, Mr Gadhafi has not had and does not have the possibility of using the said remedies. Consequently, the Applicant cannot be expected to exercise such a remedy before bringing the case before the Court.

71. As regards the reasonable time requirement, the initial Application was filed before the Court on 31 January 2013 that is, one year following the firm conclusion that the Respondent State has not complied with the Provisional Measures ordered by the Commission on 18 April 2012. This Application limits itself to praying the Court to issue provisional measures against the Respondent. That is a reasonable period of time.

72. The Court therefore notes that the condition set forth in Article 40(6) of the Rules has been met.

73. It follows from the aforesaid, that all the admissibility conditions set forth in Rule 40 of the Rules of Court have been met.

74. Having ruled that it is competent to hear the case and declared the Application admissible, the Court will now proceed to consider the merits of the matter.

VII. The Merits of the Matter

75. In the Application dated 28 February 2014, it is alleged that the Respondent State has violated Articles 6 and 7 of the Charter.

76. The Court finds, as a preliminary remark, that whereas it is accepted under international law that, in exceptional circumstances, States Parties to a human rights instrument such as the International Covenant on Civil and Political Rights (hereinafter referred to as “ICCPR”)¹⁷ have the right of derogation therefrom,¹⁸ it is no less recognised that this right has inherent limits in so far as there are rights that cannot not be derogated, regardless of the prevailing situation.

77. This is the case as regards the rights defined by Articles 6 and 7 of the ICCPR, namely: the right to life, the right not be subjected torture or to cruel, inhuman and degrading punishment or treatment – rights mostly enshrined in Articles 6 and 7 of the African Charter on Human and Peoples’ Rights. The Court therefore holds that, despite the exceptional political and security situation prevailing in Libya since 2011, the Libyan State is internationally responsible for ensuring compliance with and guaranteeing the human rights enshrined in Articles 6 and 7 of the Charter.

A. Alleged violation of Article 6 of the Charter

78. The Applicant alleges that Mr Kadhafi who has been in detention since 19 November 2011 has not been brought before any court to contest his detention. It further argues that Mr Kadhafi’s detention was extended several times without a court order; and that his place of detention has remained a secret.

79. Furthermore in its Application, the Commission grounding its submission on its own jurisprudence, noted that the prolonged secret detention constitutes a serious violation of human rights that can lead

17 Concluded in New York on 16 December 1966, entered into force on 25 March 1976 and to which Libya acceded on 15 May 1970.

18 Article 4 of ICCPR:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

to other violations such as torture, ill-treatment or interrogation without appropriate protection measures.¹⁹

80. The Court is of the opinion that deprivation of liberty, regardless of its form, is permitted only when it is in conformity with procedures established by domestic legislation which itself should be consistent with international human rights standards.

81. Article 6 of the Charter provides that: “Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained”.

82. As such, every deprivation of liberty must meet a number of minimum guarantees commonly enshrined in international human rights instruments, in particular in Article 9 of the ICCPR which is also applicable in the instant case.

83. Under Article 9 of the ICCPR, the aforesaid guarantees are:

- “2. Everyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him”.²⁰
- “3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody but release may be subject to guarantees to appear for trial at any other stage of the judicial proceedings, and should the occasion arise for execution of the judgment”.
- “4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”.
- “5. Anyone who has been a victim of unlawful arrest or detention shall have an enforceable right to compensation”.

84. Incommunicado detention constitutes in itself a gross violation of human rights that can lead to other violations such as torture, ill treatment or interrogation without appropriate due process safeguards. On this score, the Human Rights Committee notes that “arrest and detention incommunicado for seven days and the restrictions on the exercise of the right of habeas corpus constitute violations of Article 9 of the Covenant as a whole”.²¹

85. It emerges from the foregoing that Mr Kadhafi’s incommunicado detention and in isolation, the numerous extensions of the detention in his absence, and without the assistance of a lawyer of his choice to challenge every extension of that detention, constitute a violation of his

19 African Commission on Human and Peoples’ Rights, *Liesbeth Zegveld and Mussie v Eritrea*, Communication 250/02, para 55.

20 In General Comment No. 8, the Human Rights Committee notes: “in the view of the Committee, delays must not exceed a few days”.

21 Communication 1126/2002, *Marlem Carranza Alegre v Peru*, 28 October 2005.

right to liberty and to the security of his person as set forth under Article 6 of the Charter.

B. Alleged violation of Article 7 of the Charter

86. The Applicant alleges that the Detainee has no access to a counsel; nor indeed to any form of representation. Consequently, he did not have the benefit of any guarantees during the preliminary proceedings which have been going on up to now, including his interrogation in the absence of a lawyer and the absence of any possibility to rebut the evidence that will be used against him when the trial begins. Moreover, over two (2) years have lapsed since his arrest, and his trial is yet to start.

87. The Applicant further argues that Mr Kadhafi has no access to any means that would enable him to communicate with his family, friends, lawyers or the outside world.

88. Lastly, the Applicant maintains that these facts are sufficient to establish the violation by the Respondent State of the rights of Mr Kadhafi as enshrined in Article 7 of the Charter which provides that:

- “1. Every individual shall have the right to have his cause heard. This comprises:
 - a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
 - b) The right to be presumed innocent until proved guilty by a competent Court or tribunal;
 - c) The right to defence, including the right to be defended by counsel of his choice;
 - d) The right to be tried within a reasonable time by an impartial court or tribunal.
2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender”.

89. The Court notes that the right to a fair trial is a fundamental human right. It implies that every individual accused of a crime or an offence shall receive all the guarantees under the procedure and afforded the right of defence. This right is enshrined in all universal and regional human rights instruments. The International Covenant on Civil and Political Rights (ICCPR) in its Article 14(1) provides as follows: “All persons shall be equal before the courts and tribunals. Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.

90. In the instant case, it is established that the Detainee was not afforded the minimum guarantees of a fair trial at the time of his arrest, during the period of his detention and at the time he was convicted. He was indeed arraigned in the first instance before an extra-ordinary court known as “The Peoples’ Tribunal” which was on 23 December 2012, declared unconstitutional by the Supreme Court of Libya. He was detained at a secret location, completely isolated from his family and

friends without access to a counsel of his choice or to his family and friends. Additionally, he was sentenced to death in absentia.

91. It is similarly established that the right to be promptly arraigned before a judicial authority has not been respected. In that regard, every individual arrested or detained for a criminal offence should be brought with minimum delay before a judge or any other authority entitled by law to exercise judicial function, and should be tried within a reasonable time or set free. However, in the instant case, the Detainee was first arraigned before an extra-ordinary Court and subsequently condemned to death by an unknown tribunal.

92. Reiterating Article 14 of the ICCPR, Principle No. 11 of the “Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment” adopted by the United Nations General Assembly in Resolution 43/173 of 9 December 1988, provides that:

- “1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority.
2. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.
3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention”. In the same vein, detention shall be effected in an officially recognised place of detention and under decent human conditions. Detention in a secret location inflicts on the detainee considerable suffering, and as Human Rights Committee pointed out: “the Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world”.²²

93. Lastly, in the Application, the Respondent is accused of refusing the Detainee access to a lawyer or to any form of representation, thus depriving him of every guarantee during his detention. Yet, according to Article 7(1)(c) of the Charter, every accused or detained person should be afforded “the right to defence including the right to be assisted by a lawyer of his choice.” This right should be exercised at every stage of a criminal procedure especially during investigation, periods of administrative detention and during judgment by a trial and appellate court.

94. The right to defence also implies that the Detainee has the right to communicate with his counsel and have adequate time and facilities to prepare his/her defence. The accused or Detainee may not be tried without his or her counsel being notified of the trial date and of the charges levelled against him or her in time to allow for adequate preparation of a defence. The accused has a right to adequate time for preparation of a defence commensurate with the nature of the proceedings and the factual circumstances of the case. This implies the right to communicate with his lawyer and the right to access the materials required to prepare his defence.

22 Communication No 1640/2007, *El Abani v Libyan Arab Jamahiriya* (as it was then), 26 July 2010.

95. The same is the case with other international courts,²³ notably the European Court of Human Rights, which, on 14 October 2010 noted that “the person held in custody has the right to be assisted by a lawyer from the outset of such a measure and during interrogations and should be informed by the authorities of his right to remain silent”.²⁴ In another matter, “the Court recalls that the right of every accused person to be effectively defended by a lawyer, if need be, is at the heart of the notion of fair trial”.²⁵

96. According to available information, the Detainee has not had access to a lawyer nor was he afforded the assistance of a counsel of his choice. He has therefore not been protected during the different stages of the investigation instituted against him. For example, he was interrogated in the absence of a counsel and was not given the opportunity to examine the charges which would be brought against him at the start of the trial. The Detainee was arrested over two years ago and has been sentenced to death in absentia.

97. It is quite obvious that none of the rights set forth in Article 7 of the Charter earlier analysed have been respected by the Respondent State with regard to the situation of the Detainee, and consequently, the Respondent has violated Article 7 of the African Charter.

On these grounds,

THE COURT,

Unanimously,

- i) Upholds its Orders of 15 March 2013 and of 10 August 2015, and orders the Respondent State to comply therewith;
- ii) Declares that, pursuant to Articles 3 and 5(1)(a) of the Protocol, it has jurisdiction to hear the Application filed by the African Commission on Human and Peoples’ Rights;
- iii) Declares the Application admissible;
- iv) Finds that Libya has violated and continues to violate Articles 6 and 7 of the African Charter on Human and Peoples’ Rights;
- v) Therefore, orders the Respondent State to protect all the rights of Mr Kadhafi as defined by the Charter by terminating the illegal criminal procedure instituted before the domestic courts;

Orders Libya to submit to the Court a report on the measures taken to guarantee the rights of Mr Kadhafi within sixty (60) days from the date of notification of this Judgment.

23 See European Court of Human Rights, *Matter of Brusco v France*, 14 October 2010 Gaz. Pal. 17 October 2010.

24 *Idem* ECHR.

25 *Idem* ECHR 13 October 2009, *Matter of Dayanan v Turkey*, Application 7377/03, para 30.

Separate opinion: OUGUERGOUZ

1. I voted in support of the operative part of the judgment but I consider the grounds that led the Court to find that “Libya has violated and continues to violate Articles 6 and 7 of the African Charter on Human and Peoples’ Rights” (paragraph iv) of the operative part).

2. The Applicant having prayed the Court to pass judgment in default against Libya as per Rule 55 of the Rules of Court, it was incumbent on the Court to determine whether all the requirements under the said Rule have been met and, in particular “satisfy itself that it has jurisdiction in the case, and that the Application is admissible and well-founded in fact and in law”. The Court duly recognized the importance of those requirements in paragraphs 39 and 40 of the judgment and accordingly embarked on a relatively exhaustive consideration of its jurisdiction and the admissibility of the Application;¹ however, it did not, in my view, extend requisite attention to determining whether the submissions of the Applicant were “founded in fact and in law”.

3. I would observe in that regard that the phrasing of Rule 55(2) of the Rules is similar to that of Article 53(2) of the Statute of the International Court of Justice.² The latter has, on several occasions, relied on this provision and provided quite comprehensive interpretation thereof in its most recent judgment in default, namely, that of 26 June 1986 on the merits in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*.³

4. The principal judicial organ of the United Nations in particular emphasized the need to give a particular attention to the administration of justice whenever one of the two parties fails to appear,⁴ and recalled the principles which should guide the Court to ensure that the submissions of the appearing party are founded in fact and in law. The Inter-American Court of Human Rights, for example, expressly made reference to the said guiding principles in its very first two judgments

1 I would however observe that the Court did not examine the condition laid down in Rule 40(7) of its Rules that the Application does “not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union” (see paras 72 and 73 of the Judgment). The issue could, in particular, be raised with respect to the procedures put in place by the United Nations Human Rights Council and, especially, with respect to the conclusions of the Working Group on Arbitrary Detention, see *infra*, paras 22 and 23.

2 Article 53 of the Statute of the International Court of Justice provides as follows:

“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.

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 in law”. This Article also inspired Article 28 of the Statute of the International Tribunal on the Law of the Sea.

3 *ICJ Reports 1986*, see pages 23-26, paras 26-31.

4 “The vigilance which the Court can exercise when aided by the presence of both parties to the proceedings has a counterpart in the special care it has to devote to the proper administration of justice in a case in which only one party is present”, *ibid*, p 26, para 31.

rendered in default;⁵ it would have been desirable for this Court to be also guided by these principles in determining whether the Applicant's submissions were well-founded, as it is implicitly authorized by Article 61 of the African Charter.⁶

5. To satisfy itself that the submissions of the Applicant are founded in law, the Court should have made more extensive use of the powers inherent in its judicial function and decided on the basis of the *jura novit curia* ("the Court knows the law") principle.

6. According to the International Court of Justice, "the *jura novit curia* principle signifies that, to decide whether submissions are founded in law, the Court is not solely dependent on the arguments of the parties before it with respect to the applicable law". It recalls as follows:

"The Court [...], as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court".⁷

7. In paragraphs 81, 82, 83, 88 and 89 of the judgment, the Court makes reference both to Articles 6 and 7 of the African Charter, and to Articles 9 and 14 of the International Covenant on Civil and Political Rights; it is not explicit however as to the nexus it is establishing between those two instruments. Clearly, Articles 9 and 14 of the Covenant are cited solely for the purposes of interpretation of the corresponding Articles of the Charter as implicitly allowed under Articles 60 and 61 of this latter instrument, relating to "Applicable Principles".

8. Under Articles 3 ("Jurisdiction") and 7 ("Sources of Law") of the Protocol, the Court is however authorised to "apply" the abovementioned provisions of the Covenant, same as the relatively

5 *Case of the Constitutional Court v Peru (Merits, Reparations and Costs)*, Judgment of 31 January 2001, pp 33-35, paras 58-62, and *Case of Ivcher-Bronstein v Peru (Merits, Reparations and Costs)*, Judgment of 6 February 2001, pp 39-41, paras 78-82. Neither the Inter-American Convention nor the Statute of the Inter-American Court contains provision regarding the non-appearance of either party to a case; only the Rules of Procedure of the Inter-American Court makes provision thereof in its Article 29(1) as follows: "When a party fails to in or continue with a case, the Court shall, on its own motion, take such measures as may be necessary to complete the consideration of the case".

6 This provision allows *inter alia* the Court "to take into consideration as subsidiary measures to determine the principles of law, other general or special international conventions laying down rules expressly recognized by Member States of the African Union", as well as "general principles of law recognized by African States" and "legal precedents". The Statute of the International Court of Justice, which forms an integral part of the United Nations Charter, is clearly one of these general international conventions; this should encourage the African Court to, as often as possible, draw inspiration from the case-law of the World Court and of the general principles relating to a sound administration of justice to which the latter refers.

7 ICJ Reports 1986, pp 24-25, para 29.

detailed clauses of the May 2004 Arab Charter on Human Rights to which Libya is also party since 15 January 2008 (see Articles 12,⁸ 13,⁹ 14,¹⁰ 16,¹¹ 20,¹² and 23).

- 8 "All persons are equal before the courts and tribunals. The States parties shall guarantee the independence of the judiciary and protect magistrates against any interference, pressure or threats. They shall also guarantee every person subject to their jurisdiction the right to seek a legal remedy before courts of all levels".
- 9 "a) Everyone has the right to a fair trial that affords adequate guarantees before a competent, independent and impartial court that has been constituted by law to hear any criminal charge against him or to decide on his rights or his obligations. Each State party shall guarantee to those without the requisite financial resources legal aid to enable them to defend their rights.
b) Trials shall be public, except in exceptional cases that may be warranted by the interests of justice in a society that respects human freedoms and rights".
- 10 "a) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest, search or detention without a legal warrant.
b) No one shall be deprived of his liberty except on such grounds and in such circumstances as are determined by law and in accordance with such procedure as is established thereby.
c) Anyone who is arrested shall be informed, at the time of arrest, in a language that he understands, of the reasons for his arrest and shall be promptly informed of any charges against him. He shall be entitled to contact his family members.
d) Anyone who is deprived of his liberty by arrest or detention shall have the right to request a medical examination and must be informed of that right.
e) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. His release may be subject to guarantees to appear for trial. Pretrial detention shall in no case be the general rule.
f) Anyone who is deprived of his liberty by arrest or detention shall be entitled to petition a competent court in order that it may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.
g) Anyone who has been the victim of arbitrary or unlawful arrest or detention shall be entitled to compensation".
- 11 "Everyone charged with a criminal offence shall be presumed innocent until proved guilty by a final judgment rendered according to law and, in the course of the investigation and trial, he shall enjoy the following minimum guarantees:
a) The right to be informed promptly, in detail and in a language which he understands, of the charges against him.
b) The right to have adequate time and facilities for the preparation of his defense and to be allowed to communicate with his family.
c) The right to be tried in his presence before an ordinary court and to defend himself in person or through a lawyer of his own choosing with whom he can communicate freely and confidentially.
d) The right to the free assistance of a lawyer who will defend him if he cannot defend himself or if the interests of justice so require, and the right to the free assistance of an interpreter if he cannot understand or does not speak the language used in court.
e) The right to examine or have his lawyer examine the prosecution witnesses and to on defense according to the conditions applied to the prosecution witnesses.

9. Articles 9 and 14 of the Covenant, having been interpreted by the United Nations Human Rights Committee in its general comments,¹³ it would also have been useful to refer to the latter so as to shed further light on the guarantees provided in those two Articles.

10. Article 7 of the Charter, for its part, could have been read together with Article 26 of the same instrument requiring States Parties “to guarantee the independence of the Courts”. Article 2(3)¹⁴ of the Covenant should also have been cited alongside Articles 9 and 14 of this latter instrument.

11. Furthermore, the Court should have laid emphasis of the obligations devolving on the Respondent State under Article 1 of the African Charter (paragraphs 49 and 50 of the Judgment). Indeed, according to that provision, States Parties “shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them”.¹⁵

f) The right not to be compelled to testify against himself or to confess guilt.

g) The right, if convicted of the crime, to file an appeal in accordance with the law before a higher tribunal.

h) The right to respect for his security of person and his privacy in all circumstances”.

“a) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

b) Persons in pre-trial detention shall be separated from convicted persons and shall be treated in a manner consistent with their status as unconvicted persons.

c) The aim of the penitentiary system shall be to reform prisoners and effect their social rehabilitation”.

12 “Each State party to the present Charter undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”.

13 General Comments No. 35, Article 9 (Right to Liberty and Security of Person), 16 December 2014, United Nations, Doc. CCPR/C/GC/35, 22 pages, and General Comments No. 32, Article 14 (Right to equality before courts and tribunals and to a fair trial), 23 August 2007, United Nations, Doc. CCPR/C/GC/32, 24 pages.

14 Article 2(3) of the Covenant provides as follows:

“Each State Party to the present Covenant undertakes

a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

c) To ensure that the competent authorities shall enforce such remedies when granted”.

15 Article 2(1) of the Covenant provides that State Parties, for their part, undertake “to respect and to ensure to all individuals within their territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind [...]”. The Human Rights Committee indicated that States Parties obligation “to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to Application between

12. The foregoing provision places States Parties under the obligation to adopt all appropriate measures to ensure the effective protection of the rights of all persons within their territory and hence under their sovereignty. The requisite obligation to implement should be understood both as a negative obligation (“not to do”) and as a positive obligation (“to do”); in other words, violation of the African Charter by a State Party may arise from both the latter’s actions and its omissions where the State Party for example exhibits lack of diligence.¹⁶ The undertaking of State Parties to “apply” the rights guaranteed by the Charter therefore comprises not only the commitment to “respect” such rights by not infringing themselves on such rights but also the commitment to “protect” them, which includes protection against any possible infringement by non-state actors.

13. Lastly, given the situation of non-international armed conflict prevailing in Libya since 2011 it would have been necessary for the Court to more deeply examine the applicability of the African Charter in the instant case. As the African Charter does not contain any derogation clause, in contrast to the International Covenant (Article 4) and the Arab Human Rights Charter (Article 4),¹⁷ the issue indeed deserved to be raised and a response more elaborate to be received than the response contained in paragraphs 76 and 77 of the judgment.

private persons or entities. *There may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.* [...] The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities. For example, the privacy-related guarantees of Article 17 must be protected by law. It is also implicit in Article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power” (emphasis added), General Comments No. 31 [80] The Nature of the General Obligation Imposed on States Parties to the Covenant, United Nations, Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, p 4, para 8.

¹⁶ The Inter-American Court of Human Rights, for example, reached the same conclusion as regards the American Convention in the famous judgment in the matter of *Velasquez-Rodriguez v Honduras*: “Thus, in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. *An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention*” (emphasis added), *Case of Velásquez-Rodríguez v Honduras (Merits)*, judgment of 29 July 1988, Ser C, No 4, p 30, para 72.

¹⁷ Article 4 (Derogation): “b) No derogation of the provisions hereunder shall be authorized in the event of exceptional emergency situation: Article 5, Article 8, Article 9, Article 10, Article 13, Article 14, Article 15, Article 18, Article 19, Article 20, Article 22, Article 27, Article 28, Article 29 and Article 30. Furthermore, the judicial guarantees necessary for the protection of these rights shall not be suspended”.

14. I would at this juncture note that the rights guaranteed under Articles 13, 14 and 20 of the Arab Charter are not likely to be derogated. For their part, the rights guaranteed under Articles 9 and 14 of the Covenant, do not feature among the non-derogable rights contemplated by Article 4, but their fundamental nature may be derived from their possible relationship with non-derogable rights.¹⁸ Whatever the case, Libya has not invoked the right of derogation provided by Article 4 of the Covenant.

15. Having to pronounce itself on allegations of human rights violations, the Court should have examined in greater detail the legal issues mentioned above; it should also have satisfied itself that the reality of the facts constituting the alleged violations of the African Charter has been established by convincing evidence.

16. It is my view that the Court has not sufficiently demonstrated that the submissions of the Applicant were equally founded in fact. To show the arbitrary nature of the detention of Mr Saïf Kadhafi and the violation of his right to a fair trial, the Court indeed contents itself with indicating that these are established facts (see paragraphs 85, 90, 91 (in fine) and 96 of the judgment).

17. However, it was incumbent on the Court to satisfy itself about the veracity of the Applicant's allegations by resorting to any such evidence as it deemed appropriate. In this regard, it could have used the resources offered by Rules 45 ("Measures for Taking Evidence") and 46 ("Witnesses, Experts and Other Persons") of its Rules.

18. The International Court of Justice underscored this procedural requirement in unequivocal terms.¹⁹ It indicated for example that "as to the facts of the case, in principle the Court is not bound to confine its consideration to the material formally submitted to it by the parties", and that where one party is not appearing, "it is especially incumbent upon

18 The Committee indeed stated as follows as regards this issue; "While Article 14 is not included in the list of non-derogable rights of Article 4, paragraph 2, of the Covenant, States derogating from normal procedures required under Article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. Thus, for example, as Article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of Article 14", General Comment No 32, *op. cit.*, p 2, para 6. The Committee developed a similar reasoning as regards Article 9 of the Covenant, see General Comment No 35 *op. cit.*, pp 20-21, paras 64-67.

19 "The Court is careful, even where both parties appear, to give each of them the same opportunities and chances to produce their evidence; when the situation is complicated by the non-appearance of one of them, then *a fortiori* the Court regards it as essential to guarantee as perfect equality as possible between the parties. Article 53 of the Statute therefore obliges the Court to employ whatever means and resources may enable it to satisfy itself whether the submissions of the Applicant State are well-founded in fact and law and simultaneously to safeguard the essential principles of the sound administration of justice", ICJ Reports 1986, p 40, para 59.

the Court to satisfy itself that it is in possession of all the available facts".²⁰

19. It however expresses this requirement in relative terms as follows: "Nevertheless, the Court cannot by its own enquiries entirely make up for the absence of one of the Parties; that absence, in a case of this kind involving extensive questions of fact, must necessarily limit the extent to which the Court is informed of the facts".²¹ The International Court of Justice had already in 1949 expressed the limits of such a requirement in its judgment in the *Corfu Channel Case*: "While Article 53 thus obliges the Court to consider the submissions of the Party which appears, it does not compel the Court to examine their accuracy in all their details; for this might in certain unopposed cases prove impossible in practice".²²

20. Even if this Court was not bound to satisfy itself that the submissions of the Applicant are founded in fact with the same degree of certainty as whether the same submissions are founded in law, and this, for reasons of the relative complexity which generally characterizes the establishment of the facts, it was incumbent on the Court to deploy minimum effort to research into this issue.

21. On 9 July 2013 and 17 May 2014, the Court received a number of documents from the Respondent State (see paragraphs 19 and 27 of the judgment); although it may be considered that the said documents were submitted by channels not prescribed by the Rules, the said documents expressed the views of that Party on the fact of the instant case, and it was incumbent of the Court to examine the documents or at least to mention them in the reasons of the judgment.

22. In like manner, the Court ought to have taken advantage of the reports published by the United Nations such as:

- the final report of the "International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya" established by the UN Human Rights Council,²³ (for the overall factual background and on the issue of arbitrary detention until the end of 2011),
- the reports of the High Commissioner for Human Rights of 2014,²⁴ and 2016,²⁵

²⁰ *Ibid*, p 25, paras 30-31.

²¹ *Ibid*, p 25, para 30.

²² *Corfu Channel*, Judgment of 15 December 1949, ICJ Report 1949, p 248.

²³ *Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya*, United Nations, Doc. A/HRC/17/44, 12 February 2012, 78 pages (on arbitrary detention, see pp 28-32, paras 90-110).

²⁴ *Technical Assistance for Libya in the Field of Human Rights*, Report of the UN High Commissioner for Human Rights, Doc. A/HRC/25/42, 13 January 2014, 19 pages.

²⁵ *Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya – Report of the UN High Commissioner for Human Rights*, United Nations, Doc. A/HRC/31/47, 15 February 2016, 21 pages (see in particular, pp 7-8, paras 26-30).

- the compilation²⁶ and summary²⁷ prepared by the Office of the High Commissioner for Human Rights for the Universal Periodic Review of Libya held in May 2015, or
- the joint report of the High Commissioner and the UN Support Mission in Libya on deaths in detention.²⁸

23. The Court should, above all, have drawn from the findings and recommendations on the detention of Mr Saif Kadhafi, adopted on 14 November 2013 by the UN Working Group on Arbitrary Detention.²⁹ The conclusions were as follows:

“43. In grave violation of his fundamental rights, Mr Gaddafi has been deprived of liberty for two years, incommunicado, without having been able to appear before the judicial authorities to challenge the legitimacy of the detention, without access to a lawyer, without having any facilities for the preparation of his defence; which detention has been extended far beyond the maximum period of time and in violation of the procedure provided for in Libyan law.

44. The gravity of the violations, their nature in this case, and the Government’s inability to rectify the violations, has made it impossible to guarantee Mr Gaddafi’s right to a fair trial in Libya. In this regard, the Working Group concurs with the view that “[w]here the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place ... Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial”.

45. The Working Group considers that the non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights in the case under consideration, namely Article 10 of the Declaration and Article 14 of the Covenant, is of such gravity as to give the deprivation of liberty of Mr Gaddafi an arbitrary character”.³⁰

24. Consequently, the Working Group “requests the Government to take the necessary steps to remedy the situation of Mr Gaddafi and bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and holds that the adequate remedy would

26 *Compilation prepared by the High Commissioner for Human Rights in accordance with paragraph 15 b) of the annex to resolution 5/1 of the Human Rights Council and paragraph 5 of the Annex to Resolution 16/21 of the Council - Libya*, United Nations, Doc. HRC/WG.6/22/LBY/2, 27 February 2015, pp 9-12, paras 23-49.

27 *Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 c) of the annex to Human Rights Council resolution 5/1 of the Human Rights Council and paragraph 5 of the Annex to Resolution 16/21 of the Council - Libya*, United Nations, Doc. HRC/WG.6/22/LBY/3, 23 February 2015, 19 pages (see in particular p 8, paras 52-53).

28 *Torture and deaths in detention in Libya, Joint Report*, United Nations Support Mission in Libya and Office of the United Nations High Commissioner for Human Rights, October 2013, 18 pages.

29 Opinion No. 41/2013 (Libya), Communication addressed to the Government on 21 August 2013 concerning Saif Al-Islam Gaddafi, *Opinion adopted by the Working Group at its sixty-eight session, (13–22 November 2013)*, Human Rights Council, United Nations, Doc. A/HRC/WGAD/2013/41, 7 April 2014, 8 pages.

30 *Ibid*, pp 7-8.

be both to discontinue the domestic proceedings against Mr Gaddafi and his detention [...]”.³¹

25. The documents listed above prove that there are extensive sources of objective information on which the Court should have relied to satisfy itself that the Applicant’s submissions were founded in fact.

26. It is undeniable that the non-appearance of one of the parties to a case necessarily has a negative impact on the proper administration of justice and that it substantially complicates the task of this Court in the exercise of its mission. The purport of the requirements set forth in Rule 55(2) of the Rules of Court is precisely to ensure proper administration of justice in such circumstances. As underscored by the International Court of Justice in regard to Article 53 of its own Rules,

“The use of the term “satisfy itself” in the English text of the Statute (and in the French text the term “s’assurer”) implies that the Court must attain the same degree of certainty as in any other case that the claim of the party appearing is sound in law, and, so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence”.³²

27. Rule 55(2) of the Rules therefore seeks to preserve, to the extent possible, the principle of equality of the parties in adducing evidence of alleged violations through an exhaustive consideration of the facts and of the applicable law. Being bound by this Rule to ensure that the Application is well founded in fact and in law, the Court is obliged to use every means and method at its disposal to achieve that purpose.

28. It is my view that, in the instant case, the Court failed to use every available means and method to ensure that the Application was well founded in fact. The Court considers the alleged facts as established facts without examination of their veracity (see paragraphs 85, 90, 91 (*in fine*) and 96 of the judgment). The Court therefore seems to have purely and simply endorsed the Applicant’s submissions in this case, and by so doing, apparently pronounced itself automatically in favour of the Applicant, which is precisely what the prescriptions of Rule 55 of the Rules are intended to avoid.³³

29. I would note in this regard, that the summary motivation of this judgment is in sharp contrast with the very elaborate motivation contained in the three judgments recently rendered by the Court in cases similarly concerning the right to a fair trial, and in which the two parties participated.³⁴

³¹ *Ibid*, p 8, paras 48-49.

³² ICJ Report 1986, p 24, para 29.

³³ As indicated by the International Court of Justice “There is however no question of a judgment automatically in favour of the party appearing, since the Court is required, as mentioned above, to “satisfy itself” that that party’s claim is well founded in fact and in law”, ICJ Report, para 28.

³⁴ *Alex Thomas v United Republic of Tanzania*, Judgment of 20 November 2015 (see pp. 34- 54, paras 81-131), *Wilfred Onyango Nganyi & 9 Others v United Republic of Tanzania*, Judgment of 18 March 2016 (see pp. 36-53, paras 117-184) and *Mohamed Abubakari v United Republic of Tanzania*, Judgment of 3 June 2016 (see pp 27-56, paras 95-227).

30. In its first two judgments rendered in default, the Inter-American Court of Human Rights, for its part, embarked on a very meticulous evaluation of the evidence adduced by the appearing party regarding violation of the right to a fair trial by the Respondent State.³⁵ In a recent judgment rendered in default, the Court of Justice of the Economic Community of West African States also gave relatively elaborate reasons before concluding that the Respondent State has violated Article 7 of the African Charter.³⁶

31. This judgment being the very first rendered in default by the Court, it would have been desirable, if not necessary, that the Court clearly determined the principles which should guide it in effectively discharging its obligations under Rule 55 of the Rules and that it scrupulously applied the said principles in the instant case.

35 *Case of the Constitutional Court v Peru (Merits, Reparations and Costs)*, pp 19-22, paras 43-55, and pp. 35-42, paras 64-85; see also the analysis of the facts which the Court considers as proven, pp 22-32, para 56; see also, *Case of Ivcher-Bronstein v Peru (Merits, Reparations and Costs)*, pp 27-29, paras 63-75, pp. 30-39, para 76, and pp 45-49, paras 100-116.

36 *Mohammed El Tayyib Bah v Republic of Sierra Leone*, Judgment of 4 May 2015, No ECW/CCJ/JUD/11/15, pp. 9-18. Article 90(4) of the 2002 Rules of the ECOWAS Court of Justice provides for proceedings by default in the following terms:

"Before giving judgment by default the Court shall, after considering the circumstances of the case consider:

- (a) Whether the Application initiating proceedings is admissible,
- (b) Whether the appropriate formalities have been complied with, and
- (c) Whether the Application appears well founded".

**Atabong Denis Atemnkeng v African Union (jurisdiction) (2013)
1 AfCLR 182**

Atabong Denis Atemnkeng v the African Union

Judgment, 15 March 2013. Done in English and French, the authoritative text being English.

Judges: AKUFFO, OUGUERGOUZ, NGOEPE, NIYUNGEKO, RAMADHANI, TAMBALA, THOMPSON, ORE and GUISSSE

Recused under Article 22: KIOKO

The Applicant brought this action challenging the validity of Article 34(6) of the Protocol for being at variance with the Constitutive Act of the African Union and sought a declaration that Article 34(6) was null and void. In dismissing the Application, the Court held that it does not have jurisdiction to hear cases against entities that are not parties to the Protocol.

Jurisdiction (international organization as Respondent, 38-40)

Separate opinion: AKUFFO, NGOEPE and THOMPSON

Interpretation (Article 34(6) incompatible with Charter, 7-8; Article 34(6) violates access to justice, 11)

Separate opinion: OUGUERGOUZ

Jurisdiction (Court does not have jurisdiction against non-parties to the Protocol, 1)

I. Subject of the Application

1. By Application dated 18 October 2011, which reached the Registry on 1 December 2011, Mr Atabong Denis Atemnkeng, a Cameroonian national (hereinafter referred to as “the Applicant”) and staff member of the African Union Commission brought the African Union (herein after referred to as “the Respondent”) before the African Court on Human and Peoples’ Rights (hereinafter referred to as “the Court”) to obtain a judgement stating that Article 34(6) of the Protocol which established an African Court on Human and Peoples’ Rights (hereinafter referred to as the “Protocol”), is inconsistent with the Constitutive Act of the African Union (hereinafter referred to as the “Constitutive Act”) and the African Charter on Human and Peoples’ Rights (herein after referred to as “the Charter”) and that it should on those grounds be declared null and void.

II. Procedure

- 2.** The Application was received at the Registry of the Court on 1 December 2011 and registered as Application 014/2011.
- 3.** By letter dated 5 January 2012, the Registrar acknowledged receipt of the Application, pursuant to Rule 34(3) of the Rules.
- 4.** Pursuant to Rule 5(1) of the Rules, the Registrar forwarded copies of the letter to the President and to the other members of the Court.
- 5.** Pursuant to Article 22 of the Protocol and Rule 8(2) of the Rules of Court, (hereinafter referred to as “the Rules”), Judge Ben KIOKO, member of this Court, who was involved in this case as the then Legal Counsel of the Respondent, recused himself.
- 6.** By letter dated 15 February 2012 and pursuant to Rule 35(2) of the Rules of Court, the Registrar sent a copy of the Application to the Respondent requesting it to submit the names of its representatives within 30 days and to respond to the Application within 60 days.
- 7.** Pursuant to Rule 35(3) of the Rules and by letter dated 15 February 2012, the Registrar informed the Chairperson of the African Union Commission as well as State Parties to the Protocol of the filing of the Application.
- 8.** By e-mail dated 1 April 2012, the Applicant made additional submissions.
- 9.** By letter dated 27 April 2012, received the Registry on 20 May 2012, the Respondent submitted to the Registry, the name of its legal representative and its response to the Application in question.
- 10.** By letter dated 21 May 2012, the Registry communicated the said response to the Applicant.
- 11.** By letter dated 22 May 2012, the Registry forwarded to the Respondent an addendum to the Application.
- 12.** On 11 June 2012, the Registry received the Applicant’s response dated 6 June 2012. It acknowledged receipt thereof on the same day and forwarded it immediately to the Respondent.
- 13.** By letter dated 25 June 2012, the Registry informed the parties that the written procedure had ended and that they could ask for leave to make additional submissions, if necessary.
- 14.** By letter dated 27 June 2012, the Applicant submitted an Application for leave to make additional submissions.
- 15.** Without waiting for the said leave of the Court, the Applicant filed the said additional submissions. The Registrar acknowledged receipt on 2 July 2012.
- 16.** By Order dated 7 December 2012, the Court rejected the Applicant’s request for leave to make additional submissions as baseless and filed in violation of Rule 50 of the Rules of Court which provide that “No party may file additional evidence after the closure of pleadings except by leave of Court”.

III. The submission of the parties

A. The submission of the Applicant

17. In his initial Application, the Applicant alleges that Article 34(6) of the Protocol is inconsistent with the Treaty which established the African Union, namely, the Constitutive Act which upholds fundamental principles such as the rule of law, condemnation, rejection of impunity and promotion of human rights as enshrined in the African Charter. The Applicant is of the view further that Article 34(6) of the Protocol is an impediment to justice as it prevents African citizens from having access to the Court, especially victims of human and peoples' rights violations who are unable to secure remedy from national Courts or from the African Commission on Human and Peoples' Rights.

18. He also claims that this same Article 34(6) gives violators of human and peoples' rights, especially the States, powers to prevent their victims from making their voices heard and from obtaining justice.

19. The Applicant contends that the African Union cannot afford to be viewed by Africans as an institution which adopts provisions preventing African citizens from obtaining justice or places human rights violators above the law.

20. In the addendum to his Application, the Applicant raises three issues: the obligation for the African Union to ensure that its rules are consistent with the Constitutive Act and the Charter; the jurisdiction of the Court as a core factor ensuring that Member States honour their obligations as set out in the Constitutive Act and the Charter; and the capacity of the Applicant to seize the Court.

21. In regard to the first issue: the Applicant evokes the role of the African Union as coordinator in ensuring that the decisions of the Union are in conformity with the provisions of the Constitutive Act, other legal instruments of the Union and draft treaties and conventions as well as cooperation agreements signed between the African Union and Member States or other institutions.

22. On the second issue, the Applicant contends that Article 34(6) excludes jurisdiction being exercised by the only continental body charged with considering allegations of Member State violations of their obligations under treaties they had signed. In his view, it is difficult to imagine that States would make declarations and/or enter some reservations that undermine the obligations they had previously agreed to observe willingly thus depriving the continental Court of any authority to hear and determine cases of violations alleged by individuals and NGOs against the States concerned.

23. On the last issue: the Applicant submits that every African worthy of the name has the obligation to defend the Constitutive Act of the African Union in the same manner as every citizen should defend the constitution of his or her country. Referring to the provisions of Article 34(6), the Applicant is of the view that since the Application was not directed against any Member State, it should not be rejected under the said Article.

24. Furthermore, the Applicant alleges that Article 34(6) is at variance with the Constitutive Act of the African Union because it is a violation of the principles and objectives enshrined in the said Act. In that regard, he quotes part of the Preamble of the Protocol according to which Member States of the Organization of African Unity, State Parties to the Charter were, “Firmly convinced that the attainment of the objectives of the African Charter on Human and Peoples’ Rights require the establishment of an African Court on Human and Peoples’ Rights to complement and reinforce the functions of the African Commission on Human and Peoples’ Rights”. The Applicant concludes therefrom that all the principles enshrined in the Constitutive Act and the rights enumerated in the Charter will be completely meaningless if they cannot be recognized and defended before a competent Court.

25. In conclusion:

The Applicant prays the Court to:

- Declare that Article 34(6) of the Protocol is contrary to the spirit and letter of the Constitutive Act and the Charter and is therefore null and void.
- Declare that Article 34(6) is null and void because it is already so in light of the *jus cogens* laws set out in the Charter.

B. The submissions of the Respondent

26. As a preliminary objection, the Respondent raises the issue of the admissibility of the Application on the grounds that it is baseless, frivolous, vexatious and amounts to an abuse of process; the Applicant has no capacity to seize the Court being a national of a State which has not yet made the declaration contained in Article 34(6) of the Protocol; it is neither party to the Constitutive Act of the African Union, the Charter nor the Protocol. It cites Article 34 of the Vienna Convention on the Law of Treaties in support of its allegations.¹

27. On the merits of this case, notably, the inconsistency of Article 34(6) of the Protocol with the Constitutive Act of the African Union and the Charter, the Respondent submits that Member States have the sovereign right to negotiate, adopt, sign and ratify any treaty or accede to it. It further states that all the provisions of the Protocol, including Article 34(6), conform to the Vienna Convention on the Law of Treaties and to international customary law.

28. The Respondent argues that in international law, a treaty cannot be null and void unless it contradicts an imperative norm in international law, it rejects the idea that Article 34(6) of the Protocol is at variance with all the instruments adopted by the Organization of African Unity or the African Union.

29. The Respondent further argues that Member States have the sovereign right at the time of ratification of the Protocol or at any time thereafter to make the declaration accepting the jurisdiction of the Court

¹ A treaty does not create either obligations or rights for a third State without its consent.

to receive Applications directly from individuals or non-governmental organizations which have observer status before the Commission.

30.In conclusion, the Respondent prays the Court to:

- Reject the Application on the basis of Article 38 of the Rules of Court or for lack of jurisdiction and
- Order the Applicant to bear the costs.

IV. Jurisdiction of the Court

31. Under Rules 39(1) and 52(7) of the Rules, the Court is required to consider the objections raised by the Respondent and in particular, that regarding the jurisdiction of the Court to hear and determine the present Application.

32. Article 3(2) of the Protocol and Rule 26(2) of the Rules of Court provide that “in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.”

33. To resolve the issue raised in the preliminary objection, it should be understood that, for the Court to entertain an Application submitted directly by an individual, the said Application should inter-alia meet the requirements of Articles 5(3) and 34(6) of the Protocol.

34. Article 5(3) of the Protocol provides as that: “The Court may entitle relevant Non-Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol.”

35. Article 34(6) of the Protocol for its part provides that “at the time of the ratification of this protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration”.

36. A combined reading of the above-mentioned provisions show that the direct seizure of the Court by an individual can only be against a State Party which has made a declaration authorizing such seizure.

37. As stated *supra*, the Applicant submits that his Application is not directed against any State in particular, but against the African Union and therefore, Article 34(6) should not apply in the present case.

38. The Court is of the opinion that the fact that a non-State entity like the African Union is not bound under Article 34(6) of the Protocol to make the declaration does not necessarily confer on the Court, the jurisdiction to receive Applications brought by individuals against it. At any rate, the Court would have to consider its jurisdiction vis-a-vis the Respondent.

39.The Court notes however that the Application is not filed against a State Party to the Protocol but against the African Union which is party neither to the Charter nor to the Protocol on which the Applicant relies.

40. It should be underscored that the Court was established by the Protocol and that its jurisdiction is clearly enshrined in the Protocol. When an Application is brought before the Court, the jurisdiction

rationae personae of the Court is set out in Articles 5(3) and 34(6), read jointly. In the present case where the Application is brought against a body which is not a State which has ratified the Protocol and/or made the required declaration, it falls outside the jurisdiction of the Court. Consequently, the Court lacks the jurisdiction to hear and determine the said Application.

41. Having concluded that it lacks the jurisdiction to hear the case, the Court holds that it is not necessary for it to consider the issue of the admissibility of the Application or the merits of the case.

42. Considering that the Respondent alluded to costs in its submissions, the Court must now rule on that issue.

43. In its reply, the Respondent had asked that the Applicant be ordered to bear the cost.

44. The Court notes that Rule 30 of the Rules provides that: “Unless otherwise decided by the Court, each party shall bear its own costs”.

45. Considering all of the above, the Court is of the opinion that it should not depart from the provisions of Rule 30 of its Rules.

46. On those grounds,

THE COURT by a majority vote of six (6) to three (3)

a) Declares that, pursuant to Articles 5(3) and 34(6) of the Protocol read together, it does not have the jurisdiction to hear and determine the Application brought by Atabong Denis ATEMKENG against the African Union; and

b) Decides that each party shall bear its cost.

Dissenting Opinion: AKUFFO, NGOEPE and THOMPSON

1. The facts of the case have been succinctly outlined in the majority judgment, we adopt them as ours.

2. We have read the reasoning in the majority judgment and unfortunately do not agree with it. In Application 001/11 *Femi Falana v African Union* we dissented – Akuffo, Ngoepe and Thompson JJ. We adopt the dissenting opinion in that case as if the reasoning is herein reproduced, and are indeed fortified all the more by the submissions made by the Applicant herein.

3. The Applicant contended that “With respect to the promotion of human and peoples’ rights in accordance with the ACHPR (African Charter on Human and Peoples’ Rights) Article 34(6) particularly violates Articles 2, 3 and 7 of the ACHPR. In all these provisions, the Charter stresses the right of *every individual* to have access to justice; it stresses the equality of parties before the law. However, by operation of Article 34(6) of the Protocol, all victims of human and peoples’ rights in countries which have not expressed their acceptance of the Court’s competence for cases brought against them are without access to any justice whatever.”

4. He argued that, this restriction placed on the enforcement of human and peoples' rights by Article 34(6) should further be placed in the light that human rights are not rights granted by states, but rights that attach to each individual person by virtue only that he or she is human. States may articulate them, but states are not their origin. Therefore not even states have the right to obstruct the enjoyment of those rights, and worse, to be given the right to do so under the instruments of a continental organization purporting to stand for justice. Given that human rights are not derived from states but from our status as human beings, every state that violates those rights ought to be held accountable.'

5. Further, that "Anyone reading the Protocol would wonder how the true subjects of human and peoples' rights law could be so systematically excluded from access to a Court purportedly created to implement and enforce human and peoples' rights."

6. The Applicant maintains that "It is a gross violation of the basic principles of law for violators to decide whether their victims shall have access to the courts of law or not. Article 34(6) effectively grants State Parties the right to decide whether their victims shall have access to the African Court or not, contrary to the fundamental principles of Law."

7. We agree with the Applicant in his argument that Article 34(6) of the Protocol to the African Charter of Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol) is incompatible with the Protocol itself and inconsistent with the African Charter on Human and Peoples' Rights (the Charter). It also violates the fundamental right of the Peoples' of Africa to ventilate their grievances in a Court established for that purpose.

8. Member States must not only create institutions for the protection of human rights but they must ensure that the instruments used by the institutions meet international standards and do not derogate from the protective mandate, enshrined for the peoples of Africa in the Charter. They cannot and should not be allowed to abandon their responsibility and to approbate and reprobate. And where they have purported to do so, the African Union, the body they have established to facilitate their collective will and action, can and should be amenable to being held liable for such failure and or abandonment.

9. The right of access to justice is a peremptory norm- *jus cogens*. This right is in the African Charter and other International Human Rights instruments to which State parties are signatories. The instruments have been properly stated by the Applicant at page 11 of his rejoinder on 6 June 2012. See

- i. Article 7 of the African Charter on Human and Peoples' Rights;
- ii. Article 8 of the Universal Declaration of Human Rights;
- iii. Article 2(3) of the International Covenant on Civil and Political Rights; and;
- iv. Article 10(3) of the African Charter on Democracy, Elections and Governance.

10. We agree with the Applicant on this assertion. It is for this reason that we distinguish our position in *Femi Falana v African Union* as enunciated in our Dissenting Opinion therein.

11. The State Parties have the duty to ensure that the peoples of Africa have access to judicial protection of their rights and this cannot be achieved with the clog of Article 34(6) of the Protocol. The right to access the Court is an essential element in the protection of human rights. In ensuring access to Court, the Court is competent to set aside any impediment. It is for the above reasons, together with the reasons we have already articulated in the aforesaid case of *Femi Falana v the African Union*, that we have no hesitation declaring Article 34(6) null and void.

Separate opinion: OUGUERGOUZ

1. I fully subscribe to the decision on the Court's lack of jurisdiction to hear the Application filed against the African Union by Mr Atabong Denis Atemnkeng. The Protocol establishing the Court indeed provides that only States Parties to the said Protocol may be brought before the Court (see Articles 3(1), 5(1(c), 7, 26, 30, 31 and 34(6)). The African Union not being a State entity party to the Protocol, the Court manifestly lacks the jurisdiction to hear this Application. Consequently, I am of the opinion that the Application ought not to have given rise to a judgment *per se* on the basis of Article 52(7) of the Rules, relating to preliminary objections; it ought to have been dismissed *de plano* by a simple letter from the Registrar (see *mutatis mutandis* my separate opinion attached to the Court's judgment of 26 June 2012 in a similar case namely *Femi Falana v The African Union*; see also my separate opinion attached to the decision of 30 September 2011 in the case of *Efouna Mbozo'o Samuel v Pan African Parliament*).

2. Besides, the fact that the Court manifestly lacks the jurisdiction to hear this Application is clearly exhibited in the relative brevity of the reasons for the judgement (see paragraphs 36 to 40, and more specifically paragraphs 36 and 39).

Ernest Francis Mtingwi v Malawi (jurisdiction) (2013) 1 AfCLR 190

Ernest Francis Mtingwi v Republic of Malawi

Decision, 15 March 2013. Done in English and French, the authoritative text being English.

Judges: AKUFFO, OUGUERGOUZ, NGOEPE, NIYUNGEKO, RAMADHANI, THOMPSON, ORE, KIOKO, GUISSÉ and ABA

Recused under Article 22: TAMBALA

The case concerned the alleged wrongful and unfair termination of the employment of the Applicant by the Malawi Revenue Authority (MRA). The Court held that it did not have an appellate jurisdiction and struck out the case.

Jurisdiction (Court does not have appellate jurisdiction, 14-16)

I. The facts

1. In his Application, the Applicant alleges as follows:

- That he, Ernest Francis Mtingwi (hereinafter referred to as the Applicant), was employed by the Malawi Revenue Authority (MRA), a state agency of the Republic of Malawi (hereinafter referred to as the Respondent), on a 4-year contract for the period of 1 January, 2003 to 31 December, 2006,
- That on 4th November, 2004, the Board of Directors of the Malawi Revenue Authority held an extra-ordinary meeting at night at which a resolution to immediately terminate his contract of employment was passed, and approved.
- That he was informed of the termination of his contract the following morning.

2. The Applicant sued the MRA for damages for wrongful and unfair termination of employment in the High Court of Malawi, Civil Cause No 3389 of 2004: *Ernest F Mtingwi v Malawi Revenue Authority*.

3. The matter was heard in the High Court of Malawi on 24 March 2005, and the Court declared the dismissal unlawful and ordered that three months salary and benefits be paid to the Applicant because the Applicant's contract was terminated without notice.

4. According to the Applicant, after the award of damages, he found that a number of items of benefits as damages were accidentally omitted during the preparation of exhibits submitted to the Registrar, and therefore the order of assessment of damages did not reflect or embody the manifest intention of the High Court order on damages. According

to the Applicant, benefits that were in the contract of employment and conditions of service of MRA were accidentally omitted.

5. An Application was made to the High Court in January 2007 by the Applicant which brought to the attention of the Court the said accidental omissions and asked the Court to consider correcting it. The Application was placed before His Honor, Assistant Registrar Chigona, who determined that there were no accidental omissions in the order of assessment of damages and dismissed the Application.

6. The Applicant then appealed to a Judge in chambers. The appeal was placed before Hon Justice Kamwambe of the High Court who ruled that there were indeed accidental omissions in the order of assessment of damages.

7. The MRA then appealed the ruling to the Malawi Supreme Court of Appeal. On 28 May 2010, the Malawi Supreme Court allowed the appeal and dismissed the High Court judgment of Kamwambe J.

8. The Applicant has appealed against the ruling of the Malawi Supreme Court of Appeal to the African Court on Human and Peoples' Rights, praying the latter for:

- "A Reversal of the lower court's order;
- An order that the words, "all terminal benefits in the contract of employment between the Applicant and MRA" means salary and benefits as per the contract of employment and conditions of service of MRA to the end of the contract of employment;
- An order that all items of terminal benefits that were accidentally omitted for the remainder of the contract of employment to be paid to the Applicant as damages for the unlawful dismissal of the Applicant;
- Costs of this action"

II. Procedure

9. The Application dated 17 January 2013, was received at the Registry of the Court on 1 February, 2013, and was registered as Application 001/2013 - *Ernest Francis Mtingwi v the Republic of Malawi*.

10. On 6 February, 2013, the Registrar wrote to the Applicant acknowledging receipt of the Application.

III. Applicable law

11. 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 (the Protocol) and Rule 8(2) of the Rules of Court (the Rules), Justice Duncan Tambala, member of the Court of Malawian nationality, recused himself.

12. Having regard to Article 3 of the Protocol, the Court deliberated on its competence to receive the Application.

13. Article 3(1) of the Protocol provides that 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".

14. The Court notes that it does not have any appellate Jurisdiction to receive and consider appeals in respect of cases already decided upon by domestic and/or regional and similar Courts.

15. As this is an appeal by the Applicant against the decision of the Malawi Supreme Court of Appeal, a domestic Court in the Respondent State, the Court concludes that, it does not have the jurisdiction to receive the Application.

16. For these reasons,

THE COURT, unanimously:

i. Finds that, in terms of Article 3 of the Protocol, it has no jurisdiction to receive the Application instituted by Mr Ernest Francis Mtingwi against the Republic of Malawi.

ii. Rules that this Application be and the same is hereby struck out for want of jurisdiction.

**African Commission on Human and Peoples' Rights v Kenya
(provisional measures) (2013) 1 AfCLR 193**

African Commission on Human and Peoples' Rights v The Republic of Kenya

Order (provisional measures), 15 March 2013. Done in English and French, the English text being authoritative.

Judges: AKUFFO, OUGUERGOUZ, NGOEPE, NIYUNGEKO, RAMADHANI, TAMBALA, THOMPSON, ORE, GUISSSE and ABA

The case dealt with the eviction of an indigenous community from a forested area in Kenya and had been pending before the African Commission since 2009 when the Commission issued provisional measures. Upon being seized of the Application by the Commission, the Court issued provisional measures in relation to transactions of land within the forest.

Jurisdiction (*prima facie* jurisdiction before provisional measures, 16; case brought by the Commission, 19)

Provisional measures (situation of extreme gravity and urgency and risk of irreparable harm, 20-25)

1. The Court received, on 12 July 2012, an Application by the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Applicant"), instituting proceedings against the Republic of Kenya (hereinafter referred to as "the Respondent"), for alleged serious and massive violations of human rights guaranteed under the African Charter on Human and Peoples' Rights (hereinafter referred to as 'the Charter').
2. The Application is brought in terms of Article 5(1)(a) 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").
3. The Applicant, in its Application, submits that, on 14 November 2009, it received, against the Respondent, a complaint, on behalf of the Ogiek Community of the Mau Forest asserting that:
 - They are an indigenous minority ethnic group comprising about 20,000 members, about 15,000 of whom inhabit the greater Mau Forest complex, a land area of about 400,000 hectares, straddling about seven administrative districts;
 - In spite of the near universal acknowledgement of their dependence on the Mau Forest as a space for the exercise of their traditional livelihoods and as a source of their sacral identity, the Government of Kenya in October 2009, through the Kenya Forestry Service, issued thirty (30) days eviction notice to the Ogiek and other settlers of the Mau Forest, demanding that they move out of the Forest on the

grounds that the forest constituted a reserved water catchment zone, and was in any event part and parcel of government land under Section 4 of the Government's Land Act.

4. The Applicant is concerned that the implementation of the eviction notices of the Government of Kenya will have far reaching implications on the political, social and economic survival of the Ogiek Community as their eviction will lead to the destruction of their means of survival, their livelihoods, culture, religion and identity, which amounts to serious and massive violations of the rights enshrined in Articles 1, 2, 4, 14, 17(2) and (3), 21 and 22 of the African Charter on Human and Peoples' Rights as envisaged under Article 58(1) of the same Charter.

5. The Applicant concludes the Application by praying the Court to order the Respondent to:

- Halt the eviction of the Ogieks from the East Mau Forest and refrain from harassing, intimidating or interfering with the Community's traditional livelihoods;
- Recognize the Ogieks' historic land, and issue the community with legal title that is preceded by consultative demarcation of the land by the Government and Ogiek Community, and for the Respondent to revise its laws to accommodate communal ownership of property; and
- Pay compensation to the community for all the loss they have suffered through the loss of their property, development, natural resources and also freedom to practice their religion and culture.

I. Procedure

6. On 13 July 2012, the Registry acknowledged receipt of the Application, in accordance with Rule 34(1) of the Rules of Court.

7. On 25 September 2012, the Registry forwarded copies of the Application to the Respondent, in accordance with Rule 35(2)(a) of the Rules of Court, and invited it to indicate, within thirty (30) days of receipt of the Application, the names and addresses of its representatives, in accordance with Rule 35(4)(a), and further, the Registry invited the Respondent to respond to the Application within sixty (60) days, in accordance with Rule 37 of the Rules.

8. By letter dated 25 September 2012, the Registry informed the Chairperson of the African Union Commission, and through him, the Executive Council of the African Union, and all the other States Parties to the Protocol, of the filing of the Application, in accordance with Rule 35(3) of the Rules. In the Application, the Applicant did not request the Court to order provisional measures; and, in view of an Order of the High Court of Kenya of 15 October 1997 in case number 635 of 1997 and the Provisional Measures issued by the Applicant on 23 November 2009, which are still in force, the Court decided at its 26th Ordinary Session held from 17-28 September 2012, not to order further provisional measures *suo motu*.

9. On 31 December 2012, the Registry received from the Applicant a request for provisional measures in the matter, the receipt of which was acknowledged by the Registry's letter to the Applicant, dated 2 January 2013 wherein the Applicant was advised that the request would be

submitted to the Court for consideration during its upcoming 28th Ordinary Session scheduled for 4-15 March 2013.

10. In support of the request, the Applicant alleges that, by its letter dated 9 November 2012 and addressed to the Nakuru District Land Registrar, the Respondent has lifted the restrictions on land transactions for all parcels of land measuring five acres or less within the Mau Forest Complex, and this act has great potential to cause further irreparable damage to Ogieks and will serve to “perpetuate and expand the prejudice that is subject” of the Applicant’s main Application. Pending resolution of its Application, therefore, the Applicant prays the Court to order that the Respondent should reinstate the ban on transactions of land in the Mau Forest Complex and to follow up on implementation in accordance with Rule 51(5).

11. The request is brought in terms of Article 27(2) of the Protocol and Rule 51 of the Rules of Court. Article 27(2) provides that “In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary”.

12. The Registry served the request on the Respondent by its letter dated 7 January 2013, inviting the Respondent to submit any comments it had regarding the Applicant’s request within thirty (30) days of the receipt of the letter. The Respondent received this letter on 17 January 2013.

13. The said time limit expired on 16 February 2013, and Respondent has, to date, not responded to the request for provisional measures.

14. By letter dated 21 February 2013, the Registry informed the Respondent that the Court will, at the 28th Ordinary Session, consider the Applicant’s request for provisional measures. Again, the Respondent has not, to date, responded.

15. In dealing with any Application, the Court has to ascertain that it has jurisdiction under Articles 3 and 5 of the Protocol.

16. However, before ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction.

17. The Court notes that Article 3(1) of the Protocol provides that “the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned”.

18. The Court further notes that the Respondent ratified the Charter, which came into force on 21 October 1986, on 23 January 1992 and deposited its instruments of ratification on 10 February 1992; and further that Respondent ratified the Protocol, which came into force on 25 January 2004, on 4 February 2004 and deposited its instruments of ratification on 18 February 2005 and is therefore a party to both instruments.

19. The Court acknowledges that Article 5(1)(a) of the Protocol lists the Applicant as one of the entities entitled to submit cases to the Court,

and takes judicial notice that the request before it is for provisional measures, which may be a consequence of the right to protection under the Charter, and which do not require prior consideration of the substantive issues arising from the Application.

20. In the opinion of the Court, there exists a situation of extreme gravity and urgency, as well as a risk of irreparable harm to the Ogiek Community with regard to violation of their rights guaranteed under the Charter to, among others:

- Enjoyment of their cultural rights and protection of their traditional values under Article 2 and 17(2) and (3);
- Protection before the law under Article 3;
- Integrity of their persons under Article 4;
- The right to property under Article 14; and
- The right to economic, social and cultural development under Article 22.

21. In the light of the foregoing, the Court is satisfied that:

- *prima facie*, it has jurisdiction to deal with the Application; and
- that this is a matter where provisional measures should be granted in terms of Article 27(2) of the Protocol;

Now therefore

22. The Court finds that there is a situation of extreme gravity and urgency, as well as a risk of irreparable harm to the Ogiek of the Mau Forest and also prejudice to the substantive matter before the Court.

23. Consequently, the Court concludes that the circumstances require it to order, as a matter of urgency, provisional measures, in accordance with Article 27(2) of the Protocol and Rule 51 of its Rules, to preserve the status *quo ante* pending the determination of the Court on the main Application;

24. For the avoidance of doubt, the measures the Court will order will necessarily be provisional in nature and will not in any way prejudice the findings the Court might make on its jurisdiction, the admissibility of the Application and the merits of the case.

25. For these reasons,

The Court unanimously grants the Applicant's request and hereby provisionally orders that:

1) The Respondent immediately reinstates the restrictions it had imposed on land transactions in the Mau Forest Complex and refrains from any act or thing that would or might irreparably prejudice the main Application before the Court, until the final determination of the said Application.

2) The Respondent reports to the Court within a period of fifteen (15) days from the date of receipt hereof, on the measures taken to implement this Order.

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (preliminary objections) (2013) 1 AfCLR 197

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo, Baise Ilboudo and the Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso

Ruling on preliminary objections, 25 June 2013. Done in English and French, the French text being authoritative.

Judges: AKUFFO, OUGUERGOUZ, NGOEPE, NIYUNGEKO, RAMADHANI, TAMBALA, THOMPSON, ORE, GUISSÉ, KIOKO and ABA

The Court determined preliminary objections raised by the Respondent State in a case dealing with the killing of an investigative journalist and his companions in 1998. While finding that it had jurisdiction with respect to the manner in which domestic proceedings were conducted, and especially because the related alleged violations continued after the entry into force of the Protocol, the Court held that it lacked jurisdiction concerning the allegation relating to the violation of the right to life because the death of the journalists occurred instantly.

Jurisdiction (temporal jurisdiction, unlawful killing, 65-68; continuous violation, investigation, 74-77)

Admissibility (effectiveness of local remedies linked to merits, 102, 103; submission within reasonable time, 120-124)

Separate opinion: AKUFFO and THOMPSON

Jurisdiction (temporal jurisdiction, 5, 8)

I. Subject of the Application

1. By letter dated 11 December 2011, the Court was seized with this matter by Ibrahima Kane, claiming to act on behalf of the family and Lawyers of the Late Norbert Zongo. According to the document entitled "Communication/Application", dated 10 December 2011, annexed to the above mentioned letter, the action is brought against Burkina Faso, by the beneficiaries of the Late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo and Blaise Ilboudo and by the Burkinabé Movement on Human and Peoples' Rights.

A. The facts of the case

2. According to the Application, the facts date back to the assassination on 13 December 1998, of Norbert Zongo, an investigative journalist,

and his above-mentioned companions. Messrs Abdoulaye Nikiema alias Ablassé and Blaise Ilboudo were collaborators of Mr Zongo, while Mr Ernest Zongo was his younger brother.

3. The Applicants state that “the investigative journalist and Director of the weekly magazine *L’Indépendant*, Norbert Zongo and his companions, Abdoulaye Nikiema, Ernest Zongo and Blaise Ilboudo were found burnt in the car they were travelling in, on 13 December 1998, seven kilometres from Sapouy, on the way to Leo, in the south of Burkina Faso”.

4. Relying mainly on the report of the Independent Commission of Inquiry set up by the Government to determine the cause of death of these persons, the Applicants allege that “the murder of the four persons on 13 December 1998 is linked to investigations that Norbert Zongo was conducting on various political, economic and social scandals in Burkina Faso during that period, notably the investigation of the death of David Ouedraogo, the driver of François Compaoré, the brother of the President of Burkina Faso and Adviser at the Presidency of the Republic”.

5. The Applicants state that, “as the driver and employee of François Compaore, David Ouedraogo died on 18 January 1998 at the Health Centre of the Presidency in Burkina Faso, apparently as a result of the ill-treatment inflicted on him by presidential security guards who were investigating a case of money stolen from the wife of François Compaore.”

6. The Applicants also claim that “Norbert Zongo devoted a series of very critical articles on the matter, in which he highlighted numerous irregularities, the refusal of the persons “implicated” to face justice, and more specifically, the attempt to cover-up a very embarrassing matter in which the family of the President’s brother was deeply involved”.

B. Alleged violations

7. The Applicants allege concurrent violations of the provisions of various international human rights instruments to which Burkina Faso is a party.

8. With regards to the African Charter on Human and Peoples’ Rights (hereinafter referred to as the “Charter”), they allege that Article 1 (the obligation to take appropriate measures to give effect to the rights enshrined in the Charter); Article 3 (equality before the law and equal protection of the law); Article 4 (the right to life); Article 7 (the right to have one’s cause heard by competent national Courts); and Article 9 (the right to express oneself and disseminate his or her opinion), have been violated.

9. Regarding the International Covenant on Civil and Political Rights, (hereinafter referred to as the “ICCPR”), they contend that Article 2(3) (the right to be heard in case of violation of rights); Article 6(1) (the right to life); Article 14 (the right to have one’s cause heard by a competent, independent and impartial Judge); and Article 19(2) (freedom of expression), have been violated.

10. With respect to the Universal Declaration of Human Rights, the Applicants allege that Article 8 (the right to an effective remedy before competent national courts in case of violation of rights), has been violated.

11. On the revised Treaty of the Economic Community of West African States (ECOWAS), they allege that Article 66(2)(c) (the obligation to respect the rights of a journalist), has been violated.

12. The Applicants emphasized in particular that “.... the essential element of the obligation to protect the right to life and ensure the existence of effective remedies when the said right is violated is the duty to investigate the perpetrators of the acts of homicide, such as that of Norbert Zongo, identify the suspects and bring them to justice”.

13. They added that “instead of complying with that obligation, Burkina Faso manifestly and repeatedly chose to frustrate the efforts of the families of Norbert Zongo and his companions to ensure that those responsible for the deaths account for their actions”.

14. They also contend that “by failing to initiate an effective inquiry to determine the circumstances surrounding the death of Norbert Zongo and ensuring that those responsible were identified, prosecuted and convicted, Burkina Faso violated Norbert Zongo’s right to life as guaranteed under Articles 4 of the Charter on Human and Peoples’ Rights; 6(1) of the ICCPR and that of equal protection of the law, as well as Article 3(2) of the Charter”.

15. Finally, they submit that “these actions for which Burkina Faso is held liable constitute a violation of Article 9(2) of the Charter and Article 9(1) and (2) of the ICCPR...” which guarantee freedom of expression.

II. Handling of the matter at the national level

16. At this stage, it is necessary to provide a summary of the manner in which this matter was handled at the national level.

According to the sequence of events by the Applicants, both in their Application and in their submission on the Merits, as well as at the Public Hearing of 28 and 29 November 2013, the matter went through the following stages:

- Seizure by the Prosecutor of Faso, of the Dean of the Examining Magistrates of Cabinet No. 1 of the Ouagadougou High Court for investigations to be initiated to ascertain the cause (or causes) of the death of the occupants of Norbert Zongo’s car;
- On the instruction of the Judge, post mortem was conducted on the exhumed bodies and forensic analysis done on the items found at the scene of the crime;
- Letter of complaint and filing of civil action by the plaintiffs - 6 January 1999;
- Establishment of an Independent Commission of Enquiry (ICE) charged with “conducting all the investigations to establish the causes of death of the occupants of the 4WD vehicle, registered as 11 J 6485 BF, which occurred on 13 December 1998 on the Ouagadougou highway (Kadiogo Province), and which included the journalist Norbert

Zongo” (December 1998); the Commission’s report was submitted in May 1999;

- Decision by an extra-ordinary session of the Council of Ministers to transmit the ICE report to the Courts, without delay (May 1999);
- Putting in place of a Committee of the Wise to examine all pending issues of the day, and to make recommendations acceptable to all stakeholders on the national political scene (May 1999); the Report of the Committee of the Wise was submitted in July 1999;
- Summons of 16 January, 2001, issued by the first Investigating Magistrate, to François Compaoré, who failed to appear;
- Hearing of François Compaoré by a second Investigating Magistrate, after the first Investigating Magistrate, who had charged him with murder and concealment of the body, had been withdrawn from the case (January 2001);
- Indictment of one of the suspects previously identified by the ICE (February 2001); the indictee was said to be sick and action on the matter had been stayed for more than five years;
- Order to terminate proceedings against the indictee, for lack of evidence, issued by the Investigating Magistrate of the Ouagadougou High Court, after a witness declined to give evidence (July 2006); and
- Appeal against the order to terminate proceedings, filed by late Norbert Zongo’s family before the *Chambre d’accusation* of the Ouagadougou Court of appeal, which dismissed the appeal and upheld the decision to terminate the proceedings, (August 2006).

17. In its Response, the Respondent confirmed the setting up of an ICE and the Committee of the Wise and provided details on their composition, terms of reference and the task they had accomplished.

Furthermore, it made reference *inter alia*, to the following procedures and actions:

- Arrival of the Sapuoy Police at the scene of the crime on 13 December 1998 at 16.45 hours;
- Arrival at the scene of the State Prosecutor of the Ouagadougou High Court on 14 December 1998;
- Identification of the bodies on 15 December 1998 by a Physician of the Leo Medical Centre;
- Request on 24 December 1998, by the Prosecutor of Faso, to initiate investigations so as to determine the cause or causes of death of the occupants of the car registered under No.11 J6485 BF and to refer the matter to Investigating Magistrate No. 1;
- Submission on 7 May 1999 of the ICE Report;
- Forwarding on 10 May, 1999, of the ICE Report to the Courts by the Government;
- The Forensic and ballistic reports ordered by the investigating Magistrate;
- Request on 21 May 1999 by the Prosecutor of Faso, to initiate investigations against unknown persons for the murder of Norbert Zongo, Ernest Zongo, Blaise Ilboudo and Abdoulaye Nikiema alias Ablassé;
- Examination of the file by the investigating magistrate, followed by the arrest and detention of the main suspect in February 2001;

- Face-off on 15 May 2001 between the main suspect, Warrant Officer, Marcel Kafando and the witness Jean Racine Yameogo;
- The postponement in May 2001 of the face-off between the accused and the witness, due to the state of health of the accused ; resumption of the face-off on 31 May 2006;
- Final request by the Prosecutor on 13 July 2006, requesting that proceedings against the sole accused person be abandoned;
- Order to abandon proceedings (*nolle prosequi*) issued by the Investigating Magistrate on 18 July 2006;
- Appeal of 19 July 2006 to the Criminal Appeal Court of Ouagadougou, filed by the *parties civiles* against the Order to abandon proceedings; and
- Ruling by the Appeal Court on 16 August 2006, confirming the Order to abandon proceedings, issued by the Investigating Magistrate.

19. The Court notes that, on the whole, the description of the facts on the handling of the matter at the national level by the Applicants and the Respondent is the same and complementary, save on two issues, also argued during the Public Hearings of 7 and 8 March and of 28 and 29 March 2013. First, the Respondent indicated that the matter was handled by a single Investigating Magistrate, thus refuting the Applicant's allegation that a first Investigating Judge was withdrawn from the case. In rebuttal, one of the Counsels for the Applicants provided the names of the two Investigating Magistrates. Furthermore, the Respondent refutes the Applicants' allegation that the hearing of the matter was stayed between 2001 and 2006, and claims that the hearing, including the interrogation of witnesses, continued during that period.

III. Procedure before the Court

20. The Application was received at the Registry of the Court on 11 December 2011.

21. By separate letters dated 13 and 21 December 2011, the Registry acknowledged receipt of the Application, and forwarded to the parties a copy of the Charter, the Protocol establishing the Court, as well as the Rules of Court (hereinafter referred to as "the Rules").

22. By separate letters dated 11 and 23 January 2012, addressed to the Foreign Ministry of Burkina Faso, the Registry forwarded the Application to the Respondent, pursuant to Rule 35(4)(a) of the Rules with a request that the names and addresses of the Respondent's representatives be submitted to the Court within thirty (30) days; and further, pursuant to Rule 37 of the said Rules, that a response to the Application be provided within sixty (60) days. A copy of the Rules of Court was also attached.

23. By letter dated 20 January 2012, addressed to the Chairperson of the African Union Commission, the Registrar informed him of the filing of the Application and submitted to him a copy of this Application as well as the Rules of Court. Through the Chairperson, he also informed the Executive Council of the African Union and all States Parties to the Protocol, of the Application pursuant to Rule 35(3) of the Rules.

- 24.** By letter dated 27 February 2012 addressed to the Registrar, the Acting Legal Counsel of the African Union Commission acknowledged receipt of the letter mentioned in the preceding paragraph and provided every assurance that the Commission had taken the necessary measures to inform the Executive Council and other States Parties to the Protocol, of the said Application.
- 25.** By letter dated 29 February 2012, addressed to the Acting Legal Counsel of the African Union Commission, the Registry acknowledged receipt of the letter mentioned in the previous paragraph.
- 26.** By letter dated 13 March 2012, addressed to the Registrar, by way of a *Note Verbale* from the Embassy of Burkina Faso Permanent Mission to the African Union and dated 23 March 2012, the Minister of Communication and Government Spokesperson, sitting in for the Minister of Foreign Affairs and Regional Cooperation of Burkina Faso, submitted the names and addresses of the representatives of the Government of Burkina Faso and gave assurances that the Government of Burkina Faso would cooperate with the Court to establish the truth of this matter.
- 27.** By *Note Verbale* dated 26 March 2012 sent to the Embassy of Burkina Faso in Addis Ababa and Permanent Mission of that country to the African Union, the Registry of the Court acknowledged receipt of the letter from the Government of Burkina Faso mentioned in the paragraph above.
- 28.** Through successive letters dated 11 April, 25 April, 8 May and 15 May 2012, the Respondent submitted to the Registry of the Court its response setting out its observations on the admissibility of the Application.
- 29.** Through successive letters dated 17 April, 2 May, 15 May and 24 May 2012, the Registrar of the Court acknowledged receipt of the response of the Respondent.
- 30.** Through successive letters dated 12 April, 15 May and 19 July 2012, the Registrar requested Counsel for the Applicants to produce the Powers of Attorney showing that they had been authorised to represent the Applicants before the Court.
- 31.** Through successive letters dated 8 May, 6 June and 8 June 2012, the Registrar acknowledged receipt of the Power-of-Attorney submitted by Counsel for the Applicants.
- 32.** Through successive communications dated 8 May and 6 June 2012, the Registry forwarded to the Respondent copies of the Powers of Attorney received.
- 33.** By *Note Verbale* dated 12 June 2012, the Embassy of Burkina Faso in Addis Ababa and Permanent Mission of that country to the African Union acknowledged receipt of the letter from the Court forwarding the Powers-of-Attorney.
- 34.** By letters dated 6 and 8 June 2012 addressed respectively to both Counsel for the Applicants, the Registrar forwarded a copy of the response of the Respondent.

35. By email dated 8 August 2012, Counsel for the Applicants sought from the Registrar a 10 (ten) day extension of the time limit for the submission of the Applicants' reply to allow them to resolve issues related to the compilation of documents to be attached to their submissions.

36. By email dated 21 August 2012, the representatives of the Applicants submitted their response to the Court which only dealt with preliminary objections raised by the Respondent.

37. By an Order dated 23 August 2012, the Court accepted the Applicants' request for an extension of the time limit and fixed the date for submission of their response for 21 August 2012, the date on which the Registry received this document.

38. By letter dated 23 August 2012, addressed to the Applicants, the Registry acknowledged receipt of their reply.

39. At its 26th Ordinary Session in Arusha from 17 to 28 September 2012, the Court decided that the written procedure on preliminary objections were closed and that it would hold a public hearing on the preliminary objections at its March 2013 Ordinary Session.

40. By letter dated 24 September 2012, the Registrar informed the parties of the holding of the public hearing on dates to be announced in due course.

41. At its 27th Ordinary Session held from 26 November - 7 December 2012, the Court decided that the public hearing on the preliminary objections will take place on 7 and 8 March, 2013.

42. By separate letters dated 20 December 2013, the Registry notified both parties of the dates of the public hearing, requesting them to confirm their availability within thirty (30) days.

43. By letter dated 18 January 2013, the Respondent informed the Court that it will be present at the public hearing of 7 and 8 March, 2013.

44. By an email dated 7 February 2013, the Applicants acknowledged receipt of the notification of the date of the public hearing and confirmed their availability for the public hearing on the dates proposed.

45. The public hearing took place on the set dates at the seat of the Court in Arusha, and the Court heard the oral arguments of the parties: Representing the Respondent which raised the preliminary objections were:

- Barrister Antoinette OUEDRAOGO, Counsel
- Barrister Anicet SOME, Counsel
- Mr Paulin BAMBARA, Counsel
- Mr Mathias NIAMBEKOUDOU, Counsel

Representing the Applicants were:

- Barrister Ibrahima KANE, Counsel
- Barrister Chidi Anselm ODINKALU, Counsel

46. At the public hearing, the Judges of the Court posed questions to the parties and the latter responded.

47. By separate letters dated 12 April 2013, the Registrar requested the parties to submit, within fifteen (15) days, any documents which may corroborate the allegations they made during the public hearing. He, in particular, requested the Respondent to submit any document which may prove that between 2001 and 2006, hearing on the matter continued, notably, the interrogation of witnesses.

48. By letter dated 28 April 2013, the Applicants responded to the letter of the Registrar mentioned in the paragraph above and reiterated their position, according to which hearing on the matter was stayed between 2001 and 2006, and produced a copy of the final Decision of dismissal for want of evidence handed down by the State Prosecutor of Burkina Faso dated 13 July 2006, as well as a copy of the summons to Mrs Geneviève Zongo, dated 28 April 2006, for her to be heard.

49. By letter dated 25 April 2013, the Respondent forwarded to the Registrar an inventory of items compiled on 20 July 2006, listing all the action taken during the investigations from 1999 to 2006, and signed as required by law, by the Examining Magistrate. It also contained nine case reports and 22 pages of hearings, interface and testimony, out of a total of 63 acts performed during the investigations between the period of suspension of the hearing of the main suspect and appellate proceedings.

50. In its response dated 13 April 2012, the Respondent raised an objection to the *ratione temporis* jurisdiction of the Court and on the admissibility of the Application, as a result of the failure to exhaust local remedies or to observe reasonable time limit in submitting the Application to the Court.

Pursuant to Rules 39(1) and 52(7) of the Rules of Court, the Court will now consider these preliminary objections.

IV. Lack of *ratione temporis* jurisdiction of the Court

A. Submissions of the Respondent

51. In its response to the Application dated 13 April 2012, the Respondent raised a preliminary objection to the lack of *ratione temporis* jurisdiction of the Court. It noted that the alleged human rights violations following the 13 December 1998 incident, even if confirmed, occurred, in the case of Burkina Faso, before the entry into force of the Protocol establishing the Court on 25 January 2004; the Rules of Court on 20 June 2008; and the International Covenant on Civil and Political Rights on 4 April 1999.

52. It concluded that "... given that these facts took place before the entry into force of the Protocol establishing the African Court on Human and Peoples' Rights, Application No. 013/2011 of 11 December 2011 - beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo, and the Burkinabé Movement on Human and Peoples' Rights (BMHPR) against Burkina Faso, cannot be heard by a Court which was established after the incident took place, because of the cardinal principle of the non-retroactivity of the law".

53. The Respondent argued further that “the provisions of the International Covenant on Civil and Political Rights could also not be invoked against Burkina Faso because the alleged violations took place before the country acceded to this instrument” and that “once again the principle of non-retroactivity of the law applies in this case”.

54. At the public hearing of 7 March 2013, the Respondent reiterated this position, adding that: “... death is an instantaneous act recognised as such by the Applicants and accepted as such by the Respondent. Based on this principle, an instantaneous act remains instantaneous; it can be circumscribed in space and time”.

55. Regarding the allegation made by the Applicants that the incident in question constitutes continuous violations of the provisions of relevant international human rights instruments, the Respondent argues that “this assertion would not hold if we were to consider the actions taken by the government and the judicial processes undertaken”, adding that:

“in a bid to ensure an effective handling of the case, an Examining Magistrate was specifically assigned, an autonomous unit of the judicial police was placed at his disposal and the required funds were given to him by the government. The Examining Magistrate conducted investigations and organised hearings for periods beyond the entry into force of the Protocol establishing the African Court on Human and Peoples’ Rights”.

56. At the public hearing of 7 and 8 March 2013, the Respondent argued that the notion of continuous violation is a jurisprudential creation attached to precise facts which have not been alleged in this case, that is, detentions, abductions and disappearances. It added that the notion often concerns inaction on the part of judicial authorities and that in this case the State cannot be blamed for any inaction whatsoever, considering the exemplary rapidity with which the authorities handled the matter, as proven by the short time within which the investigations were carried out, the judicial inquiry opened and an Independent Commission of Inquiry and a Committee of the Wise established. It declared that when in 2006 no charges were brought against the accused, the authorities simply complied with the decision of the Judge, and that in any case, if those guilty were not found, innocent people should not be punished to satisfy the beneficiaries, with the risk of violating the principle of presumption of innocence.

B. Arguments of the Applicants

57. The Applicants for their part stated that although the alleged violations started even before the entry into force of the Protocol establishing the Court, they “continued thereafter and thereby constitute continuous violations of the Charter and other applicable instruments to the extent that the Application is within the temporal jurisdiction of the Court”

58. In their response, relying extensively on the works of the International Law Commission and International Jurisprudence, the Applicants concluded as follows:

“If the murder of Norbert ZONGO and his companions may be construed as an ‘instantaneous’ act beyond the *ratione temporis* jurisdiction of your Court because of the date of its occurrence, the entire process of

identifying and bringing charges against the authors of these violations which took place after the entry into force of the Protocol establishing the Court, that is, after 24 January 2004, in turn fall within the purview of your temporal jurisdiction. The Burkinabé authorities themselves admit that judicial procedures which started timidly in May 1999 with the commencement of investigations against unknown persons only became effective in May 2006, with the interface before the investigating Judge of the main suspect and the witness in the matter”.

59. They argued that in this matter “there is a case of continuous or persistent violation which stretches throughout the period during which the acts continued and are inconsistent with the international obligation of Burkina Faso”.

60. During the public hearing of 7 and 8 March 2013, the Applicants reiterated this position and added that their action was aimed at highlighting the international responsibility of Burkina Faso for failing to seriously investigate, charge and try the persons responsible for the death of Norbert Zongo and his three companions.

C. Analysis of the Court

i. Preliminary observations

61. Article 3(1) of the Protocol establishing the Court provides that “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”.

Article 3(2) of the same Protocol also provides that, “in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide”. (See also Rule 26(2) of the Rules of Court).

62. The Court notes in the first place that in the instant case, the relevant dates regarding its *ratione temporis* jurisdiction are those of the entry into force of the Charter (21 October 1986), the Protocol (25 January 2004) as well as that of the deposit at the Secretariat of the Organization of African Unity by Burkina Faso of the declaration accepting the jurisdiction of the Court to receive Applications from individuals, (28 July 1998).

63. The Court further notes that the Application of the principle of non-retroactivity of treaties contained in Article 28¹ of the Vienna Convention on the Law of Treaties of 23 May 1969 is not contested by the parties. The issue here is to know whether the different violations alleged by the Applicants would, if proven, constitute instantaneous or continuous violations of the international obligations of Burkina Faso in the area of human rights.

Consequently, the Court is of the opinion that to treat this issue in relation to the different alleged violations, it will be necessary, as

1 Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party”

suggested by the parties, to distinguish, between alleged “instantaneous” and alleged “continuous” violations of the international obligations of the Respondent.

64. Based on these observations, the Court will deal with its jurisdiction *ratione temporis* by making the distinction between alleged violations of the right to life, the right to be heard by competent national Courts and other violations alleged by the Applicants.

ii. Allegations of the violation of the right to life

65. The first allegation of violation of human rights submitted by the Applicants concerns the right to life and is based on the assassination which took place on 13 December 1998, of Norbert Zongo, Abdoulaye Nikiema, also known as Ablasse, Ernest Zongo and Blaise Ilboudo. In that regard, the Applicants alleged the violation of Article 4 of the Charter and Article 6(1) of the ICCPR. As indicated earlier, the parties agreed to consider that the assassination of these persons was an “instantaneous” act occurring outside the temporal jurisdiction of the Court. (*Supra*, paragraphs 52 and 58).

66. The notion of “instantaneous” or “complete” violation is recognized in international law. According to Article 14(1) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001: “the breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue”. In its commentary on this Article, the Commission stated that “an act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues”.

67. The Court notes that the murder of the four individuals herein concerned took place after Burkina Faso had ratified the Charter on 21 October 1986, but before it became bound by the ICCPR (4 April 1999) and the Protocol establishing the Court (25 January 2004).

68. The Court is of the opinion that although Burkina Faso had already ratified the Charter at the time of the alleged crime, the Court lacks *ratione temporis* jurisdiction to consider the alleged violation of the right to life resulting from the murder of Norbert Zongo, Abdoulaye Nikiema *alias* Ablasse, Ernest Zongo and Blaise Ilboudo, because, in the case of Burkina Faso, “this instantaneous and completed incident” occurred before the entry into force of the instrument, that is, the Protocol, which gives the Court jurisdiction to hear, *inter alia*, the alleged violations of the Charter.

On the declaration submitted by Burkina Faso to the Organization of African Unity before the incident (28 July 1998) accepting the jurisdiction of the Court to receive Applications from individuals and non-governmental organizations under Article 34(6) of the Protocol establishing the Court, before the incident (28 July 1998), it is clear that, in the case of the State in question, it could not have had any legal effect before the entry into force of the main legal instrument from which it is derived.

69. As a result of the foregoing, the Court concludes that it does not have *ratione temporis* jurisdiction to hear the allegation of violation of the right to life based on the ‘completed’ act of murder of the four persons here-in concerned, which occurred on 13 December 1998.

70. The Court would however like to note that it is making a clear distinction here between the “instantaneous” act of assassination which is beyond its jurisdiction, and the other acts alleged by the Applicants, which are the consequence of this act, and which may constitute separate violations of other rights of persons concerned or their beneficiaries, as guaranteed by relevant human rights instruments. As the Court has already indicated, (*supra*, paragraph 63), it will determine its *ratione temporis* jurisdiction in relation to these other acts depending on whether they themselves are “instantaneous” or “continuous”.

B. Alleged violation of the right to be heard by competent national courts

71. The second allegation of violation of human rights submitted by the Applicants concerns the right to be heard by competent national Courts. On that score, the Applicants alleged the violation of Article 7 of the Charter and Article 6(1) of the ICCPR.

72. As indicated earlier, whereas the Applicants allege that the Respondent had not done all in its power to find, arrest, try and punish the perpetrators of the assassination of Norbert Zongo and his companions, and that this was tantamount to a continuous violation of the provisions mentioned in the preceding paragraph, the Respondent maintains that there had been no violation of the rights of the Applicants to be heard because the judicial authorities had fulfilled their responsibility in this matter.

73. The notion of continuous violation of an obligation is also recognised in international law. Article 14(2) of the abovementioned Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted in 2001 by the International Law Commission provides that “the breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international Obligation”. In its commentary on this Article, the Commission declared that “a continuing wrongful act is one which has been commenced but has not been completed at the relevant time”.

74. In the present case, the alleged act which is continuous is the behaviour of the Respondent concerning the investigation, arrest, trial and punishment of those responsible for the assassination of Norbert Zongo and his companions; the moment considered is the date of the entry into force of the Protocol establishing the Court, that is, 25 January 2004.

75. It is noted that, following the murder of the four persons on 13 December 1998, police investigation and judicial procedures which started immediately after the murder, continued until 2006, and ended with a decision by the Court of Appeal of Ouagadougou dismissing the matter for lack of evidence, in favour of the only accused person in this

matter. It is further submitted that since that decision, to date, no investigation or charges have been brought against any suspects by the Burkinabé authorities.

76. In the opinion of the Court, were this situation to be interpreted as inaction on the part of the Respondent, a matter yet to be determined, it is evident that it will constitute, an “act” which is not yet “complete”, and which therefore is “continuous”.

77. As a consequence, considering that this situation started before the entry into force of the Protocol establishing the Court, with regard to the Respondent on 25 January 2004, and continued after this critical date, the Court has *ratione temporis* jurisdiction to hear the allegation of violation against the Respondent.

C. Other allegations of human rights violations

78. As stated earlier, (*supra* paragraphs 8 to 11), in addition to allegations of violations of the right to life and the right to be heard by competent national Courts, the Applicants also allege the violation by the Respondent of its obligation to adopt legislative and other measures to ensure the respect of rights guaranteed under the Charter; the right of equality before the law and of equal protection of the law; and the right to express one’s opinion.

79. The Respondent for its part did not specifically address the issue of *ratione temporis* jurisdiction of the Court to hear allegations of the violation of these other rights. In its response, as we saw earlier, the Respondent stated in general terms that the alleged violations of human rights after the assassination of 13 December 1998, even if proven, took place before the crucial dates to determine the *ratione temporis* jurisdiction of the Court.

80. For their part, the Applicants did not emphasize the issue of whether these allegations fall within the ambit of the temporal jurisdiction of the Court or not. However, they indicated that by failing to carry out effective investigations to determine the circumstances surrounding the assassination of Norbert Zongo and ensuring that the perpetrators were identified, arrested, tried and punished, Burkina Faso violated the right to equal protection of the law enshrined in paragraph 2 of Article 3 of the Charter. Similarly, at the public hearing of 8 March 2013, the Applicants argued that in relation to the rights of journalists to physical protection under Article 66(2)(c) of the revised ECOWAS Treaty, the violation of this right was continuous as long as the issue of the rights of Norbert Zongo to have his cause heard by Burkinabé Courts had not been effectively addressed.

81. The Court notes that in reality, the parties rather focused on its temporal jurisdiction in relation to allegations of violation of the right to life and the right to be heard by a Judge in case of violation of this right. The Court also notes that the Applicants alleged that other rights had been violated, not really separately, but in relation to what they considered as violations of rights already alluded to above.

82. Under such circumstances, and considering earlier conclusions on the *ratione temporis* jurisdiction in relation to allegations of violation of

the right to life and the right to be heard by a Judge in case of violation of these rights, (*supra*, paragraphs 69 and 77), the Court is of the opinion that it does not have the jurisdiction to hear the allegations of violation of the other rights mentioned above, except where these allegations were directly linked to the allegation of the violation of the right to be heard by competent national Courts.

83. Based on the foregoing, the Court concludes as follows:

- It does not have *ratione temporis* jurisdiction to decide on the allegation of the violation of the right to life of Norbert Zongo, Abdoulaye Nikiema, alias Ablasse, Ernest Zongo and Blaise Ilboudo;
- It has *ratione temporis* jurisdiction to deal with the allegations of violation of the rights of the Applicants to be heard by competent national Courts;
- It has *ratione temporis* jurisdiction to deal with the allegations of violations of human rights in relation to the obligation to guarantee respect for human rights, the right to equal protection of the law, and equality before the law, and the right to freedom of expression and the protection of journalists, only when these allegations are directly linked to the violation of the right to be heard by competent national Courts.

V. Inadmissibility of the Application as a result of failure to exhaust local remedies

84. Under Article 6(2) of the Protocol establishing the Court, “the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.

Article 56(5) of the Charter provides that, to be admissible, Applications must be submitted if they “are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged”. (See also Rule 40 of the Rules of Court).

A. Arguments of the Respondent State

85. In its response, the Respondent raised a preliminary objection of failure to exhaust local remedies. It pointed out that the highest Court in Burkina Faso, the *Cour de Cassation*, was not seized before the matter was brought before the African Court on Human and Peoples’ Rights.

86. It stated that even though they had a possibility to do so, the Applicants chose not to go to the *Cour de Cassation* and “the *certificat de non pourvoi* of 31 August 2006 shows that the *parties civile* did not make use of this jurisdiction. They did not therefore exhaust all available local remedies”.

87. On the argument canvassed by the Applicants regarding the unduly prolonged judicial procedure, the Respondent maintains firstly that the notion of “unduly prolonged procedure...should be considered solely in light of available and effective remedies that had not been resorted to and not in relation to the entire procedure, adding that “this notion should be set aside where remedies are available, and in this case, the *Cour de Cassation* was not utilised, whereas Applicants had unimpeded access to such remedy”.

88. It further argued that, “unduly prolonged procedure is also set aside where an available and accessible remedy is effective and offers plaintiffs the option of seeking redress to an alleged violation”, observing further that:

“it is clear, the Applicants have not shown the imperfection of the nature of remedies placed at their disposal. Paradoxically, the five years they did not want to ‘loose’ before the *Cour de Cassation*, have been used to wait patiently before seizing the African Court on Human and Peoples’ Rights... whereas the African Commission on Human and Peoples’ Rights was functional to deal with the alleged violations...”.

89. The Respondent argues further that, based on the jurisprudence of the African Commission on Human and Peoples’ Rights “it is incumbent on the Applicant who invokes a waiver, ‘to substantiate the veracity of the facts alleged either through attempts to seize national Courts or through the presentation of similar cases where actions of the Court were proven to be ineffective...’, and that in the instant case, the Applicants do not show any proof of the facts they are alleging”.

90. Finally, the Respondent argues that “the period of the prosecution of the Norbert Zongo matter cannot be referred to as unduly prolonged” and that “this duration is linked to the complexity of the case, the absence of formal proof concerning the identification of the perpetrators and the desire of the Courts to respect the presumption of innocence”.

91. The Respondent reiterated this position at the public hearing of 7 and 8 March 2013, emphasising that even though the decision of the *Cour de Cassation* had set no deadline, litigation before it is easy to initiate, useful, effective and sufficient and “may lead to a decision which is different from that of an Investigating Magistrate and/or of the *Chambre d’accusation*”. They therefore called on the Court to declare the Application inadmissible.

B. The Applicants’ arguments

92. In their Application, the Applicants pointed out that “in terms of the law in Burkina Faso, there is indeed the possibility of going to the *Cour de Cassation* provided for in Article 575 of the Criminal Code”, but that “the family of Norbert Zongo decided deliberately not to use it and to seize [the African Court] because the judicial remedies which they have followed for 9 years have proven to be ineffective and unsatisfactory, and the seizure of the *Cour de Cassation* was inefficient”.

93. They argue that “litigation before the *Cour de Cassation* would have been of no use as it is common knowledge that the highest Court takes about 5 years to decide on any matter after it is seized”.

94. They emphasized that, “...in the instant case, it was probable that in view of the bad faith exhibited by political authorities, such time limit could have been deliberately extended” and added that “Article 56(5) of the Charter provided specifically that an Applicant before the Court was not bound to comply where a judicial procedure was ‘unduly prolonged’”.

95. In their response, the Applicants stated basically that “an Applicant is not obliged to utilise an ineffective or inadequate remedy, that is, a

remedy that will not lead to a resolution of the allegations of human rights violations”.

96. They noted that in the instant case, “they had to wait for nearly two years for the brother of the President of Burkina Faso, who seems to be at the very core of the murder of the journalist and his companions, to be heard by an investigating judge”, adding that “another bizarre aspect of the case is the suspension of proceedings for more than five years as a result of the illness of the main accused who would later be discharged before his death shortly after the resumption of proceedings by the investigating magistrate”.

97. The Applicants further cite the case of Thomas Sankara, former President of Burkina Faso, in which according to them, “the Sankara family, for fifteen (15) good years requested the government of Burkina Faso, without success, to identify those responsible for the murder of the former President, and especially to show them where he was buried”.

98. Finally, the Applicants argue that “in addition to the ineffectiveness of the remedies, one could add a list of national authorities who have done nothing to ensure that the perpetrators of the murder of Nibert Zongo and his companions were apprehended”.

99. At the public hearing of 7 March 2013, the Applicants reiterated this position by insisting on the ineffective nature of the *Cour de Cassation*, which according to them, did not “have the ability to change in essence the decisions which had already been taken”.

C. Analysis by the Court

100. The fact that Applicants have not exhausted all local remedies available to them under the Burkinabé legal system cannot be contested. It is in fact clearly established that they decided not to go to the *Cour de Cassation*.

101. What however is at issue here between the parties is first of all to know whether in this matter the procedure was unduly prolonged within the meaning of Article 56(5) of the Charter. The next question will be to determine whether or not the option of appeal to the “*Cour de Cassation*,” which the Applicants did not resort to, was in itself an effective remedy.

102. The Court notes at this stage that the issue is to determine if it is allowed to rule on whether the procedure in the case of local remedies was unduly prolonged or not, and whether such remedies were effective or not, without prejudice to its position on the merits of the Applicants’ allegation of violation of their right to be heard by competent local Courts. The right to be heard by competent national Courts implies, *inter alia*, that available remedies are both effective and adequate in resolving matters within a reasonable time.

103. In the circumstances, the Court is of the opinion that on the allegation of violation of the right to be heard by competent local Courts, the inadmissibility arising from the non-exhaustion of local remedies is not entirely preliminary, and should be joined to the substantive case in accordance with Rules 52.3 of the Rules.

VI. Inadmissibility as a result of failure to file the Application within a reasonable time

104. Article 56(6) of the Charter, similarly with Article 6(2) of the Protocol establishing the Court provides that to be admissible Applications must “be submitted within a reasonable time from the time local remedies are exhausted or from the date [the Court] is seized with the mater” (see also Rule 40(6) of the Rules).

A. The arguments of the Respondent

105. In its response, the Respondent raised the issue of the inadmissibility of the Application based in its view, on the failure to file it within a reasonable time.

106. The Respondent argues that, if one takes as the starting time, the date of the last judicial decision rendered in this matter (16 August 2006) or that of the issuing of the *certificat de non pourvoi* to the Applicants (31 August 2006), over five years have elapsed before 11 December 2011, when the Applicants decided to seize the Court.

It notes further that if one were to consider as the starting date, the date of entry into force of the Interim Rules of Court (20 June 2008), over three years would have elapsed before they decided to seize the Court.

The Respondent is of the opinion that the time limit in which the Court had been seized was not reasonable.

107. The Respondent argues that reasonable time is “a time span situated within a fair average or which is convenient”. It argues that the objectives of the requirement to seize a Court within reasonable time includes, *inter alia*:

“Guaranteeing the integrity of the judicial system, by ensuring that the authorities and other concerned persons are not kept in a situation of uncertainty for a protracted period;

- availing the Applicant sufficient time to reflect on whether or not to bring the matter to court and, if necessary;
- to determine the specific cause of action and arguments to be raised....”

108. It added that “seizure of the Court within reasonable time allows for the facts of the matter to be established because, over time, it becomes difficult for an international Court seized with the matter to be able to consider the issues raised in a fair manner”. The Respondent concludes that, “obviously, the Applicants had no intention to pursue the objectives mentioned above; otherwise, they would not have waited for five (5) years before seizing the African Court on Human and Peoples’ Rights”.

109. The Respondent notes finally that the African Commission on Human and Peoples’ Rights, which has always made its decision on a case-by-case basis on the question of reasonable time, has, in some cases, considered that delays much shorter than that of the present case were not reasonable.

110. This position was reaffirmed by the Respondent at the public hearing of 7 and 8 May 2013, where it further submitted that the time of

seizure of the Court should have commenced from the date of the last ruling delivered by the national Judge (on 16 August 2006), before concluding that: "...in the matter before you, it is manifestly obvious that the time taken by the Applicants is excessive and unreasonable, and on those basis, the Application before you should be declared inadmissible, plain and simple".

B. The argument of the Applicants

111. In their response, the Applicants noted that "contrary to what the government of Burkina Faso has stated, the African Commission on Human and Peoples' Rights has no fixed jurisprudence on the issue", and that it has indeed dealt with this issue on a case-by-case basis.

112. They point out that in the instant case, "the Application was filed when the Applicants were informed by this Court itself during a sensitization visit to Burkina Faso in July 2011", and that "the visit made it possible for the MBDHP to obtain all the necessary information on the procedure of submitting Applications which were not available to it earlier".

113. At the public hearing of 7 March 2013, the Applicants claim that they had waited for five years before seizing the Court in order to give the Respondent sufficient time to fulfil its obligation of finding, charging, prosecuting and punishing the perpetrators of the murder of Norbert Zongo and his companions. At the public hearing of 8 March 2013, they emphasised that for them, the deadline for seizure of the Court had not started running since the violations continued, and as confirmed by the Respondent, the matter is still pending before the domestic judicial system.

C. Analysis by the Court

114. The issue here is to know whether the time limit within which the Applicant seized the Court is reasonable, pursuant to Article 56(6) of the Charter.

To deal with this issue adequately, it will be necessary to first of all establish the date from which this time should be calculated and considered.

i. The commencement of reasonable time

115. As indicated above, (paragraphs 110 and 113), whereas the Respondent is of the view that the time for seizure of the Court should begin from 16 August 2006, "the date on which the last Ruling was delivered by a domestic Court" (the Ruling of the Court of Appeal of Ouagadougou); for the Applicants, that time had not started because the alleged violations continued and the matter was yet to be resolved at the domestic level.

116. The Court is of the opinion that it is necessary to immediately dispose of the argument, according to which time for seizure of the Court had not started on the ground that the matter was still pending before national courts. That argument is not acceptable because it would mean that in all cases where the Applicants had not exhausted

local remedies (because they are not effective or because the procedure is unduly prolonged), the time of seizure of the Court would never begin. Furthermore, this argument is fundamentally at variance with that of the Applicants, according to which there would no longer be anything to expect from the national judicial system. The Applicants cannot at the same time put forward this argument and benefit from its consequence, that the reasonable time of seizure of the Court will only begin when the national judicial system which they did not want to use will have settled the matter.

117. That having been clarified, Article 56(6) of the Charter cited above provides that reasonable time, which is the issue here, begins “from the time local remedies are exhausted or from the date the [Court] is seized with the matter”.

118. In the instant case, where all local remedies have not been exhausted on the ground of unduly prolonged procedure, the date that should be considered is that of the expiry of the right to appeal not exercised under national law. In that regard, the parties submitted that the period of appeal was five days from the date of delivery of the ruling on the appeal. As the ruling at issue was delivered on 16 August 2006 (*supra*, paragraph 18), the date of commencement of the seizure of the African Court would be 22 August 2006.

119. As for Applications filed in its early years of existence, the Court should inevitably take into account the fact that it did not start its judicial activities upon its establishment in July 2006. More specifically, in compliance with Article 33 of the Protocol establishing the Court, it had to draft its own Rules which set out precisely, the terms and conditions of seizure by institutions and persons qualified to do so.

120. It would not therefore be reasonable for the time limit for seizure of the Court to start running from a date prior to the entry into force of the Interim Rules of Court, that is, 20 June 2008. In the instant case, the Court is of the opinion that it is this latter date that is relevant as it is from that date that all potential Applicants were considered to have been apprised of the purport of the Rules and thus assumed to have been in a position to refer matters to the Court.

ii. Reasonableness of the time frame for seizure of the Court

121. The Court will now consider whether or not the time limit of seizure between 20 June 2008 and 11 December 2011, that is, about three years and five months, is reasonable time. In the opinion of the Court, the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis.

122. In the instant case, with the rather recent establishment and effective entry into operation of the judicial activities of the Court mentioned above, (paragraph 119) – any circumstances unknown to the Applicants work in favour of some consideration in the assessment of the nature of reasonable time for seizure.

123. Furthermore, if we consider the reasonableness of the time frame of about three years, taking into account the objectives of the time of seizure as presented by the Respondent itself (*supra*, paragraph 107), we must notice first of all that the judicial integrity of the Respondent is not at stake in this matter because, as it indicated itself, the case of the murder of Norbert Zongo and his companions is not yet over and investigations may be reopened and may continue until August 2016. Furthermore, the Applicants may have needed more time to reflect on the suitability of submitting an Application and specifying the complaints and arguments to be raised with the Court. Lastly, this three-year time frame will not affect the ability of the Court to establish the relevant facts relating to the matter which for the most part are not contested by either of the parties.

124. For all these reasons, the Court concludes that the time within which it had been seized of the present matter, that is, 11 December 2011, computed as from the date of the coming into effect of the Interim Rules of the Court on the 20th of June 2008, is reasonable time within the meaning of Article 56(6) of the African Charter on Human and Peoples' Rights.

125. *For the above reasons,*

THE COURT, unanimously

1) *Upholds* the *ratione temporis* objection to the jurisdiction of the Court, in regard to the violation of the right to life, based on the 13 December 1998 murder of Norbert Zongo, Abdoulaye Nikiema known as Ablasse, Ernest Zongo and Blaise Ilboudo ;

2) *Overrules* the *rationae temporis* objection to its jurisdiction in regard to the allegation of violation of the rights of the Applicants to have their cause heard by a Judge based on the judicial acts and procedures which occurred during the treatment of this matter at the national level;

3) *Overrules* the *rationae temporis* objection to the jurisdiction of the Court on allegations of violations of human rights in regard to the obligation to guarantee respect for human rights, the right to equal protection of the law and equality before the law, and the right to freedom of expression and the protection of journalists, as long as these allegations are directly linked to the allegation of violation of the right of the Applicants to have their cause heard by competent national Courts.

4) *Declares* that, in the circumstances of this case, the objection to the admissibility of the Application based on the failure to exhaust local remedies is not an exclusively preliminary objection and is joined to the substantive case;

5) *Overrules* the objection to the admissibility of the Application based on the failure to observe reasonable time in the submission of the Application to the Court;

Hereby decides to consider the matter on its merits;

Directs the Respondent to submit to the Court its Response on the merits of the case within 30 days of the date of this Ruling; further Directs the Applicants to submit to the Court their Brief on the merits of

the case within 30 days from the date of receipt of the Response of the Respondent State.

Separate opinion: AKUFFO and THOMPSON

1. We have read in draft the majority decision on the preliminary objection. We agree in principle with the decision but have great difficulty in agreeing with the reasoning in paragraphs 62, 67, 68, 69 and 125(1) of the said decision.

2. The reasons being that:

- i The right to life claim as noted by the court was instantaneous and so no longer existed (see paragraph 65 and 66) To our mind it means that the issue of right to life for the victims i.e. Norbert Zongo, Abdoulaye Nikiema, alias Ablasse, Ernest Zongo and Blaise Ilboudo is no longer an issue and so there is no need to go into the objection raised.
- ii Furthermore, the Applicants rightly or wrongly agreed that the Court lacked the jurisdiction in relation to the issue of right to life, (see paragraphs 57, 58 and 62 of the decision of the Court). In that case again there is no need for the Court to go into a long voyage of adjudication and then come to the same decision of lack of jurisdiction, which the Applicant has conceded.
- iii We are of the firm view that in applying the non retroactivity principle, as is laid down in the Vienna Convention, a distinction has to be made between a treaty conferring rights and duties and that which simply provides for the mechanism for the enforcement of the rights in another treaty.

3. The African Charter of Human and Peoples' Rights (African Charter) is the treaty which provides for rights of the people, and a duty on State Parties to protect these rights,

4. The Protocol to the African Charter on Human and Peoples' Rights (Protocol) which established the Court merely provided a mechanism for the enforcement of the rights conferred under the African Charter

5. It is therefore wrong to say that because the death of Norbert Zongo and his companions occurred before the coming into force of the Protocol this Court lack the *temporis* jurisdiction to hear the issue of right to life.

6. We are fortified in this view when one considers the Rome Statute which sets up the International Criminal Court.

7. Article 11 of the said Statute provides thus:

"11.1 The Court has only jurisdiction with respect to crimes committed after the entry into force of this Statute

11.2. If a state party becomes a party to this statute after its entry into force, the court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this statute for that state ..."

8. If the Protocol establishing the Court intended the interpretation given by the majority it would have expressly stated so as has been done in the Rome statute. It is our view, that in the interpretation and adjudication of instruments and matters concerning human rights, a

Court must be very careful when reading into instruments external principles that have limiting effects on the scope of protection and enjoyment of rights, any other interpretation certainly creates a bad law.

9. It is for the reasons above that we feel compelled to write this separate opinion. For the avoidance of doubt we agree with the majority decision in the manner the preliminary objection has been disposed of.

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (merits) (2014) 1 AfCLR 219

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo, Baise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso

Judgment, 28 March 2014. Done in English and French, the French text being authoritative.

Judges: AKUFFO, NGOEPE, NIYUNGEKO, OUGUERGOUZ, TAMBALA, THOMPSON, ORE, GUISSÉ and ABA

The case dealt with the killing of an investigative journalist and his companions in 1998. Their burnt corpses were found in a car. The Court held that the state had failed to act with due diligence in arresting, detaining and trying the perpetrators in violation of Article 7 of the African Charter.

Admissibility (exhaustion of local remedies, unduly prolonged, 106)

Fair trial (protracted duration of proceedings, 151, 152)

State responsibility (due diligence of investigation, 156)

Equality before the law (complexity of case, 167-169)

Expression (fear caused by extra-judicial killing, 186, 187)

Separate opinion: NIYUNGEKO, OUGUERGOUZ, GUISSÉ and ABA

Expression (fear caused by extra-judicial killing; evidence, 6)

I. Subject of the Application

1. By letter dated 11 December 2011, the Court was seized of this matter by Ibrahima Kane, claiming to act on behalf of the family and advocates of Late Norbert Zongo. According to the document titled "Communication/Application" dated 10 December 2011 annexed to the aforesaid letter, the action is brought against Burkina Faso by the beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema *alias* Ablasse, Ernest Zongo and Blaise Ilboudo and by the Burkinabe Human and Peoples' Rights Movement.

A. The facts of the matter

2. According to the Application, the facts date back to 13 December 1998, when Norbert Zongo, an investigating journalist, and his above-mentioned companions were murdered. The companions, Abdoulaye Nikiema and Blaise Ilboudo, were work colleagues of Mr Zongo, while Ernest Zongo was his younger brother.

3. The Applicants state that “the investigating journalist and Director of the weekly magazine *L’Independant*, Norbert Zongo and his companions, Abdoulaye Nikiema, Ernest Zongo and Blaise Ilboudo, were found burnt in the car in which they were travelling, on 13 December 1998, seven kilometres from Sapouy, on the way to Leo, in the south of Burkina Faso”.

4. Relying mainly on the report of the Independent Commission of Enquiry set up by the Government to determine the cause of death of the aforementioned persons, the Applicants allege that “the murder of the four persons on 13 December 1998 is connected with investigations that Norbert Zongo was conducting on various political, economic and social scandals in Burkina Faso during that period, notably the investigation of the death of David Ouedraogo, the chauffeur of François Compaore, brother of the President of Faso and Adviser at the Presidency of the Republic”.

5. The Applicants state that, “as the chauffeur and employee of Francois Compaore, David Ouedraogo died on 18 January 1998 at the Health Centre of the Presidency in Burkina Faso, apparently as a result of the brutal treatment inflicted on him by presidential security guards who were investigating a case of money stolen from the wife of François Compaore.”

6. The Applicants also claim that “Norbert Zongo had written a series of very critical articles on the matter in which he highlighted numerous irregularities, the refusal of the persons “implicated” to appear before justice, and above all the attempt to stifle a very embarrassing matter in which the family of the President’s brother is deeply involved”.

B. Alleged violations

7. The Applicants allege concurrent violations of the provisions of various international human rights instruments to which Burkina Faso is a party.

8. With regard to the African Charter on Human and Peoples’ Rights (hereinafter referred to as the “Charter”), they allege that Article 1 (the obligation to take appropriate measures to give effect to the rights enshrined in the Charter); Article 3 (equality before the law and equal protection of the law); Article 4 (the right to life); Article 7 (the right to have one’s cause heard by competent national courts); and Article 9 (the right to express and disseminate his or her opinion) have been violated.

9. Regarding the International Covenant on Civil and Political Rights (hereinafter referred to as “ICCPR”), they contend that Article 2(3) thereof (the right to be heard in case of violation of rights); Article 6(1)

(the inherent right to life); Article 14 (the right to have one's cause heard by a competent, independent and impartial tribunal); and Article 19(2) (freedom of expression) have been violated.

10. As regards the Revised Treaty of the Economic Community of West African States (ECOWAS), they allege that Article 66(2)(c) (the obligation to ensure respect for the rights of journalists) has been violated.

11. With respect to the Universal Declaration of Human Rights, the Applicants allege that Article 8 thereof (the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law) has been violated.

12. More specifically, the Applicants emphasize that "...the crucial element in the obligation to protect the right to life and guarantee the existence of effective remedies when the said right is violated is the duty to investigate the perpetrators of the acts of homicide such as that of Norbert Zongo, identify the suspects and bring them to justice..."

13. They further stress that "instead of fulfilling that obligation, Burkina Faso patently and repeatedly chose to frustrate the efforts of the families of Norbert Zongo and his companions at ensuring that those responsible for the deaths account for their actions".

14. They also contend that "by failing to initiate an effective inquiry to determine the circumstances surrounding the death of Norbert Zongo and ensuring that those responsible are identified, tried and punished, Burkina Faso violated Norbert Zongo's right to life as guaranteed under Article 4 of the Charter on Human and Peoples' Rights and Article 6(1) of ICCPR, as well as Article 3(2) of the Charter on equal protection of the law".

15. Finally, they submit that "these actions for which Burkina Faso is held liable constitute a violation of Article 9(2) of the Charter and Article 9(1) and (2) of the ICCPR..." both of which guarantee freedom of expression.

II. Handling of the matter at national level

16. At this juncture, a summary of the manner in which this matter was handled at national level would be appropriate.

According to the narrative of events by the Applicants, both in their Application and in their submissions on the Merits, as well as at the Public Hearing of 28 and 29 November 2013, the matter went through the following main stages:

- Seizure of the Dean of the Examining Magistrates of Cabinet No. 1 of the Ouagadougou High Court, by the State Prosecutor through a formal request dated 24 December 1998 for investigations to be initiated to ascertain the cause (or causes) of the death of the occupants of Norbert Zongo's car;
- On the directive of the aforementioned judge, a *post mortem* examination of the exhumed bodies and forensic analysis of the items found at the scene of the crime, were conducted;
- Letter of complaint and filing for damages by the Applicants - 6 January 1999;

- Creation of an Independent Commission of Enquiry (ICE) charged with “conducting all the necessary investigations to establish the cause of death of the occupants of the 4WD vehicle with plate number 11 J 6485 BF, which occurred on 13 December 1998 on the Ouagadougou highway (Kadiogo Province), including the journalist Norbert Zongo” (December 1998). The Commission submitted its report in May 1999;
- Decision by an extra-ordinary session of the Council of Ministers to forward the ICE report promptly to justice (May 1999);
- Establishment of a Committee of the Wise to examine all issues pending at the time, and to make recommendations acceptable to all stakeholders on the national political scene (May 1999). The Committee of the Wise submitted its report in July 1999;
- Summons issued on 16 January 2001 by a first Investigating Magistrate to François Compaore who failed to appear;
- Hearing of François Compaore by a second Investigating Magistrate, after the first Investigating Magistrate who had charged him with murder and concealment of the body, had been withdrawn from the case (January 2001);
- Indictment of one of the suspects previously identified by the ICE (February 2001). As the indictee was said to be ill, action on the matter was frozen for more than five years;
- Order to terminate proceedings against the indictee for lack of evidence, issued by the Investigating Magistrate of the Ouagadougou High Court, after a witness declined to give evidence (July 2006); and
- Appeal against the order to terminate proceedings filed by late Norbert Zongo’s family before the Criminal Appeal Chamber of the Ouagadougou Court of Appeal, which dismissed the appeal and upheld the decision to terminate the proceedings (August 2006).

17. In its memorandum of response registering preliminary objections and response on the Merits, the Respondent confirmed the setting up of an ICE (Decree of December 1998 as amended on 7 January 1999) and of the Committee of the Wise (mentioned in the speech of the President of Faso on 21 May 1999 and effectively established on 1 June 1999) and provided details on the composition and mandate of the two structures as well as on the task they had accomplished.

18. Furthermore, the Respondent in particular made reference to the following procedures and actions:

- Arrival of the Sapuoy Police at the crime scene on 13 December 1998 at 16.45 hours;
- Arrival of the State Prosecutor of the Ouagadougou High Court at the crime scene on 14 December 1998;
- Identification of the bodies on 15 December 1998 by a physician of the Lew Medical Centre;
- The 24 December 1998 request by the State Prosecutor for investigations to be initiated to determine the cause or causes of the death of the occupants of the car with Registration Number 11 J6485 BF, and for the matter to be referred to Investigating Magistrate of chamber 1 to that effect;
- Submission of the ICE Report on 7 May 1999;
- Forwarding of the ICE Report to justice by the Government;
- Forensic and ballistic reports ordered by the Investigating Magistrate;

- The 21 May 1999 Application by the State Prosecutor of Burkina Faso, for investigations to be initiated against X for the murder of Norbert Zongo, Ernest Zongo, Blaise Ilboudo and Abdoulaye Nikiema *alias* Ablasse;
- Examination of the case file by the Investigating Magistrate, followed by the arrest and detention of the principal suspect on 2 February 2001;
- Adversarial procedure between the principal suspect, Warrant Officer Marcel Kafando and the witness Jean Racine Yameogo;
- The suspension on 15 May 2001 of the adversarial procedure between the accused and the witness as a result of the poor state of health of the accused; and resumption of the adversarial procedure on 31 May 2006;
- Definitive directive by the State Prosecutor on 13 July 2006, requiring the abandonment of the proceedings against the sole accused person;
- Order to terminate proceedings issued by the Investigating Magistrate on 18 July 2006;
- Appeal filed by the *parties civiles* (private parties) on 19 July 2006 with the Criminal Appeal Court of Ouagadougou against the Order to terminate proceedings for lack of evidence; and
- Ruling by the Appeal Court on 16 August 2006, confirming the Order to terminate proceedings issued by the Investigating Magistrate.

19. The Court notes that the narration of the facts on the handling of the matter at national level as presented by the Applicants and by the Respondent State was, on the whole, the same and complementary, save on three issues, which were also debated during the Public Hearings of 7 and 8 March and of 28 and 29 March 2013.

Firstly, the Respondent claimed that the matter was handled by a single Investigating Magistrate, thus refuting the Applicant's allegation according to which the first Investigating Judge had been withdrawn from the case. In rebuttal, Counsel for the Applicants provided the names of the two Investigating Magistrates. Finally, during the

Public Hearing of 29 November 2013, Counsel for the Applicants admitted that there was only one Investigating Magistrate in the matter of Norbert Zongo and Others (*infra*, paragraph 129).

On the second issue, whereas the Applicants contend that Mr François Compaore refused to appear before a first Magistrate, but appeared once before a second Magistrate who replaced him when he the Magistrate was withdrawn from the case, the Respondent posited that Mr François Compaore appeared at least twice before a single Investigating Magistrate who dealt with the matter.

Furthermore, the Respondent refutes the Applicant's allegation that the hearing of the matter was stayed between 2001 and 2006, and claims that the hearing, including the hearing of witnesses, continued throughout that period.

The Court will have the opportunity to review all the aforesaid allegations when examining the allegation of violation of the right to have one's cause heard by competent national courts.

III. Summary of the procedure before the Court¹

20. The Application was received at the Registry of the Court on 11 December 2011.

21. By separate letters dated 11 and 23 January 2012, addressed to the Minister of Foreign Affairs of Burkina Faso, the Registry transmitted the Application to the Respondent pursuant to Rule 35(4)(a) of the Rules of Court and requested that the names and addresses of the representatives of Government be submitted to the Court within thirty (30) days of receipt of the Application. The Registry further indicated that the Minister's response to the Application should be filed within sixty (60) days as stipulated by Rule 37.

22. By letter dated 13 March 2012, addressed to the Registrar and submitted through a Note Verbale dated 23 March 2012 from the Embassy of Burkina Faso, Permanent Mission to the African Union, the Burkinabe Minister of Communication, Spokesperson of the Government and Interim Minister of Foreign Affairs and Regional Cooperation, submitted the names and addresses of the representatives of the Government of Burkina Faso.

23. By separate correspondence dated 11 April, 25 April, 8 May and 15 May 2012, respectively, the Respondent transmitted to the Court Registry, its response to the Application, with observations regarding the admissibility of the Application.

24. In its memo in response dated 11 April 2012 received in the Court Registry on 17 April 2012, the Respondent State raised objection regarding the Court's jurisdiction *ratione temporis* and the admissibility of the Application, on the grounds that the Applicants failed to exhaust local remedies and had not observed reasonable time prior to submission of the Application to the Court.

25. By letters dated 6 and 8 June 2012, respectively, addressed to the Applicants, the Registry forwarded copy of the response of the Respondent.

26. In their memo in reply received in the Court Registry on 22 August 2012, the Applicants systematically rejected the preliminary objections raised by the Respondent State.

27. At its 26th Ordinary Session held in Arusha from 17 to 28 September 2012, the Court decided that the written procedure on the preliminary objections was closed, and scheduled a Public Hearing on the said objections for March 2013.

28. The Court effectively held a Public Hearing on 7 and 8 March 2013, following which it went into deliberation on the preliminary objections.

29. By letters dated 12 April 2013 addressed to the parties, the Registrar requested the latter to produce, within fifteen days, all such document as may corroborate the allegations made at the Public

¹ The details of procedure before the Court which culminated in its Ruling of 21 June 2013 on the preliminary objections can be found in paragraphs 20-49 of the said Ruling.

Hearing, with specific request to the Respondent to submit all such document as may prove that between 2001 and 2006, treatment of the matter had continued, particularly with the hearing of witnesses.

30. By letter dated 25 April 2013, one of the Counsels to the Respondent State transmitted to the Registrar, a list of documents compiled on 20 July 2006, detailing all the actions taken in regard to the case from 1999 to 2006, signed as required by law, by the Investigating Registrar of the Court in Ouagadougou, together with nine reports comprising twenty-two pages of hearings, adversarial procedures and submissions, totalling sixty-three procedural acts which form part of the process of addressing the matter between the period of suspension of the hearing of the principal accused and the appeal proceedings.

31. By letter dated 28 April 2013, the Applicants responded to the Registrar's letter mentioned in paragraph 29, reiterating their position that the matter had been stayed between 2001 and 2006, and producing a copy of the definitive directive dated 13 July 2006 by the Prosecutor of Faso to terminate proceedings, as well as a copy of the summons dated 28 April 2006 issued to the Counsel to appear for the hearing of Madam Genevieve Zongo.

32. On 21 June 2013, the Court delivered its ruling, as follows:

“On these grounds,

THE COURT, unanimously,

1. *Upholds* the objection to the Court's jurisdiction *ratione temporis* with respect to the violation of the right to life, based on the 13 December 1998 murder of Norbert Zongo, Abdoulaye Nikiema known as Ablasse, Ernest Zongo and Blaise Ilboudo;
2. *Overrules* the objection to its jurisdiction *ratione temporis* in regard to the allegation of violation of the rights of the Applicants to have their cause heard by a Judge on the basis of the judicial acts and procedures which occurred during treatment of this matter at national level;
3. *Overrules* the objection to the Court's jurisdiction *ratione temporis* on allegations of violations of human rights in regard to the obligation to guarantee respect for human rights, the right to equal protection of the law and equality before the law, and the right to freedom of expression and the protection of journalists as long as these allegations are directly linked to the allegation of violation of the right of the Applicants to have their cause heard by competent national courts;
4. *Declares* that, in the circumstances of the case, the objection to the admissibility of the Application on the grounds of failure to exhaust local remedies is not an exclusively preliminary objection and joins the said objection to the substantive case;
5. *Overrules* the objection to the admissibility of the Application on the grounds of failure to observe reasonable time in the submission of the Application to the Court;
6. *Decides* to consider the merits of the matter;
7. *Directs* the Respondent to submit to the Court its response on the merits of the case within 30 days of the date of this Ruling; and further

directs the Applicants to submit to the Court their briefs on the merits of the case within 30 days from the date of receipt of the response of the Respondent State”.

33. By letters dated 3 July 2013 addressed to the parties, the Registrar served them with a copy of the 21 June 2013 Ruling on the preliminary objections, and informed them that the Public Hearing on the merits of the case would take place on 19 and 20 September 2013 at the Seat of the Court in Arusha.

34. By letter dated 19 July 2013, the Respondent submitted to the Registrar, two copies of its briefs in response, pursuant to the provisions of the 21 June 2013 Ruling of the Court.

35. By letter dated 30 July 2013, the Registrar notified the Applicants of the above mentioned response of the Respondent State, and invited them to submit their reply, if need be, within thirty days from the date of receipt of the notice.

36. By letter dated 27 August 2013 addressed to the Registrar, the Applicants requested an extension of the deadline by thirty days, to enable them collect all the evidence which they would like to annex in support of their reply.

37. By letter dated 3 September 2013, the Registrar informed the Applicants that the Court had decided to extend the deadline for submission of their reply by thirty days effective from 6 September 2013, and that the Public Hearing had therefore been deferred to a date to be announced.

38. The Court further decided that the Public Hearing on the merits of the case would be held during the November-December 2013 Ordinary Session, on dates to be announced. At its 30th Ordinary Session held in Arusha from 16 to 28 September 2013, the Court agreed on 28 and 29 November 2013 as dates for the Public Hearing.

39. By email dated 7 October 2013, received in the Registry on the same date, the Applicants, through their representatives, filed their reply dated 6 October 2013.

40. The Public Hearing was held on 28 and 29 November 2013, at the Seat of the Court in Arusha, and the Court heard the submission of the Parties as follows:

For the Applicants:

- Advocate Benewende Stanislas SANKARA, Counsel
- Advocate Ibrahima KANE, Counsel
- Advocate Chidi Anselm ODINKALU, Counsel

For the Respondent State:

- Dieudonne Desire SOUGOURI, Director General of Legal and Consular Affairs at the Ministry of Foreign Affairs and Regional Cooperation
- Advocate Antoinette OUEDRAOGO, Counsel
- Advocate Anicet SOME, Counsel

41. During the Public Hearing, the Judges of the Court asked the parties questions and the latter responded.

42. By letter dated 18 December 2013 addressed to the Registrar of the Court, the Respondent, as requested by the Court during the Public Hearing of 29 November 2013, submitted a set of documents intended to establish the fact that hearing on the matter had not been suspended between 2001 and 2006 on grounds of the illness of the accused, Marcel Kafando, and that the hearing followed its normal course.

The documents produced included: letters of assignment of Counsels for the beneficiaries of Norbert Zongo *eta*’; letters from the Counsel requesting that some witnesses be heard; warrants for the detention and for extension of the period of detention of the accused; several medical documents on the state of health of the suspect; several summons for witnesses and the suspect; twenty seven (27) reports on the hearings.

43. By letter dated 2 January 2014, the Registrar served these documents on the Applicants.

44. By letter dated 29 January 2014, the Applicants submitted to the Court, following its request at the Public Hearing of 29 November 2013, the written submissions of Mattre B. N. Sankara at the Public Hearing, as well as documents annexed to the pleadings. The documents produced were, *inter alia*, the Applicants’ complaint in a civil suit; several reports on interrogations and adversarial procedures; exchange of correspondence between the Applicants and the Prosecutor of Faso on the subject of reopening of investigations into the matter, after the 18 July 2006 Order to terminate proceedings.

45. During the written procedure, the parties made the following submissions:

On behalf of the Applicants,

In the Application:

“52. In view of the above-mentioned points of fact and the law, without prejudice to elements of fact and of law, and elements of evidence which may later be adduced, as well as the right to amend and supplement this document, the beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema *alias* Ablasse, Ernest Zongo and Blaise Ilboudo and the Burkinabe Human and Peoples’ Rights Movement, respectfully pray the Court to:

- (1) Declare the Application admissible;
- (2) Declare that the State of Faso has violated the relevant provisions of the Universal Declaration of Human Rights (Article 8), the ICCPR [Articles 2(3), 6(1) and 19(2)], the Charter [Articles 1, 3, 4, 7, 9 and 13] and the Revised ECOWAS Treaty [Article 66(2)(c)];
- (3) Order Burkina Faso to pay to the beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema *alias* Ablasse, Ernest Zongo and Blaise Ilboudo and the Burkinabe Human and Peoples’ Rights Movement, the following damages:
 - a. Damages for all the losses incurred in terms of family support following the assassination of Norbert Zongo, Abdoulaye Nikiema *alias* Ablasse, Ernest Zongo and Blaise Ilboudo, the burial expenses and loss of the vehicle which they were using at the time of the assassination;
 - b. General damages for the pain, physical suffering and emotional trauma endured by the beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema *alias* Ablasse, Ernest Zongo and Blaise Ilboudo and the

Burkinabe Human and Peoples' Rights Movement for the entire period of mourning, and the protracted judicial procedure for which the Burkinabe authorities should be held fully responsible;

- c. Punitive damages as a deterrent to ensure Burkina Faso does not again engage in such crimes on its territory and to compel it to harmonise its legislation with the principles and standards of judicial procedure applicable at international level.
- d. The complainants submit themselves to the wisdom of the Court to determine the *quantum* of the damages mentioned hereinabove."

In its response to the preliminary objections:

"62. In view of the points of fact and of law as stated above, and without prejudice to elements of fact and of law, the evidence which may later be produced, as well as the right to supplement and amend this document, the beneficiaries of Late Norbert Zongo and his three companions pray the Court to reject the preliminary objections raised by Burkina Faso and to consider their Application admissible".

In their reply on the merits of the case:

"41. As regards the determination of the *quantum* of damages which we are seeking, we submit ourselves to the wisdom of your august Court and request that it take due account of the anguish and mental pressure which the beneficiaries of Norbert Zongo, Ernest Zongo, Blaise Ilboudo, and Ablasse [*sic*] Nikiema *alias* Ablasse have continued to endure as they are yet to know those who murdered their relatives. To the above should be added the financial losses incurred since the disappearance of the persons who substantially provide the daily bread of their families (...).

42. [We pray the Court to] ... grant the request for payment of damages be they general, special or punitive".

On behalf of the Respondent

In its response with respect to the preliminary objections:

"89. In consequence of the aforesaid, the Government of Burkina Faso respectfully prays the African Court on Human and Peoples' Rights to declare inadmissible Communication No. 013/2011 of 11 December 2011 filed against Burkina Faso, by the beneficiaries of Late Abdoulaye Nikiema *alias* Ablasse, Ernest Zongo, Blaise Ilboudo and Norbert Zongo and the Burkinabe Human and Peoples' Rights Movement (*MBDHP*)".

In its response on the merits:

"1 03. Consequently, it prays the Court",

On the procedure,

To declare,

Communication/Complaint No. 013/2011 of 11 December 2011 inadmissible for having failed to exhaust local remedies (Article 56(5) of the African Charter on Human and Peoples' Rights and Rule 40.5 of the African Court on Human and Peoples Rights), firstly because, the highest court in Burkina Fa so, the "Cour de cassation" was not seized of the matter by the beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema *alias* Ablasse, Ernest Zongo and Blaise Zongo and by the Burkinabe Human and Peoples' Rights Movement (*MBDHP*) before it was brought before the African Court on Human and Peoples' Rights; and secondly, because the procedure before the domestic courts had not been unduly protracted.

On the merits

If the Communication/Complaint was to be declared admissible, it should be rejected as unfounded and, as a consequence, all claims for damages be it general, special or punitive, brought by the beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema *alias* Ablasse, Ernest Zongo and Blaise Zongo and by the Burkinabe Human and Peoples' Rights Movement (MBDHP) should be dismissed".

46. At the Public Hearing of 28 and 29 November 2013, the Applicants stood by their submissions while the Respondent maintained its position.

IV. Competence of the Court

47. Rule 39(1) of the Rules of Court provides that "The Court shall conduct preliminary examination of its jurisdiction...."

48. Regarding its material jurisdiction, Article 3(1) of the Protocol establishing the Court (the Protocol) provides that "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".

In the instant case, the Applicants allege violation, by the Respondent State, of the provisions of the Charter, of the ICCPR,² as well as a provision of the Revised ECOWAS Treaty which guarantees the rights of journalists. (*supra*, paragraph 7 to 11).

Consequently, the Court does have the material jurisdiction to consider the said allegations.

49. As regards the personal jurisdiction of the Court, the Protocol first requires that the State against which action is brought should not only have ratified the Protocol and the other human rights instruments mentioned (Article 3(1) above, but also, in relation to Applications from individuals, must have made the declaration accepting the competence of the Court to receive such Applications as provided for in Article 34(6). In the instant case, records show that Burkina Faso became a Party to the Charter on 21 October 1986, and the ICCPR on 4 April 1999, ratified the Revised ECOWAS Treaty on 24 June 1994, and also made the declaration as required under Article 34(6) on 28 July 1998.

The Protocol provides that "the Court may entitle Non-Governmental organizations (NGOs) with observer status before the Commission and individuals to institute cases directly before it, in accordance with Article 34(6) of the Protocol". In the instant case, the beneficiaries of Norbert Zongo and others are individuals, and, as the records indicate, the Burkinabe Human and Peoples' Rights Movement (*MBDHP*) is an NGO with observer status before the African Commission on Human and Peoples Rights (The Commission).³

2 The Applicants also allege violation of the Universal Declaration of Human Rights, which is not a Treaty.

3 Observer status was granted to this organisation by the African Commission during its 6th ordinary session held in Banjul, The Gambia from 23 October to 4 November 1989.

In view of the foregoing, the Court notes that it also has personal jurisdiction to hear the case based on the submissions of the Applicants and those of the Respondent State.

50. As regards the Court's jurisdiction *rationae temporis*, it should be noted that the Court had already issued a ruling on the preliminary objections raised by the Respondent State in that regard.

In its ruling of 21 June 2013 on this issue, the Court sustained the objection to its jurisdiction *rationae temporis* on the allegation of the violation of the right to life but overruled the objection to its jurisdiction *rationae temporis* on the allegation of violation of the rights of the Applicants to have their cause heard by a judge, as well as the allegations of violation of human rights in relation to the obligation to guarantee respect for human rights, the right to equal protection of the law and equality before the law and the right to freedom of expression and protection of journalists (*supra*, paragraph 32).

51. It emerges from the foregoing considerations, that the Court does have jurisdiction to hear all allegations of human rights violations made by the Applicants save the allegation on violation of the right to life.

V. Admissibility of the Application

52. Rule 39 of the Rules of Court provides that "The Court shall conduct preliminary examination of its jurisdiction and the admissibility of the Application in accordance with Articles 50 and 56 of the Charter, and Rule 40 of these Rules".

Article 6(2) of the Protocol for its part provides that "The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter".

Rule 40 of the Rules of Court which essentially refers to the provisions of Article 56 of the Charter, states that:

"Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, Applications to the Court shall comply with the following conditions:

1. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
2. comply with the Constitutive Act of the Union and the Charter;
3. not contain any disparaging or insulting language;
4. not be based exclusively on news disseminated through the mass media;
5. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
7. not raise any matter or issue previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union".

A. Admissibility requirements not canvassed by the parties

53. Requirements in respect of the identity of Applicants, the compatibility of the Application with the Constitutive Act of the African Union and the Charter, the language used in the Application, the nature of evidence and the principle of *non bis in idem*, (paragraphs 1, 2, 3, 4 and 7 of Rule 40 of the Rules) have not been raised by the parties.

For its part, the Court equally notes that there is no suggestion in the pleadings submitted to it by the parties that any of these conditions has not been met.

Consequently, the Court is of the opinion that the requirements under consideration herein have been fully met in the instant case.

B. Requirements relating to seizure of the Court

54. In its preliminary objections, the Respondent State had raised an objection to the admissibility of the Application on the grounds that reasonable time had not been observed in submitting the Application to the Court (Rule 40(6)).

However, in its Ruling of 21 June 2013, the Court dismissed that objection. (*supra*, paragraph 32). Consequently, the requirement regarding the time for submitting the case to the Court by the Applicants has equally been met.

C. Objection to the admissibility of the Application due to failure to exhaust local remedies

55. In its preliminary objections, the Respondent also raised an objection to the admissibility of the Application on the grounds of non-exhaustion of local remedies (Rule 40(5)).

However, in its Ruling of 21 June 2013, the Court had declared that this objection was not of an exclusively preliminary nature and had to join it with the merits, pursuant to Rule 52(3) of the Rules of Court (*supra*, paragraph 32). At this juncture of consideration of the matter, the Court will now rule on the said objection.

56. An examination of the pleadings establishes that there was no dispute over the fact that the individual Applicants had not exhausted all the local remedies available to them under the Burkinabe judicial system. It had been clearly established that they had decided not to go on appeal.

The issue in contention here between the parties is, first, one of determining whether the fact that the individual Applicants did not resort to the Court of Final Appeal (*Cour de Cassation*) was effective or not. The other issue is one of ascertaining whether litigation of these cases had been unduly prolonged within the meaning of Article 56(5) of the Charter.

Moreover, it will be necessary to treat separately the issue as to whether or not the Burkinabe Human and Peoples' Rights Movement (*MBDHP*) was, for its part, also required to exhaust local remedies.

i. The issue of the effectiveness of the Appeal to the “Cour de Cassation” (Court of Final Appeal)

57. In its response dated 13 April 2012, the Respondent noted that the highest judicial institution in Burkina Faso, the “Cour de cassation”, had not been seized of the matter before it was brought before the African Court on Human and Peoples’ Rights.

58. It stated that whereas that option was available to them, the Applicants failed to have recourse to the “Court of Final Appeal” and therefore “[had] not exhausted all the local remedies available”.

59. The Respondent further stressed that “ the Court of Final Appeal was in the position to give them satisfaction because, according to Article 605 of the Criminal

Procedure Code, ‘when it annuls a ruling or a judgement, the Criminal Bench of the Court of Final Appeal refers a case and the parties back to a court of the same level and jurisdiction as the one which issued the impugned decision or, if necessary, before the same court but differently constituted”.

60. This position was reiterated by the Respondent State during the Public Hearing of 7 and 8 March 2013, by emphasising that even though the decisions of the ‘Cour de cassation’ were not subject to any deadline, recourse to that jurisdiction was easy to initiate and was useful, efficient and sufficient, and “may have resulted in a decision different from that of the Investigating Magistrate and of the ‘Chambre d’accusation’ (Court of Criminal Appeal)”.

61. In its response on the merits of the matter, the Respondent again submitted that since the Applicants themselves had refused to make use of the “Cour de Cassation”, even though that remedy was available, easy and accessible, and could have resulted in the reversal of the ruling of 16 August 2006, they could no longer accuse Burkinabe courts of being inefficient or unable to investigate, identify and act with diligence in bringing to justice those responsible for the assassination of Norbert Zongo.

62. In their Application, the Applicants indicated that “in Burkinabe law, there is the possibility of appeal to the ‘Cour de Cassation’ under Article 575 of the Criminal Procedure Code”, and that “the family of Norbert Zongo deliberately decided not to use that procedure and, instead, to go to the African Court because the judicial remedies it had sought for 9 years had proved to be inefficient and unsatisfactory, and seizure of the “Cour de Cassation” would have been a waste of time”.

63. They stressed that “having recourse to the “Cour de Cassation” would have been futile as it was common knowledge that the supreme jurisdiction took about five years, after it has been seized, to rule on the least of matters”.

64. In their reply to the preliminary objections, the Applicants stated in the main that “an Applicant was not bound to go to an inefficient or insufficient jurisdiction, that is, a jurisdiction which may not provide the remedy to the allegations of human rights violations”.

65. At the Public Hearing of 7 March 2013, Counsel for the Applicants restated this same position, insisting on the ineffectiveness of this “Cour de Cassation”, which in his view “did not provide the possibility to change the substance of the decisions that had been taken”.

66. The Court observes that under the Burkinabe judicial system, appeals to the “Cour de Cassation” were intended to annul a final judgement or ruling for violation of the law (Criminal Procedure Code of 21 February 1968, Articles 567 and *et seq*).

67. As has just been seen, according to the Respondent, the “Cour de Cassation” was an absolutely effective judicial remedy which allows the highest court in the land to redress violations of the law by lower courts.

The Applicants however argue that, in the instant case, this remedy would not have yielded any effect as the “Cour de Cassation” was limited to censuring violations of the law without delving into the merits of the matter *per se*.

68. In ordinary language, being effective refers to “that which produces the expected result” (*Le Petit Robert*, 2011, p. 824). On the issue under consideration, the effectiveness of a remedy is therefore measured in terms of its ability to solve the problem raised by the Applicant.

69. In the instant case, no doubt has been cast *a priori* on the ability of the “Cour de Cassation” to bring about a change in the situation of the Applicants on the merits of the matter, where it notices any violations of the law in the treatment of the matter by the Court whose ruling has been impugned.

On that score, it should even be noted that in terms of Article 605 of the Criminal Procedure Code of Burkina Faso “... if the judgment or ruling on appeal is reversed [anew] for the same reasons as the first, the judicial chamber will apply the provisions of the law to the facts deemed established by the Judges of the lower court”; which means that, in the final analysis, the lower court itself will rule on the merits of the matter.

Furthermore, in terms of Article 18 of the Organic Law No. 013-2000/AN of 9 May 2000, on the organisation, jurisdiction and functioning of the “Cour de Cassation” and its procedure “... where the referral is ordered by the combined chambers of the “Cour de Cassation”, the lower court to which the matter is referred has to comply with the decision of the combined chambers on the points of law addressed by the latter.

Finally, in terms of Article 19 of the same law, “[the ‘Cour de Cassation] in reversing a decision without referral may put an end to litigation when the facts of the matter are such that they allow for Application of the appropriate law.

70. It is therefore clear that appeal at the Cour de Cassation is not a waste of time and it can in certain circumstances lead to a change or change the substance of a decision; and without making such an appeal, one may not know what the Court would have decided.

As the European Court of Human Rights noted, in a matter concerning France which belongs to the same legal family as Burkina Faso: “the

Cour de Cassation” is among the local remedies to be exhausted in principle to comply with Article 35 of the Convention.”⁴

From the foregoing, it is evident that the appeal provided by the Burkinabe judicial system is an effective remedy, which the individual Applicants should have accessed so as to comply with the rule of exhaustion of local remedies required under Article 56(5) of the Charter and Rule 40(5) of the Rules.

71. It is understood that this conclusion does not in any way prejudice the distinct issue as to whether the procedure relating to a given remedy is unduly prolonged. This issue will now be addressed by the Court.

ii. The issue of unduly prolonged procedure

72. In its preliminary objections and response to the Applicants’ submission regarding the unduly prolonged nature of the procedures, the Respondent argues, firstly, that “the unduly prolonged nature of the procedure ... is determined only in cases where available and effective remedies do exist but have not been utilised and not in the entire procedure” adding that “the unduly prolonged nature of the procedure does not apply in matters where remedy is available (such) as the ‘Cour de Cassation’ in the instant case, but not utilised whereas it could have been accessed by the Applicants without the least impediment”.

73. The Respondent further argues that “the unduly prolonged concept is also not considered where available and accessible remedies are ineffective as they afford litigants the opportunity to cure the alleged violation”; and then goes on to note that:

“Ironically, the five (5) years which they didn’t want to “loose” before the ‘Cour de Cassation’, were spent idling, before the matter was referred to the African Court on Human and Peoples’ Rights (...) whereas the African Commission on Human and Peoples Rights was functional to hear the alleged violations...”

74. The Respondent further argues, based on the jurisprudence of the African Commission on Human and Peoples’ Rights, “that it is up to the complainant seeking a waiver “to prove the veracity of the facts alleged either by trying to seize the national courts or by presenting a specific case where actions in court were finally proven to be ineffective ...” and that in the instant case “the Applicants do not present any evidence as to the veracity of the facts which they are alleging”.

75. Lastly, the Respondent State argues that “the duration of the handling of the Norbert Zongo case cannot be referred to as one in which local remedies have been unduly prolonged” and that “this duration is tied to the complexity of the dossier, the absence of formal evidence concerning identification of the culprits and the need for the Courts to respect the principle of presumption of innocence”.

4 Matter of *Civet v France*, ruling of 28 September 1999, para 41. See also the jurisprudence cited in the same vein and paragraph 43. See further the matter of *Yahoui v France*, 20 January 2000 ruling, para 32.

76. In its response on the merits of the matter, the Respondent invoking the jurisprudence of the European Court of Human Rights, argues that “the reasonableness of the duration of a procedure is determined on the basis of the circumstances of the case and more specifically on grounds of the complexity of the matter, the comportment of the Applicant and of the competent authorities”.

77. On this score, the Respondent once again sought to show how complex the matter had been (murder in open countryside; absence of eye witnesses; vehicle and corpses burnt to ashes; x-rays and forensic reports carried out by experts in Burkina Faso and abroad; hearing of hundreds of witnesses) and concluded that “the more complex the matter, the more protracted the investigations would be”.

78. The Respondent then added that the comportment of the Applicants’ advocates could have caused an extension of the duration of the hearing. As proof in support, the Respondent refers to the fact that the representative of *Reporters Without Borders* and a certain Mr Moïse Ouedraogo claimed to be in possession of information useful for the investigation without submitting such information to the State Prosecutor of Burkina Faso at the time of the investigation, and waited until the end of the case to make mention of it. Further reference was made to the fact that the representative of Burkinabe Human and Peoples’ Rights Movement who had presided over the Independent Commission of Enquiry “had not reported these facts to the State Prosecutor of Faso, facts of which he could not have been unaware”.

79. The Respondent finally pleads that “it cannot be accused of the laxity or inaction on the part of the political, administrative and judicial authorities” (creation of the ICE which included national and international journalists and the *MBDHP* which was both a member and the chair of the ICE; seizure of the Court on the basis of ICE report). It further states that “it can also not be blamed for not providing effective and efficient local remedies to the beneficiaries of Norbert Zongo and his companions” (opening of the investigations against X; allocation of significant financial and material resources to the Investigating Magistrate; conduct of autopsy and forensic examination on the objects found in the vehicle and on the arms and ammunition similar to those found at the scene of the incident, photographs, transportation to the scene of the incident, hearing of dozens of witnesses; arrest and detention of Marcel Kafando on 2 February 2001). It concludes that “the investigating magistrate cannot be blamed for having waited for two years before questioning the prime suspects, as if he had not initiated any preliminary procedure (hearing of witnesses, request for forensic evidence, etc....) from the time he was seized of the matter”.

80. As regards the period between 2001 and 2006, again relying on the jurisprudence of the European Court of Human Rights, the Respondent explains that even the slowdown of investigations which could have been caused (but not proven) by the five (5) year suspension of adversarial procedure between of Marcel Kafando and Racine Yameogo cannot be blamed on the State, given that “it has been deemed on several occasions that the State cannot be blamed for prolongation of the duration of the proceedings for reasons of the illness of a suspect”.

81. On the determination of the period of reasonable time, the Respondent is of the view that the *dies a quo* should be the day when Marcel Kafando was arrested (2 February 2001) and the *dies ad quem* the day on which the ruling became final, as no appeal was lodged with the “Cour de Cassation” (31 August 2006), that is, five years, six months and 29 days.

82. The Respondent concludes that “in view of the complex nature of the matter and the comportment of the Applicants and their advocates, as stated earlier, one could conclude that the duration of the investigation was normal, thanks to the effectiveness of the Investigating Magistrate and the substantial contribution made by the political and administrative authorities of Burkina Faso” and that “the said duration meets the requirements of reasonable time as set out in community and international instruments, violations of which are being wrongly attributed to Burkina Faso”.

83. In their submission, the Applicants recall that the judicial remedies they had resorted to lasted 9 years and would have again been prolonged for five more years if the “Cour de Cassation” had been seized.

84. They explain that “... in the instant case, it is probable that given the bad faith on the part of the political authorities, this delay could have been prolonged at will”. They assert that “Article 56(5) of the Charter provides that an Applicant before the Court was not bound to exhaust local remedies where the judicial process is unduly prolonged” (sic).

85. In their reply to the preliminary objections, the Applicants noted that in this matter “they had to wait... for close to two years for the brother of the President of Faso, who seems to be at the centre of this case of murder of the journalist and his companions, to be heard by an Investigating Magistrate”, adding that: “some other strange occurrence in this case is the fact that the matter was frozen for over five years because of the illness of the principal accused, who later would be discharged for lack of evidence upon resumption of the hearing by the Investigating Magistrate before his demise”.

86. The Applicants further cite as example the case of Thomas Sankara, former President of Faso, in which they allege that, “the Sankara family, for fifteen (15) good years, had unsuccessfully requested the Burkinabe judicial system to identify those responsible for the murder of the former President and in particular to show them where he was buried”.

87. In their correspondence to the Court dated 28 April 2013, submitted upon request by the Court to the parties to submit all such documents as may corroborate the allegations they made during the Public Hearing of 7 and 8 March 2013, the Applicants maintained their position according to which the handling of the matter was interrupted between 2001 and 2006, adding that “....the judicial machine really came alive in this case only in May 2006 with the real face off before the Investigating Magistrate Wenceslas H. Ilboudo, between the principal suspect, Staff Sergeant Marcel KAFANDO and a witness in the matter, Jean Racine YAMEOGO”.

The Applicants explain that “... it was only on 4 May 2006 that the same Investigating Judge heard, for the first time, the widow of Norbert ZONGO as party to the civil suit”.

The Applicants conclude by emphasizing that “in all the minutes of the hearings which closed Norbert ZONGO’s case, unless the State provides proof to the contrary, no mention was made of the hearings, adversarial procedures or other acts carried out by the Investigating Magistrate between 16 May 2001 and 30 May 2006”.

88. The Court would like, at this juncture, to recall that Articles 56(5) of the Charter and Rule 40 of the Rules provide that there is an exception to the exhaustion of local remedies where “it is obvious that this procedure is unduly prolonged”.

a. The concept of remedy proceedings

89. On the above issue, there is first a divergence of views between the parties on the exact meaning of the concept of “remedy procedure”. Whereas for the Respondent State, the length of the procedure should be determined in terms of the single remedy which was not utilised, for the Applicants, it should be judged in terms of the entirety of the procedure conducted at national level.

90. In the opinion of the Court, the unduly prolonged nature of a procedure as addressed in Article 56(5) of the Charter applies to local remedies in their entirety as utilised or likely to be utilised by those concerned. The wording of this Article which refers to exhaustion of “local remedies” and the procedure for “such remedies” is quite clear and does not contain any provision limiting the criteria for unduly prolonged procedure solely to remedies which have not yet been utilised. Besides, it would be difficult to determine the length of the procedure for a remedy which has not even been utilised.

b. The duration of the remedy procedure

91. The Respondent further argues (as we have seen) that the duration of investigations into the matter simply depends on the complexity of the case, the absence of formal evidence as to the identity of the culprits, the concern of the courts to respect the presumption of innocence, the comportment of the Applicants themselves, and that of the Respondent’s own institutions. It rejects in particular the Applicants’ allegation according to which this matter had been frozen between 2001 and 2006, indicating that “during the period of illness of the principal accused, other acts of investigation, such as hearing of witnesses, were performed”.

For their part, the Applicants maintain that the procedure had been unduly prolonged, considering, in particular, that they had to wait for two years for the brother of the President of Faso to be heard by an Investigating Magistrate and furthermore that investigations were subsequently frozen for more than five years due to the illness of the principal accused.

92. The Court is of the opinion that determination as to whether the duration of the procedure in respect of local remedies has been normal

or abnormal should be carried out on a case-by-case basis depending on the circumstances of each case.

93. On the alleged complexity of the case, the Respondent State does not show how this case is more complicated than other cases of murder committed in the absence of eye witnesses. In particular, it does not provide the reasons which could have prevented the Police and the judiciary from apprehending the culprits, nor does it indicate the special insurmountable obstacles that would have been faced by the officials in that regard.

94. On the absence of formal evidence in respect of identification of the culprits, it is indeed the responsibility of the Respondent to deploy all the means at its disposal to find the presumed assassins, even where the said assassins were initially unknown.

95. As for the well-founded concern of respecting the presumption of innocence of the accused, this does not absolve the Respondent State from proceeding reasonably with the procedure which had already been initiated. In the instant case, one does not see how the procedural guarantees that must be accorded to accused persons could really have delayed the procedure.

96. On the comportment of the Applicants, the latter clearly had no interest in delaying the procedure, and could not be held responsible for the comportment of witnesses (the representative of *Reporters without Borders* and Moise Ouedraogo) who did not submit the information in their possession to the Burkinabe judicial authorities in a timely manner.

Furthermore, the requests by the said witnesses to be heard by the judicial authorities could not have delayed procedure which lasted till August 2006, because the requests in question were made in 2006, after legal proceedings on the matter had been closed.

97. On the diligence with which the State authorities acted, this issue applies rather to the merits and will be examined in relation with the allegation of violation of the right for one's cause to be heard by competent national courts (*infra*, para. 141 to 156).

98. On the hearing of witness Francois Compaore in January 2001, the Court is of the opinion that this did not cause unreasonable delay in the investigation given that other procedures related to the investigations were carried out by the Respondent's authorities between the date of the assassinations and that of the said hearing (*supra*, paragraph 16).

99. Lastly, there is the issue of ascertaining whether, as affirmed by the Applicants, handling of the matter had been frozen for over five years between 2001 and 2006. In answer to a question from a member of the Court on this issue during the Public Hearing of 8 March 2013, Counsel to the Respondent refuted the allegation and indicated that acts of investigation, especially the hearing of witnesses, did take place during that period.

100. As mentioned earlier, by letter dated 25 April 2013, the Respondent State submitted to the Court Registry, *inter alia*, nine (9) reports of hearings, adversarial procedure and submissions as part of the investigations of the case during the period of suspension of hearing of the principal suspect (*supra*, paragraph 30).

101. Following the Public Hearing of 29 November 2013, the Respondent further submitted to the Court, by letter dated 18 December 2013, additional documents, including a number of other minutes of hearings of witnesses or of the civil suit (*supra*, paragraph 42).

102. Consideration of all the documents submitted to the Court and, in particular, the minutes of hearings, indicate that between 15 May 2001 (date of the first adversarial procedure between the principal accused and the main witness) and 31 May 2006 (date of the second and last adversarial procedure between these two same persons), there was indeed a number of hearings of witnesses or of the parties to the civil suit. The hearing of witnesses accordingly took place on the following dates: 30 May 2001 (one); 2 November 2001 (two); 18 December 2003 (one); 19 December 2003 (one); 26 December 2003 (three); 22 April 2004 (one); 23 April 2004 (one); 5 May 2004 (two); 6 May 2004 (one); 5 January 2005 (one); 9 May 2006 (one). As for the hearing of the parties in the civil suit, this occurred on the following dates: 22 February 2006 (three); 4 May 2006 (one); and 4 May 2006 (one).

103. It is therefore clear that although the adversarial procedure between the principal accused and the main witness was indeed suspended between 2001 and 2006 for reasons of illness, investigations however, continued during that period especially with the hearing of witnesses. The Respondent cannot therefore be accused of having suspended investigations during the period.

104. On the question as to when the local remedy procedure is to be deemed to have started, it should first be stated that, contrary to the Respondent's assertions (*supra* paragraph 81), the procedure at issue here is not that of the prosecution and trial of the principal suspect in the matter, but rather that of the search for, trial and judgment of the assassins of Late Norbert Zongo and his companions, because it is the beneficiaries of the latter who have brought the action before the Court, in pursuit of the right to have their cause heard by competent national courts. That being the understanding, the date of commencement would therefore be that on which the Respondent's judicial system started dealing with the matter. Consideration of the case reveals that the Police embarked on routine investigations at the scene of the crime on the very day the murder was committed, that is, 13 December 1998. (*supra*, paragraph 18). It is therefore from that date that the Burkinabe judicial outfit initiated proceedings, and it is from that date that the length of the local remedy procedure, under consideration, should be determined.

105. Since the local judicial procedure was closed with the expiry of the deadline for appeals to the "Cour de Cassation", that is, 21 August 2006,⁵ the duration of the entire procedure should be considered in relation to that date. In total, local remedies procedure therefore lasted from 13 December 1998 to 21 August 2006, that is, seven (7) years, eight (8) months and ten (10) days.

⁵ See on this same case, the Ruling of the Court on Preliminary Objections dated 21 June 2013, para 118.

106. In light of all the foregoing considerations, and although investigations were not frozen between 2001 and 2006, the Court is of the opinion that the procedure in the domestic courts on the matter from 1998 and 2006, or nearly eight years, was unduly prolonged in terms of Article 56(5) of the Charter.

Moreover, the procedure would have been further prolonged if the matter had been brought to the “Cour de Cassation” by the Applicants regardless of the despatch with which the “Cour de Cassation” would have disposed of the matter.

Consequently, the Court concludes that in the circumstances, the individual Applicants did no longer need to exhaust the other local remedies under Burkinabe judicial system.

ii. On the issue of the Burkinabe Human and Peoples’ Rights Movement

107. In formulating the objection to admissibility on grounds of non-exhaustion of local remedies, the Respondent did not make any distinction between the steps taken by individual Applicants on the one hand, and those taken by the Burkinabe Human and Peoples’ Rights Movement, on the other.

108. In response to a question from a member of the Court during the Public Hearing of 8 March 2013, Counsel for the Applicants explained that under Burkinabe law, only victims may bring cases before criminal courts. The Counsel cited, in that regard, Article 2 of the Criminal Procedure Code of Burkina Faso which provides that: “civil action for damages caused by a crime, an offence or a contravention shall be brought by all those who have suffered personally from the damage directly caused”, and explained that the Burkinabe Human and Peoples’ Rights Movement was not a direct victim in this matter, and could not therefore bring the case before Burkinabe courts.

109. According to the afore-cited Article 56(5) of the Charter, the Applicant is required to exhaust local remedies only in so far as such remedies “exist” in his case.

110. In the instant case, it would appear, in light of the aforesaid, that the Burkinabe Human and Peoples’ Rights Movement is not entitled to bring action in this matter before the courts in Burkina Faso.

111. Consequently, the Respondent cannot object to the admissibility of the Application on grounds of non-exhaustion of local remedies because one of the Applicants, the Burkinabe Human and Peoples’ Rights Movement did not exhaust the said remedies.

112. In light of all the above considerations, the Court concludes that the Respondent’s objection to the admissibility of the Application on the grounds of failure to exhaust local remedies should be overruled both in regard to the case of the individual Applicants and in regard to that of the Burkina be Human and Peoples’ Rights Movement.

113. The Court, having considered all the requirements relating to admissibility of the Application pursuant to Article 56(5) of the Charter

and Rule 40(5) of the Rules, concludes that the Application is admissible.

VI. The merits of the matter

A. Allegations of violation of the rights of the Applicants to have their cause heard by competent national courts

114. The right to have one's cause heard by competent national courts is guaranteed under Article 7(1) of the Charter and Articles 2(3) and 14 of the ICCPR. This right is also enshrined in Article 8 of the Universal Declaration of Human Rights.

115. According to Article 7 of the Charter:

"1. Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force ...".

116. According to Article 2(3) of the ICCPR:

"Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted".

Article 14 of the Covenant for its part provides that:

"1 Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law..." which shall rule either on the validity of any criminal accusation brought against him or on disputes regarding his civil rights and obligations ...

117. As for Article 8 of the Universal Declaration of Human Rights, it provides that:

"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".

118. The Court shall consider the allegation of violation of the right to have one's cause heard by competent national courts, first in light of Article 7 of the Charter, and then, if need be, in regard to the provisions of other international instruments invoked by the parties.

119. The right to have one's cause heard by competent national courts has several aspects. In the instant case, the aspects raised and discussed by the parties are as follows: duration of the proceedings in the local courts; the role of the Prosecutor in the judicial system of the Respondent State; the issue of withdrawal of an Investigating Magistrate; the issue of a witness failing to appear; the involvement of

parties in the civil suit, and the question of the despatch with which the Respondent guaranteed this right in the instant case.

i. Duration of local remedies

120. It is understood that procedure in a case wherein a party is involved has to take place within reasonable time. In the instant case, after consideration of the pleadings of the parties in regard to the rule on exhaustion of local remedies, the Court concludes that the procedure in the local courts on the matter of the individual Applicants has been unduly prolonged (*supra*, paragraph 106).

On the allegation of violation of the right to have one's cause heard by competent national courts guaranteed under Article 7 of the Charter, the Court is obliged to conclude, for the same reasons, that the case brought by the Applicants was not addressed within reasonable time.

ii. Role of the Prosecutor in the legal system of the Respondent State

121. In their response on the merits, the Applicants sought to show that justice had been impeded by the Executive through the Prosecutor of Faso. In that regard, they emphasize the fact that "the Prosecutor of Faso, as a judicial officer 'comes under' the supervision and control of his hierarchical superiors and under the authority of the Minister of Justice, a situation which imposes on him the obligation to be loyal to his superiors".

122. They added that "the observed delay in the handling of the case of Norbert Zongo and his companions can be explained by Executive interference in the functioning of the judicial machine, notably through the Prosecutor of Faso ... who interfered in the choice of those to be heard and in the deployment of judicial staff during that period, thus making it possible for the real accomplices of the suspects identified by the Independent Commission of Enquiry to escape from the strong arms of the law".

123. At the Public Hearing of 28 and 29 November 2013, the Applicants reiterated the position according to which the role played by the Prosecutor in Burkinabe judicial system was a violation of the letter and spirit of the Charter particularly because he was hierarchically subordinate to the Minister of Justice.

124. At the Public Hearing on 28 November 2013, Counsel for the Respondent retorted, in regard to the role of the Prosecutor in the Burkinabe judicial system, that Burkinabe is not "a strange entity in law" and that "it was part of the romano-germanic system of law", like many other countries. The Respondent explained that the Prosecutor was first and foremost a judicial officer who has sworn to work independently and with dignity.

125. Article 7 of the Charter speaks of the right to have one's cause heard by competent *national courts* (italics added). What is important under this Article is the independence of the *judge* seized of the matter.

However, on the case filed before the Court, no evidence has been adduced to show that in the Burkinabe judicial system, the Judge is bound to follow the position of the Prosecutor when he or she rules on a given matter. On the contrary, articles 129 and 130 of the Burkinabe Constitution provide, respectively, that “the judiciary is independent” and that “sitting Magistrates are subject only to the authority of the law in the exercise of their duties [and] are irremovable”.

Only the specific conduct by a Prosecutor in a given matter, as in the cases cited by the Applicants (*infra*, paragraph 127 *et seq*), could eventually be construed – if proven – as interference with the independence of the judge.

126. Consequently, it cannot be said that the institution and profile of the Prosecutor in the Burkinabe judicial system, was in itself and by its nature at variance with Article 7 of the Charter, as long as the existence of these institutions does not affect the independence of the relevant jurisdictions.

iii. The issue of withdrawal of an Investigating Magistrate

127. In their reply on the merits, the Applicants claim that, at the initiative of the Prosecutor and in violation of the law, a judge was replaced with another who “managed to ensure that Francois Compaore was not heard ...”. They conclude that the interference in this procedure “by the Prosecutor of Faso, the hatchet man of the Minister of Justice, can be regarded as an obstruction to the normal course of justice and as an attempt to reassign the case to more trusted persons”.

128. At the Public Hearing of 28 November 2013, a Counsel for the Applicants reiterated this allegation.

129. At the Public Hearing of 29 November 2013, however, in answer to a question by the Court, a Counsel for the Applicants finally declared that it was a mix up with another case (that of David Ouedraogo) which had brought about the confusion; he admitted that there was no withdrawal of any judge, and that it was a single Investigating Magistrate that handled the matter of Zongo and others, from the beginning to the end.

130. At the Public Hearing of 28 November 2013, the Counsels to the Respondent State had clearly explained that there had never been the removal of any judge whatsoever and that only one judge dealt with the case from the start to the finish.

131. The Applicants having themselves admitted that they had been mistaken in asserting that a judge had been withdrawn in a manner that undermined the independence of the judiciary, the Court is of the opinion that there was never any such withdrawal and that the matter had been considered by only one judge.

Consequently, the Respondent cannot be blamed for interfering with the independence of the judiciary in this regard.

iv. The issue of non-appearance of a witness

132. On the accusation of obstruction of the normal course of justice brought against the Respondent State, the Applicants further stated in their reply on the merits that everything was done to ensure that François Compaore was not heard by the court.

133. At the Public Hearing of 28 November 2013, the Respondent State noted that the Applicants were contradicting themselves by making such an allegation, whereas they themselves had at the same time indicated in their Application that he was heard on 16 January 2001 (*supra*, paragraph 16). They explained that the person in question was heard as a witness at least twice.

134. At the Public Hearing of 29 November 2013, in answer to a question by the Court, Counsel for the Respondent State confirmed that François Compaore had been heard at least twice.

135. It emerges from all the minutes of the hearings produced by the Respondent through its letters dated 25 April 2013 and 18 December 2013, that François Compaore was heard by the same Investigating Magistrate as a witness in the matter of Zongo and others, on two occasions, that is, on 17 January 2001 and 19 May 2006.

Consequently, the allegation made by the Applicants according to which François Compaore was never heard by the court is unfounded. The Respondent State cannot therefore be accused of having obstructed justice in that regard.

v. The issue of involvement of civil parties in the procedure⁶

136. Counsel for the Applicants explained in response to a question from the Court at the Public Hearing on 29 November 2013, and or purposes of fairness of the proceedings, that between 2001 and 2006, the parties claiming damages had not been informed about the proceedings, were not involved in investigations before 2006, and had never been party to any adversarial procedures involving them.

137. In its letter dated 18 December 2013 forwarding the documents requested by the Court at the Public Hearing of 29 November 2013, the Respondent State explained that under the Burkina Faso Criminal Procedure Code [Articles 111 and 118], adversarial procedures “were required only if the Investigating Magistrate believes that they may lead to the discovery of the truth”. It added that “in the instant case, although the Investigating Magistrate was of the view that confrontation between Marcel Kafando (the suspect) and Jean Racine Yameogo (the witness) was necessary for the truth to be established, he did not however deem it necessary to confront the suspect with the parties in the civil suit as they were all beneficiaries and were not eye witnesses to the crime”. It concludes by pleading that in any case “the Investigating Magistrate never refused to organize adversarial proceedings between the

6 In the civil law system, a civil party is an individual who has personally suffered damages directly caused by an offence, who brings against the author of such damage a civil action in reparation for the harm caused by the offence (Legal vocabulary, Gérard Cornu ed., 2009, p 664).

suspect and the parties in the civil suit, which proceedings could have been sought by the Applicants, yet neither they nor their numerous Counsel did so”.

138. Examination of the documents produced by the Respondent, as earlier indicated, does show, on the one hand, that no adversarial procedure had occurred between the suspect and the civil suit parties, and on the other, that the civil parties were heard by the Investigating Magistrate on 22 February 2006 and 4 May 2006, respectively.

139. On the hearing of the civil parties, even if they had been heard towards the end of the procedure, the hearings actually took place before the Magistrate rendered his decision and it is this latter consideration that matters when looking at the issue of fairness of the procedure. Consequently, it is the opinion of the Court that the Respondent cannot be accused of violating the principle of fair trial in this regard.

140. On the absence of adversarial procedure between the suspect and the civil parties, it lies with the national judge to determine whether this is necessary and useful based on the specific circumstances of each case. In the instant case, the Applicants have not shown whether adversarial procedure was useful and necessary and have not provided any proof of a request for that purpose to which the Investigating Magistrate had failed to respond. Consequently, the Respondent cannot be accused of violating the principle of fair trial in this specific area.

vi. The issue of the despatch with which the Respondent provided remedy in the instant case

141. In their submission, the Applicants assert, citing the jurisprudence of the African Commission on Human and Peoples’ Rights, that “...Burkina Faso was bound by Article 7 of the Charter, to guarantee available, efficient, accessible and satisfactory remedies for violation of the rights which it guarantees”.

142. As noted earlier, the Applicants maintain that the Respondent State had, *inter alia*, the obligation to carry out investigations on those responsible for the murder of Norbert Zongo and his companions and to try them. Instead of doing so, however, the State chose to obstruct efforts in that regard by the families of the victims.

143. In their reply to the preliminary objections, the Applicants maintain that “the ineffectiveness of the remedies initiated was compounded by the shortcomings on the part of the national authorities who did nothing to ensure that the assassins of Norbert Zongo and his companions were actually arrested”.

144. In a letter dated 28 April 2013 filed in Court following a request by the Court at the Public Hearing of 7 and 8 March 2013, the Applicants again explained that “ ... it was only ... on 4 May 2006, that the same Investigating Magistrate heard the widow of Norbert Zongo as part of the civil suit for the first time”.

145. At the Public Hearing of 29 November 2013, the Applicants maintained that when murder is committed in the territory of a State, the

State in question has the responsibility to ensure that investigations are conducted. Such investigation must be independent, efficient and capable of apportioning responsibility for the murder. It must be conducted with reasonable speed, accessible and appropriate, particularly for the victims and for the sake of protection of the society. Taking issues with the absence of an independent investigation and the length of the procedure, the Applicants submitted that none of those responsible was identified, that of the six suspects identified by the enquiry, five were never prosecuted; and the remedies were not adequate for the victims and for protection of the society.

146. In its response on the merits, the Respondent State, after criticising the Applicants for being vague on the question of the right to seek recourse to a judge which was breached in this case, expressed the view that what “the State of Burkina Faso is being criticized for seems to boil down to its violating the right of everyone to be heard by competent national courts within reasonable time”.

147. As noted earlier, the Respondent maintained that it could not be held responsible for laxity or inaction on the part of its political, administrative and judicial organs.

It further asserted that “the rights of the Applicants had been brought before competent, impartial and independent national courts, and this, within reasonable time and that they had benefited from an effective and efficient remedy”.

148. At the Public Hearing of 28 November 2013, the Respondent State noted that the Independent Commission of Enquiry chaired by the representative of the *MBDHP*, which is party to the instant case, concentrated on a single approach, which was to carry out investigations within Government circles, whereas, there were other avenues that could have been explored, such as the conflicts between Norbert Zongo and livestock graziers and poachers in his ranch, or the fact that he had been poisoned a few weeks prior to his assassination.

149. At the Public Hearing of 29 November 2013, a Counsel for the Respondent, in replying to a question from the Court as to why the Burkinabe authorities had not explored the other avenues of investigation raised in the ICE report, stated that the Investigating Magistrate had relied on the findings of the Independent Commission of Enquiry which had focused, in a rather biased manner, on the sole target of members of the presidential guard and had failed to identify any poacher, grazier or bandit who could have been investigated- all issues which an Investigating Magistrate could not afford to ignore”.

150. The Respondent is compelled under Article 7 of the Charter, which guarantees the right to have one’s cause heard by competent national courts, to make all necessary efforts to search, prosecute and bring to trial the perpetrators of crimes such as the murder of Norbert Zongo and his companions. The question therefore is, whether the Respondent had fully complied with that obligation, and more specifically, whether it had acted with due diligence.

151. All in all, it must be acknowledged that in the case of Zongo and others, the Respondent had continuously embarked on a number of

actions intended to seek out the suspected assassins, including investigations at the scene of the crime; *post mortem* examinations; forensic evidence; preliminary investigations; referral to an Investigating Magistrate; arrest of a suspect; adversarial procedure between the suspect and a prosecution witness; hearing of witnesses; hearing of civil parties; and trial of the suspect.

152. However, a review of the case does reveal that there had been discrepancies in the treatment of the matter by the local courts.

Firstly, from the Court's own findings, it is clear that the first case of discrepancy lay in the protracted duration of the proceedings, which stood at slightly less than eight years, given the fact that the initial investigations started on the day of the assassination in December 1998 right up to the Order to terminate proceedings in August 2006. The Respondent State was unable to convince the Court that that duration was reasonable in the peculiar circumstances surrounding the matter, and given the possible resources available to the State to deal with such a matter. Due diligence obliges the State concerned to act and react with the dispatch required to ensure the effectiveness of available remedies.

153. The second area of laxity lies in the fact that the authorities concerned never sought to explore other areas of investigation particularly those mentioned by the Independent Commission of Enquiry in May 1999, such as the conflicts between Norbert Zongo and the poachers and graziers in his ranch or the fact of his poisoning shortly before his assassination.

In that regard, the Respondent's explanation that failure on the part of the authorities to explore other areas of investigation due to the fact that the findings of the said Commission had excluded the aforesaid avenues of investigation (*supra*, paragraph 149), is not convincing. Firstly, the work of the Commission, and hence possibly its own shortcomings, call to question the international responsibility of the Respondent State, as it is the State that set up the Commission, which was operating on its behalf. Moreover, the Respondent State had failed to establish that under Burkinabe law or other legal instruments creating and organizing the ICE, the Police and the Ministry of Justice of that country were bound by the findings of the Commission. On the contrary, under the Burkinabe Criminal Procedure Code, the said institutions, particularly the Ministry of Justice, does have extensive powers of investigation. As a matter of fact, Article 40 of the Code clearly provides that the "Prosecutor of Faso shall direct or cause to be directed that all the necessary action be taken to seek out and prosecute any offences against the Penal Code".

154. The third weakness is the late hearing of the suit in respect of damages. As stated earlier, it was only in May 2006, close to eight years after the incident and only a few months before the end of court proceedings, that the civil suit was heard for the first time by the Investigating Magistrate (*supra*, paragraph 102), whereas the civil parties had complained and sought damages as early as 6 January 1999 (*supra*, paragraph 16). Diligence would certainly have required

that they be heard at the early stages of the investigation regardless of the outcome.

155. The fourth weakness in this case is that after the Order to terminate proceedings against the principal accused in August 2006, the Respondent State pursued no further investigation, as if the matter had come to an end, whereas no suspect had been placed on trial and found guilty, and whereas in its own words, public action on the case would expire only in 2016. Due diligence would also have required that the Respondent should not abandon the search for those who murdered Norbert Zongo and his companions.

156. In view of all the aforementioned discrepancies, the Court finds that the Respondent had not acted with due diligence in seeking out, prosecuting and placing on trial those responsible for the murder of Norbert Zongo and his three companions. The Court notes, in consequence, that in that aspect, the Respondent State had violated the rights of the Applicants to have their case heard by competent national courts as guaranteed under Article 7 of the Charter.

157. The Court, having made the finding that the Respondent has violated Article 7 of the Charter, does not need to consider the allegations made in the same vein by the Applicants pursuant to Articles 2(3) and 14(1) of the ICCPR, or Article 8 of the Universal Declaration of Human Rights.

B. Allegation on the violation of the right to equal protection of the law and to equality before the law

158. The right to equal protection of the law and to equality before the law is guaranteed under Article 3 of the Charter, which states that:

“1. Every individual shall be equal before the law.

2. Every individual shall be entitled to equal protection of the law”.

159. In their Application, the Applicants assert that by failing to undertake an effective investigation to prosecute and sentence those responsible for the assassination of Norbert Zongo, “Burkina Fa so had violated the right ... to equal protection of the law as provided for in paragraph 2, Article 3 of the Charter”.

160. In their response on the merits, the Applicants stated in this regard as follows:

“Because trial has always been a catalyst for and an expression of justice, the right to fair trial has always been considered as a right ‘crucial to the protection of all other basic rights and freedoms’ ... because it allows for effective and *equal* access to justice. In the instant case, neither one nor the other was possible ... ” (Italics added).

161. Referring to a provision of Article 14 of the ICCPR [“All persons shall be equal before the courts and tribunals”], the Applicants maintained that “Burkinabe tribunals did not, in managing the Norbert Zongo case, as in many other cases with serious political overtones, demonstrate the same diligence as they do in criminal matters”.

162. The Applicants complain in particular that Burkinabe justice did not act expeditiously in its treatment of the case of Zongo and others,

whereas it did act and dispose of another contemporary matter- the case of David Ouedraogo -with exemplary swiftness.

After establishing a link on this issue, between the Zongo case and another case where the procedure was equally slow - the case of Thomas Sankara-, the Applicants came to the conclusion that “such practices by Burkinabe courts therefore constituted a violation of the right to equality inherent in Article 7 of the African Charter ... and Article 14(1) of the ICCPR”.

163. At the Public Hearing of 28 November 2013, the Applicants restated that position.

164. At the Public Hearing of 28 November 2013, the Respondent State argued that the Zongo case was more complex and could not be compared to that of David Ouedraogo because in the latter case, those responsible for the assassination were known and preliminary investigations were not required to identify them. The Respondent insisted on this point by declaring that: “...what the Court should note is that these are cases that should not be compared. David Ouedraogo was detained and tortured by people who were well known; he was kept for a period of time with individuals who were known and he died in their hands. Therefore, there was nothing complex in that case, unlike that of Norbert Zongo”.

165. In its 21 June 2013 Ruling, the Court declared itself competent to hear the allegations of violation of the right to equal protection of the law and equality before the law “provided these allegations were directly linked to the allegation of violation of the right to have one’s cause heard by competent national Courts”.

166. All in all, the Applicants contend that by treating the case of Zongo and others far less expeditiously than other cases particularly that of David Ouedraogo, the Respondent had violated the right to equality of individuals before the law in Burkina Faso. It was in response to that contention that the Respondent indicated that the two cases could not be compared in terms of the complexity of the investigations.

167. The Court is of the opinion that the principle of equality before the law, implicit in the principle of equal protection of the law and equality before the law, does not necessarily mean that all cases will have to be disposed of within the same length of time by judicial institutions. The duration of the treatment of a matter could indeed depend on the specific circumstances of each matter, particularly its relative complexity.

168. In the instant case, the Court notes that in view of the elements contained in the case file, the case of Zongo and others and that of the David Ouedraogo were not of the same complexity and could not have been disposed of within the same length of time.

169. Consequently, as far as the treatment of the Zongo and others case is concerned, the Respondent has not violated the right of Applicants to equality before the law as set forth in Article 3 of the Charter.

170. In substance, Article 14(1) of the ICCPR guarantees in the same manner as Article 3 of the Charter the right to equality, especially before

Courts and tribunals. The Court having ruled on the alleged violation in relation to Article 3 of the Charter, does not deem it necessary to make a ruling on the same allegation in relation to Article 14(1) of the ICCPR.

C. Allegation of violation of the obligation to respect the rights of journalists and the right to freedom of expression

171. The obligation to respect the rights of journalists as far as this matter is concerned, is enshrined in Article 66(2)(c) of the Revised ECOWAS Treaty, which provides that:

“2 [... Member States of ECOWAS] undertake (c) to ensure respect for the rights of journalists”.

Regarding the right to freedom of expression, this right is guaranteed under Article 9 of the Charter and Article 19(2) of the ICCPR.

According to Article 9 of the Charter:

- “1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law”.

For its part, Article 19(2) of the ICCPR provides that:

- “2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”.

172. In their Application, the Applicants allege violation of all the aforementioned provisions. They state that “in more specific terms, the murder of Norbert Zongo and his companions is a violation of paragraph 2(c) of Article 66 of the Revised ECOWAS Treaty, according to which Zongo had the right to be protected against unlawful acts of aggression, resulting from, or relating to the free exercise of his profession as a journalist and to benefit from effective remedies in case such rights were violated”.

173. They conclude by maintaining that, “the passive attitude of Burkina Faso in relation to the horrible assassination of which Norbert Zongo, an active journalist, was victim, and the fact that the State had refrained from ensuring, failed and refused to ensure that those responsible were identified and held accountable for their acts, is a source of anguish in exercising the right to freedom of expression in this country and the rights of its citizens to participate effectively in their own governance”.

174. In their reply on the merits of the matter, the Applicants first insist on “the dual nature of freedom of expression which is both the individual right of a person (...) and the right of the public to receive information and ideas ...” They went on to stress that the State is accountable for two types of obligations, namely, the obligation to refrain from any interference which may affect the freedom of speech of journalists, and the positive obligation to protect the free flow of information and ideas.

175. In the instant case, the Applicants argue that Late Norbert Zongo had complained on several occasions in his Articles, of being threatened and of attempts to abduct him. The Respondent ought to

have protected him by carrying out an effective investigation of the acts of violence about which he was complaining.

176. At the Public Hearing of 28 November 2013, the Applicants again underscored the fact that freedom of speech implied that media professionals could work without fear, apprehension or intimidation, thus enabling the public to access information and the truth.

The Applicants concluded that the State did not only have to prevent attacks against journalists in the exercise of their duties, but had to strive to quickly find those responsible for such attacks whenever they occur; and that in view of the impunity that those responsible for the assassination of Norbert Zongo had employed, the Respondent State had violated his right as a journalist, owner of a media outlet, and as an advocate of the truth, as well as his right to disseminate information and the truth.

177. In its submission on the merits, the Respondent citing various clauses of the Constitution and the Information Code of Burkina Faso, noted that “no journalist has ever been prevented from exercising his profession since the adoption of the Constitution of 2 June 1991, except where they contravened the ethics of the profession as set out in the Information Code”; that Norbert Zongo ‘whose pen was rather sharp against the Government, had never been subjected to any disciplinary or legal action’; and that the Weekly *L’Independant* of which he was Director of Publication, and its newspapers had never been closed down or seized by Government officials”.

178. The Respondent concluded that, in view of the foregoing observations, the allegations, specifically those regarding violations of Article 9(1) and (2) of the Charter, Article 19(2) of the ICCPR and Article 66(2)(c) of the Revised ECOWAS Treaty, were unfounded.

179. At the Public Hearing of 28 November 2013, Respondent State further argues that since Norbert Zongo had never complained to the courts about the death threats against him, he was not entitled to special protection by the State, given the principle of equality of all citizens before the law.

180. The Court is of the view that in the instant case, Article 66(2)(c) of the Revised ECOWAS Treaty and Article 9 of the Charter on the alleged violation should be read jointly. Whereas the first deals with the rights of journalists in general, the second guarantees their freedom of expression in particular. Against this background, according to the allegations made by the Applicants, the rights of journalists which should be guaranteed by the Respondent State are specifically the right to life and the right to freedom of expression.

181. Regarding the right to life, the Applicants allege that the Respondent had failed in its obligation to prevent and to protect Norbert Zongo against the death threats which he stated he had received.

182. However, the Court had, in its Ruling of 21 June 2013 on the preliminary objections, already recognized that it does not have jurisdiction *rationae temporis* to hear the allegation of “violation of the right to life based on the assassination on 13 December 1988 of Norbert Zongo, Abdoulaye Nikiema, known as Ablasse, Ernest Zongo

and Blaise Ilboudou (*supra*, paragraph 32). Consequently, the Court will not examine the said allegation.

183. Regarding allegation of violation of the right to freedom of expression the Court in its Ruling of 21 June 2013, had declared that it had jurisdiction to hear the case, on condition that it is directly linked “to the allegation of violation of the right (of everyone) to have his cause heard by competent national courts”.

184. In the instant case, the Applicants maintain essentially in that respect, that the very fact that the Respondent failed to expeditiously and efficiently identify, apprehend and try the assassins of the investigative journalist Norbert Zongo, constitutes a violation of the freedom of expression of journalists in general, given that they run the risk of working under fear, apprehension and intimidation. To this, the Respondent State replies that since 1991, no journalist has been disturbed by the authorities in the exercise of his profession.

185. Viewed from this perspective, the Court observes that the allegation relates to the right to freedom of expression of the media in general (and not that of Norbert Zongo in particular), and that it does not concern the specific rights of individual Applicants in this case, who are not journalists. The Court observes, on the contrary, that such allegation could be of interest to the other Applicants in this case, namely, the Burkinabe Human and Peoples’ Rights Movement.

186. In the circumstances, the Court is of the opinion that even though the Respondent State’s failure to identify and apprehend Norbert Zongo’s assassins could potentially cause fear and anxiety in media circles, in the instant case, however, the Applicants have not shown proof that the Burkinabe media had not been able to exercise freedom of expression.

187. In the circumstances, the Respondent State cannot be accused of directly violating the freedom of expression of journalists as guaranteed under Article 9 of the Charter, read together with Article 66(2)(c) of the Revised ECOWAS Treaty, merely because it had not acted with diligence and efficiency in identifying and bringing to trial the assassins of Norbert Zongo.

188. The Court, having thus decided on the alleged violation of the freedom of expression on the basis of Article 9 of the Charter, it does not find necessary to rule on the same allegation on the basis of Article 19(2) of the ICCPR.

D. Allegation of violation of the obligation to guarantee respect for human rights

189. The obligation to guarantee respect for human rights is contained in Article 1 of the Charter which provides as follows:

“The Member States of the Organisation of the African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them”.

190. In their Application, the Applicants allege that the State had violated its obligation to protect human rights as provided for in Article 1 of the Charter.

They thus assert that applied to the instant case, this Article would imply that Burkina Faso was bound, under Article 7 of the Charter, to guarantee remedies in case of violation of the rights that it guarantees.

The Applicants argue, relying on the jurisprudence of the African Commission, that the obligation set forth in Article 1 of the Charter is one of result and that the State had the choice as to the means to deploy, as far as legislative or other measures are concerned.

191. At the Public Hearing of 29 November 2013, the Applicants underscored that “when a State ratifies a Treaty, it commits itself to ensure that the provisions of the Treaty are domesticated in its national laws and, by so doing, the State conforms to the prescriptions of the Treaty in question”. The Applicants maintained that the Respondent State had violated this obligation because the legislative measures it had adopted, particularly *via* the Criminal Procedure Code, were at variance, notably with Article 7 of the Charter. The Applicants referred once again to the provisions according to which the Prosecutor could receive instructions from the Minister of Justice, or, according to which the Investigating Magistrate was not bound to conduct adversarial procedure during investigations.

192. In its Response on the merits of the matter, the Respondent State started by observing that the Applicants “had concluded that Burkina Faso had violated Article 1 of the African Charter, without stating which “legislative or other measures” had not been adopted by Burkina Faso which made it unable to “guarantee available, effective, accessible and satisfactory remedies”.

The Respondent State rejects the allegation and argues, on the contrary, that it had not only ratified key international human rights conventions, but had also at domestic level adopted the Constitution of 2 June 1991 and a long list of legislative instruments and regulations. The Respondent then concluded that: “... in claiming that the State of Burkina Faso had violated Article 1 of the African Charter, thereby leaving the impression that no internal measures had been taken by the State to ensure protection of the human rights and liberties guaranteed by the said Charter, the Applicants were making a completely baseless and gratuitous assertion”.

193. At the Public Hearing of 28 November 2013, the Respondent State reiterated this position and asked the other party to at least indicate the

measures which the Respondent State was yet to take to comply with Article 1 of the Charter.

194. In its Ruling of 21 June 2013, the Court recognised its competence to hear the allegation of violation of human rights by the Respondent State, “in as much as the said allegations were directly linked to the allegation of violation of the right of Applicants to have their cause heard by competent national courts”. (*supra*, paragraph 32).

195. In that regard, the Applicants allege the violation of Article 1 of the Charter in the sense that the Respondent State had not taken the necessary steps to ensure respect for the right to have their cause heard by competent national courts, as guaranteed by Article 7 of the Charter, and because some measures it had adopted were at variance with the same Article 7. For its part, the Respondent argued that it had adopted all the constitutional, legislative and regulatory measures required in its judicial system to ensure compliance with the provisions of Article 7 of the Charter.

i. The issue of legislative measures

196. On the allegation of violation by the Respondent State of its obligation to take legislative measures, the argument of the parties centred on compliance with the Charter, of the legislative or regulatory measures adopted by the Respondent to guarantee the rights of all persons for their cause to be heard by competent national courts, pursuant to Article 7 of the Charter.

197. In that regard, the Court observes, from the records of the case, that the Respondent had adopted a number of legal measures to guarantee the right to have one’s cause heard by an independent and impartial judge. As mentioned earlier, the Constitution of Burkina Faso, in its Articles 129 and 130, does guarantee the independence of the judiciary (*supra*, paragraph 125). Furthermore, Article 125 of this same Constitution holds up the judiciary as the custodian of the rights and freedoms which it defines. It is therefore clear that the Respondent State cannot be blamed for not having taken such measures, and for having violated Article 1 of the Charter with respect to legislative measures.

ii. The issue of other measures other than legislative measures

198. On the allegation of violation by the Respondent State of its obligation to take other measures in terms of Article 1 of the Charter, the argument between the parties centered on whether or not, by failing to seek out, prosecute and put to trial the assassins of Norbert Zongo and his companions, the Respondent failed in its obligation to take measures, other than legislative, to ensure respect for the rights of the Applicants’ cause to be heard by competent national courts.

199. In this regard, the Court has already found that the Respondent State violated Article 7 of the Charter, as it had not shown due diligence to seek out, investigate, prosecute and put to trial the killers of Norbert Zongo and his companions (*supra*, paragraph 156). The Court notes

that, by so doing, the Respondent State simultaneously violated Article 1 of the Charter, by failing to take appropriate legal measures to guarantee respect for the rights of the Applicants in terms of Article 7 of the Charter.

E. The issue of damages

200. In their written submissions, the Applicants prayed the Court to hold the Respondent liable to a series of damages to be quantified by the Court itself (*supra*, paragraph 45).

201. In its Response on the merits and during the Public Hearing of 28 and 29 November 2014, the Respondent State, for its part, prayed the Court to reject all the claims for damages filed by the Applicants (*supra*, paragraph 45).

202. Before taking a decision on the prayers in respect of damages, the Court had opted, in Application of Rule 63 of its Rules, to first rule on the various allegations of violation of the Charter made by the Applicants.

The Court, having now ruled on all said allegations, shall decide on the damages at a later stage in the proceedings, after having heard the parties more extensively.

203. *In view of the foregoing,*

THE COURT, unanimously

1. *Declares that it has jurisdiction* to hear the Application, except in relation to the allegation of violation of the right to life;

2. *Overrules* the Respondent's objection to the admissibility of the Application on the grounds of failure to exhaust local remedies; and *declares* the Application admissible;

3. *Finds* that the Respondent State has violated Article 7 of the Charter as well as Article 1 of the Charter, concerning the obligation to adopt measures, other than legislative measures;

4. *Finds that the Respondent has not violated Article 3 of the Charter, and that it has not violated Article 1 of the Charter concerning the obligation to adopt legislative measures;*

By majority of five to four, Judges Gerard NIYUNGEKO, Fatsah OUGUERGOUZ, El Hadji GUISSSE and Kimelabalou ABA dissenting:

5. *Finds* that the Respondent State has violated Article 9(2) of the Charter, read together with Article 66(2)(c) of the Revised ECOWAS Treaty;

Unanimously:

6. *Defers* its ruling on the issue of damages;

7. *Orders* the Applicants to submit to the Court their brief on damages within thirty days from the date of this ruling; and also *Orders* the Respondent State to submit to the Court its response on the damages within thirty days after receiving the response of the Applicants.

Separate opinion/joint declaration: NIYUNGEKO, OUGUERGOUZ, GUISSÉ and ABA

1. In paragraph 5 of the operative part of this judgment, the Court finds that “the Respondent State has violated Article 9(2) of the Charter, read together with Article 66(2)(c) of the Revised ECOW AS Treaty”.

2. The Court indeed considered that “the Respondent State’s failure to identify and send for trial the assassins of Norbert Zongo has provoked fear and anxiety within the media circles” (paragraph 186), and that for this reason, “the Respondent State has violated the right to freedom of expression of journalists” as guaranteed by the two above-mentioned provisions (paragraph 187 of the judgment).

3. We do admit that this failure by the Respondent State could have indeed generated a certain degree of fear and anxiety within the media profession in general, and somehow produced an “intimidating effect” on the freedom of expression of journalists (see paragraphs 173 and 176).

4. We are also of the view that when it comes to facts of a “psychological” nature, which are generally difficult to prove, the Court did not have to insist on getting convincing evidence. We are in favour, especially in the area of the protection of human rights, of an adjustment of the standard of proof relating to the establishment of the violation of certain rights guaranteed under the Charter or any other applicable legal instruments, and in particular, regarding evidence of the possible “intimidating effect” of a behaviour by a Respondent State which would be contrary to the international obligation.

5. Besides, in international judicial practice, it is generally acknowledged that, when circumstances which are not attributable to a party are such that evidence required from it is difficult or impossible to obtain, the Judge may be inclined to be convinced more easily than in normal circumstances.

6. In the instant case, however, the issue is that the Applicants content themselves with making a general allegation, without substantiating it with precise facts which could concretely reflect this fear and anxiety and thus establish *prima facie*, the merits of the said allegation. While the Respondent State argued that the treatment of the Zongo case at the national level had no negative impact whatsoever on the freedom of expression of journalists (paragraph 177), the Applicants, on their part, did not submit the slightest evidence to move the Court to make a determination on the existence of such an “intimidating effect” which could affect the rights guaranteed under the above-mentioned provisions.

They gave no indication on the fact that, since the beginning of the Zongo case, the media in Burkina Faso would no longer have been able to express itself freely. In the absence of precise facts or a minimum of evidence, and considering that the Respondent State challenged the allegation, the Court being a judicial body, ought not to have concluded in favour of such a violation.

7. It is for this reason that we could not subscribe to the decision of the majority of the Court in paragraph 5 of the operative part of this judgment, as quoted above.

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258

Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso

Judgment on reparations, 5 June 2015. Done in English and French, the French text being authoritative.

This judgment dealt with who should receive damages in a case of extra-judicial killings and how much should be paid in damages and for expenses related to bringing the case.

Judges: RAMADHANI, THOMPSON, NIYUNGEKO, OUGUERGOUZ, TAMBALA, ORE, GUISSÉ, KIOKO, BEN ACHOUR, BOSSA and MATUSSE

Reparations (close relatives of direct victim, 46-50; evidence to show relationship to direct victim, 54; moral damage, 55-56; equity in determining moral damage, 60-62; moral damages to legal entity, 65-67; normal costs for NGO activities, 71-72; reimbursement of lawyers' fees, 79-82; expenses to attend hearings at the African Court, 91-93; measures of satisfaction, 98-99, guarantees of non-repetition, 106-109)

I. Subject of the Application

1. In its earlier Judgement of 28 March 2014 on this matter, after finding that the Respondent State had violated Article 1 of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter"), Articles 7 and 9(2) of the Charter, the latter read jointly with Article 66(2)(c) of the Revised Treaty of the Economic Community of West African States (ECOWAS), the Court decided as follows on damages:

- "6. Defers its ruling on the issue of damages;
7. Orders the Applicants to submit to the Court their Brief on damages within thirty days from the date of this ruling; and also orders the Respondent State to submit to the Court its response on the damages within thirty days after receiving the response of the Applicants".

2. The present Judgment is therefore in respect of the claims for reparation filed by the Applicants pursuant to the afore-cited Judgment of the Court. According to the Applicants, the claims concern, firstly, the violation of Article 7 of the Charter by the Respondent State, as it had shown no diligence to apprehend, investigate, prosecute and put to trial those responsible for the murder of Norbert Zongo and his three companions.

The claims also relate to the violation of Article 9(2) of the Charter read jointly with Article 66(c) of the Revised ECOWAS Treaty, to wit, the violation of the right of Burkinabé journalists to freedom of expression, in the sense that “the Respondent State’s failure to find and put to trial the assassins of Norbert Zongo caused fear and anxiety in [local] media circles”. It is to be noted, however, that no argument was advanced and no specific Application for reparation filed in furtherance of the Brief on Reparations for the aforementioned violation of freedom of expression. The Court will therefore not make any ruling on reparation in this regard.

II. Short background of the matter¹

3. The facts of the matter date back to the assassination, on 13 December 1998, of Norbert Zongo, an investigative journalist, and his companions. Messrs Abdoulaye Nikiéma alias Ablassé and Blaise Ilboudo were collaborators of Mr Zongo, and Ernest Zongo was his younger brother.

4. In their initial Application dated 10 December 2011, the Applicants alleged that “the murder of the four persons on 13 December 1998 ... [was] connected with investigations that Norbert Zongo was conducting on various political, economic and social scandals in Burkina Faso during that period, notably the investigation of the death of David Ouedraogo, the chauffeur of François Compaore, brother of the President of Faso and Adviser at the Presidency of the Republic”.

5. After the Police and the Office of the Public Prosecutor in Burkina Faso had carried out investigations into the matter of the quadruple assassination, one of the suspects identified was indicted in February 2001.

6. In July 2006, an Order was issued by the Investigating Magistrate of Ouagadougou District Court dismissing the case in favour of the indicted person for lack of evidence.

7. In August 2006, an appeal filed against the Order by Norbert Zongo’s family at the indictment chamber of the Ouagadougou Court of Appeal, was thrown out by that Court, and the dismissal for lack of evidence upheld.

8. Following these developments, the Applicants alleged before this Court the Concurrent violation of the provisions of various international human rights instruments to which Burkina Faso is a party, namely:

- (i) The Charter: Article 1 (obligation to adopt legislative or other measures to give effect to the rights enshrined in the Charter); Article 3 (equality before the law and equal protection of the law); Article 4 (the right to life); Article 7 (the right for one’s cause to be heard by competent national courts); and Article 9 (the right to express and disseminate one’s opinion);

¹ For details on the facts and historical development of the case, see the Judgment of the Court dated 28 March 2014, paras 2 to 19.

- (ii) The International Covenant on Civil and Political Rights: Article 2(3) (the right to effective remedy in case of violation of rights); Article 6(1) (the inherent right to life); Article 14 (the right to have one's cause heard by a competent, independent and impartial tribunal); and Article 19(2) (right to freedom of expression);
- (iii) The Revised ECOWAS Treaty: Article 66.2(c) (obligation to ensure respect for the rights of journalists);
- (iv) The Universal Declaration of Human Rights: Article 8 (the right to an effective remedy by the competent national tribunals in case of violation of rights).

9. The Respondent State having raised various objections regarding the Court's jurisdiction and admissibility of the Application, the Court first decided on the said objections in its Ruling of 21 June 2013.²

10. As earlier indicated, the Court, in the above mentioned Judgment of 28 March 2014, found that the Respondent State violated certain provisions of the Charter (*supra*, para 1).

III. Summary of the procedure before the Court

11. After requesting and obtaining from the Court an extension of the time limit, the Applicants transmitted to the Registry of the Court their Brief on Reparations by e-mail dated 7 June 2014, received at the Registry on 9 June 2014. Attached to the Brief were two presidential decrees dated 9 June 1999 and 11 June 1999, respectively, offering social welfare cover and special allowances, notably for the beneficiaries and direct descendants of Norbert Zongo, Ernest Yembi Zongo, Blaise Ilboudo and Ablassé.

12. By e-mail dated 2 July 2014, received at the Court Registry on the same date, the Applicants submitted to the Registry a corrigendum to the Brief on Reparations. The following documents in particular were attached to the said corrigendum: a number of civil status documents (birth certificates, marriage certificates, identification cards, certificates of identity, deeds of filiation, life certificates, certificates of parental authority, nationality certificates, etc.) aimed at proving the beneficiaries' relation of kinship with the victims of the assassinations of 13 December 1998; the Indicative Scale of Costs and Fees for Lawyers of Burkina Faso, dated 20 December 2003 (excerpt); fees agreements; ministerial order of 13 July 1999 on special allowance particularly for the individual Applicants in this matter; letters from some Applicants declining the special allowance offer made by the Respondent State; Arusha hotel bills and air tickets for the purpose of the public hearings before the Court; land transport and visa fees receipts.

13. After requesting and obtaining from the Court an extension of the time limit, the Respondent State submitted to the Registry its Brief in Response to the Applicants' Reparations claim by letter dated 6 October 2014, received in the Registry on 20 October 2014.

2 See the Ruling of 21 June 2013, para 125.

14. By letter dated 17 November 2014, the Applicants in response to the Respondent State's Brief, notified the Court that they had no observations to make on the said Brief except that they refuted the allegation made by the Respondent State that it contributed financially and yearly to the funding of the functioning of the Burkinabe Movement on Human and Peoples' Rights just like other associations.

15. At its Thirty-Sixth Ordinary Session held in Arusha, Tanzania, from 9 to 27 March 2015, the Court declared the proceedings closed and decided to commence deliberation on the matter.

16. By letter dated 30 April 2015, the Registry requested the Applicants to forward to the Court the complete version of a document, the excerpt of which they had earlier filed (Indicative Scale of Costs and Fees of Lawyers of Burkina Faso), and to submit a complete set of the supporting documents which they had submitted to the Court in respect of the transport fares and sojourn expenses incurred by the Applicants' representatives in Arusha. By letter dated 14 May 2015, received at the Registry of the Court on 2 June 2015, the Applicants submitted the Indicative Scale of Fees as requested, as well as a set of supporting materials which, however, turned out to be virtually the same as those initially submitted. For its part, the Respondent State, to which the Registry's letter had been copied, forwarded a copy of the Indicative Scale by e-mail, received at the Registry on 28 May 2015 indicating, however, that it was incumbent on the Applicants to furnish the supporting materials requested.

IV. Prayers of the parties

17. During the proceedings, the following prayers were presented by the Parties;

On behalf of the Applicants, in the Brief:

"21. Mindful of the abovementioned points of law and of facts, and without any prejudice to elements of fact and of law and evidence which may be adduced subsequently, as well as the right to complement and amend the present Brief, the beneficiaries of late Norbert Zongo, Abdoulaye alias Ablassé Nikiéma, Ernest Zongo and Blaise Ilboudo and the Burkinabe Movement on Human and Peoples' Rights (*MBDHP*) [pray] your Court to order Burkina Faso to grant them the sum of three hundred and forty-nine million, nine hundred and thirty-four thousand, seven hundred and five (349,934,705) CFA F for reparation for the prejudice caused by the violation of the rights which it acknowledged [as guilty] in the case of the assassination of journalist Norbert Zongo and his companions".

in their Corrigendum:

"9. Based on the facts and law mentioned above and without prejudice to the elements of facts and of law and evidence which could subsequently be presented as well as the right to supplement and amend the present document, the beneficiaries of the late Norbert Zongo, Abdoulaye alias Ablassé Nikiéma, Ernest Zongo and Blaise Ilboudo and the Burkinabe Human and Peoples' Rights Movement (*MBDHP*) [pray] the Court to order Burkina Faso to grant them the sum of four hundred and twenty-four million two hundred and seventy-seven thousand two hundred and five (424,277,205) CFA F as reparation for damages caused by the violation of

the rights for which they were found guilty in the matter of the assassination of journalist Norbert Zongo and his companions.”

On behalf of the Respondent State, in the Brief in Reply:

“71. Based on the reasons mentioned above, the State of Burkina Faso respectfully prays the Court to;

- Rule that the Applicants have not produced or have produced insufficient documents to justify their status and identity; and have thus not established proof of their close or filial relation to the direct victims who are late Norbert Zongo, Ernest Yembi Zongo, Blaise Ilboudo and Abdoulaye Nikiéma alias Ablassé;

Thus, decide that they do not have the status of indirect victims and cannot claim any reparation whatsoever;

- Dismiss the request of the Burkinabe Human and Peoples’ Rights Movement (*MBDHP*) for the payment of the sum of 45,734,705 CFA F, as groundless;
- In the alternative, uphold the payment of a symbolic 1 Franc as reparation for moral prejudice:
- State that the fees of the Applicants’ lawyers are not specific or general damages and consequently throw them out;

Alternatively,

- State that the amounts requested as lawyers’ fees are exorbitant and reduce the said amount to a total of 20,000,000 CFA F, which breaks down to 5,000,000 CFA F each per family of the indirect victims;
- Lastly, regarding transport and sojourn costs in Arusha, Tanzania, estimated by the indirect victims and their Counsel at 6,542,500 CFA F, the State of Burkina Faso leaves it to the very wise appraisal of the Court.”

18. It is apparent, on the whole, that the Applicants are claiming damages for the prejudice they suffered; reimbursement of the costs and expenses they incurred; and at the same time, asking for measures of satisfaction and guarantees of non-repetition.

The Court will now consider these main prayers one after the other.

V. Claims of damages

19. Before considering specific claims for compensation, the Court would first like to make a number of preliminary observations of a general nature.

A. Preliminary observations

20. The Court recalls, firstly, that under international law, a country found guilty of an international crime is required to make full reparation for the damage caused.

This obligation was stated by the Permanent Court of International Justice in a *dictum* in *The Factory at Chorzów case*, in the following words: “It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure

to apply a convention, and there is no necessity for this to be stated in the convention itself.”³

21. This statement was subsequently put in the following words by Article 31(1) of Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission (ILC) and submitted to the United Nations General Assembly in 2001: “1. The responsible State is under the obligation to make full reparation for the injury caused by the internationally wrongful act”.⁴

22. In the context of the African human rights protection system, this principle is reflected in Article 27(1) of the 10 June 1998 Protocol establishing this Court, 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 fair compensation or reparation.”

23. In the instant case, the Court having found in its Judgment of 28 March 2014 above-cited that there have been violations of the Charter by the Respondent State, this State is liable to make full reparation for the prejudice caused to the Applicants.

24. The Court would further like to recall that, in accordance with international law, for reparation to accrue, there must be a causal link between the wrongful act that has been established and the alleged prejudice. On that score, Article 31(2) of the Draft Articles on Responsibility of States mentioned above indeed refers to a “prejudice ... resulting from an internationally wrongful act by a State”.⁵

25. In the instant case, therefore, it is only damages resulting from identified wrongful acts that the Court will take into consideration.

26. The Court would further like to note that, according to international law, both material and moral damages have to be repaired. In terms of Article 31(2) of the Draft Articles on Responsibility of States mentioned above: “Injury includes any damage, whether material or moral ...”⁶

27. According to *Dictionnaire de droit international public*, material damage is “one that affects economic or material interest, that is, interest which can immediately be assessed in monetary terms”.⁷ As for

3 PCIJ: *The Factory at Chorzów* (Jurisdiction) Judgment of 26 July 1927, Series A, No 9 (1927) p 21,

See also: *Idem* (Merits) Judgment of 13 September 1928, Series A No 7, p 29.

4 *Yearbook of the International Law Commission* (2001) Vol. II (2); The UN General Assembly took note of the Draft Articles by its resolution 56/83 of 12 December 2001.

5 *Ibidem*. See also: IACHR: *Ticona Estrada and Others v Bolivia* (Merits, Reparations and Costs) Judgment of 27 November 2008, para 110: “The reparations must have a causal link with the facts of the case, the alleged violations, the proven damages, as well as with the measures requested to repair the resulting damages. Therefore, the Court must observe such coincidence in order to adjudge and declare according to law.”

6 *Yearbook of the International Law Commission* 2001, Vol II (2) p 28.

7 *Dictionnaire de droit international public* Jean Salmon (ed) Bruxelles, Bruylant (2001) p 361.

moral damage, it is defined as one that affects the reputation, sentiments or affection of a natural person who enjoys diplomatic protection or who can be sued”.⁸ (Registry translation).

28. In the instant case, the Applicants are in fact claiming reparations both for the moral prejudice endured by them, and for the material prejudice suffered by the MBDHP; and so, the Court will naturally examine the two types of damages.

29. The Court also notes that reparation may take several forms. According to Article 34 of the ILC Draft Articles above cited: “Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.”⁹

30. Lastly, the Court notes that, in the instant case, the internationally wrongful act generating the international responsibility of the Respondent State is the violation of Article 7 of the Charter because this State “did not act with due diligence in apprehending, prosecuting and putting on trial those responsible for the murder of Norbert Zongo and his three companions”.¹⁰ All these claims for reparation must therefore be considered and assessed in relation to the wrongful act, and only in relation to this act.

31. In light of all the foregoing observations, the Court will now examine the different claims for reparation filed by the Applicants.

B. Claims for reparation of moral prejudice¹¹

i. The Applicants, natural persons

32. In their Brief on Reparations, the Applicants, natural persons, namely: the beneficiaries of Norbert Zongo, Abdoulaye Nikiéma *alias* Ablassé, Ernest Zongo, and Blaise Ilboudo, are claiming reparation essentially on account of the “pain, physical and emotional suffering

⁸ *Ibidem*. See also IACHR: *Cantoral Benavides v Peru* (Reparations and Costs) Judgment of 3 December 2001, para 53: “Non-pecuniary damages might include the pain and suffering caused to the direct victims and to their loved ones, discredit to things that are very important for persons, other adverse consequences that cannot be measured in monetary terms, and disruption of the lifestyle of the victim or his family”.

⁹ *Yearbook of the International Law Commission*, 2001) vol. II (2); See in this respect: United Nations Committee against Torture: *Kepra Urra Guridi v Spain* Decision of 17 May 2005, Communication No 212/2002, para 6.8; *Idem: Ali Ben Salem v Tunisia*, Decision of 7 November 2007, Communication No 269/2005, para 16.8: “The Committee considers that redress should cover all the harm suffered by the victim, including restitution, compensation, rehabilitation of the victim and measures to guarantee that there is no recurrence of the violations, while always bearing in mind the circumstances of each case”. PCIJ: *The Factory at Chorzów* (Merits) Judgment of 13 September 1928, Series A No 17, p 47; IACHR: *Castillo Paez v Peru* (Reparations and Costs) Judgement of 27 November 1998, paras 48 and 51; IACHR: *Barrios Altos, Chumbipuma Aguirre and Others v Peru* (Reparations) Judgment of 30 November 2001, para 25; IACHR: *Caracazo v Venezuela* (Reparations and Costs) Judgment of 29 August 2002, para 77.

¹⁰ Judgment of the Court in this Matter dated 28 March 2014, para 156.

¹¹ The Applicants are referring to “non-pecuniary damages”, whereas in reality, the issue is one of Application for “pecuniary” damages for “moral” prejudice.

and trauma” suffered by them “throughout the duration of the lengthy legal procedure, which is entirely ascribable to Burkinabe authorities.”

33. They pointed out that “to wait for nearly eight years for a hypothetical notification from the court to be able to provide the Judge with information likely to help him follow a line of enquiry to track down the perpetrators of the assassination of one’s relatives” ... “to wait endless hours in front of the chambers of counsel and/or investigating magistrates in search of news about these persons “ ... “and spend sleepless nights ‘brooding over’ the difficulties encountered on a daily basis in the quest for the truth “ have been, for the beneficiaries, “ordeals to which it is almost impossible to ‘attach’ a cost”.

34. They further stated that even if the Judgment of 28 March 2014 may in itself be a form of reparation,

“the length of the judicial proceedings, the suffering and persecutory treatment that they caused, the changes that they brought about in the life of the beneficiaries and, above all, the situation of impunity enjoyed by the perpetrators of the assassination of Norbert Zongo and his companions, - all justify the grant of monetary compensation, based on the principle of equity ... which could give them [the Applicants] the feeling of a fair reparation for the prejudice suffered.”

35. They underscored in this regard that they had categorically refused the social welfare cover in the form of feeding, healthcare and education as well as a special allowance offered by the Respondent State in 1999, because they did not want “any support from the State as long as the perpetrators of the assassination had not been brought to book before Burkinabe courts.

36. On that score, they claim the following amounts based on the list of persons they consider to be beneficiaries from each family, and on a lump sum to be granted to each of them:

- (i) For the beneficiaries of Norbert Zongo, they are claiming 149 million CFA F for 43 beneficiaries; with 25 million CFA F million for his spouse, 10 million for his mother, 1 million for each of the six stepmothers, 15 million for each of the five children, 2 million for each of the sixteen uterine sisters or step-sisters, and 2 million for each of his uterine brothers or step-brothers.¹²
- (ii) The beneficiaries of Ernest Zongo, for their part, are claiming 49 million CFA F for 37 beneficiaries with 10 million for his mother, 1 million for each of the six step -mothers, 2 million for each of the sixteen uterine sisters or step-sisters, and 2 million for each of the fourteen brothers or step-brothers.¹³
- (iii) As for the beneficiaries of Blaise Ilboudo, they are claiming 30 CFA F million for 07 beneficiaries with 10 million for his father, 10 million for his mother, 2 million for each of the two uterine sisters, and 2 million for each of the three uterine brothers.
- (iv) Lastly, the beneficiaries of Abdoulaye Nikiéma alias Ablassé are claiming 29 million CFA F for four beneficiaries with 10 million for his

12 The exact total is in reality 176 million CFA F.

13 It is noteworthy that in the corrigendum to the Brief, the Applicants are claiming the sum of 64 million CFA F for the same beneficiaries with the same individual rates but without any explanation. The exact total in fact stands at 76 million CFA F.

mother, 15 million for his son, and 2 million for each of his two uterine sisters.

37. In its Brief in Response, the Respondent State argues that the individual Applicants have failed to adduce sufficient evidence either in terms of Burkinabe domestic law or in terms of international law to justify their status as beneficiaries which they are claiming to be.

38. The Respondent State first submits that according to Burkinabe Law, the status of widow presupposes that two conditions have been met: marriage (attested by a marriage certificate), and death of the spouse (proven by a death certificate). It points out that these two conditions have been fulfilled in the case of the widow of late Norbert Zongo.

39. It further argues that the status of child or descendant is determined by filiation resulting in the relationship which itself is evidenced by civil status registration. It submits

that, in the instant case, “these conditions are partially met by some interested parties and completely ignored by others”.

40. Lastly, the Respondent State points out that estates are deferred to children and descendants of the deceased, to ascendants, to collateral parents and to surviving spouse in the order established by law; and that in particular, “fathers, mothers, brothers and sisters can only inherit where there were no children or descendants”.

41. It then submits that according to international and community law and, in particular, under the jurisprudence of major international jurisdictions (Human Rights Committee, Inter-American Court, European Court, African Commission and African Court), “only members of the family who have close filial relations with the direct victim are considered as indirect victims with rights to reparation”. It argues however that they have to furnish proof of such relationship.

42. On the whole, the Respondent State noted that, in the instant case, whereas some beneficiaries produced both birth and life certificates, others however submitted only one certificate (birth or life certificate) or identification papers which are no longer valid and are therefore not expected to be used to attest to their identity, because the papers in question have ceased to exist in Burkina Faso for more than ten years; and others still did not provide any document at all.¹⁴ It noted that none of the Applicants’ families has produced a certificate of inheritance, “a basic document in Burkinabe national law that alone attests to the status of inheritor.”

43. In conclusion, the Respondent State submits that, in all, “the Applicants have not justified their status as beneficiaries or indirect victims, and therefore cannot lay claim to any reparation.”

44. The Court notes that what is in discussion here between the parties, are the following issues: the notion of victim who is likely to become beneficiary of reparation and Application of this notion in the instant

¹⁴ On this score, the Respondent State presents a comprehensive Table of the categories of beneficiaries (paras 35 to 40).

case; the type of evidence to adduce to establish the status of victim; and the amount of reparation being claimed. It is also important to clarify the issue of proof of the causal link between the wrongful act and the moral prejudice suffered.

a. The notion of victim and its Application in the instant case

45. Whereas the Applicants have, in all, listed a considerable number of beneficiaries including not only the spouse and the children of the deceased, but also their fathers and/or mothers, their step-mothers and their brothers and sisters, the Respondent State submits that not all of them are beneficiaries, and that in particular, according to Burkinabe law, fathers, mothers, brothers and sisters may inherit only where there are no children and descendants. The Respondent State thus places the victims entitled to reparation on the same footing as the heirs of the deceased persons according to Burkinabe law. Going by this concept, and in the circumstances of this case, only the children and, where applicable, the spouses, would be the victims of the human rights violations established by the Court.

46. The Court is of the opinion that, in international human rights law, the notion of victim must not necessarily be limited to that of the first-line heirs of a deceased person under national law. This notion may indeed encompass not only first-line heirs but also possibly other close relatives of the deceased, who can reasonably be considered as having suffered moral prejudice as a result of the violation of the human rights in question.

47. According to Principle 8 of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* adopted by the UN General Assembly on 16 December 2005:

“For purposes of the present document, ‘victims’ are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term ‘victim’ also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”¹⁵

15 In the same vein: Committee on Human Rights *Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women v Mauritius* Decision of 9 April 1981 Communication 035/1978, para 9.2: “A person can only claim to be a victim in the sense of Article 1 of the Optional Protocol if he or she is actually affected. It is a matter of degree how concretely this requirement should be taken”; ECHR: *Aslakhanova v Russia* Judgment of 18 December 2012, para 133: “... the Applicants, who are close relatives of the disappeared men, must be considered victims of a violation of Article 3 of the Convention, on account of the distress and anguish which they suffered, and continue to suffer, as a result of their inability to ascertain the fate of their family members and of the manner in which their complaints have been dealt with.”

48. Regarding the content of the notion of closest relatives of the direct victim, international jurisprudence is not rigorously uniform. Whereas, for instance, the Inter-American Court of Human Rights has in some cases considered closest relatives as fathers, mothers, children and spouses,¹⁶ it has in most cases also included brothers and sisters of the direct victim.¹⁷

49. In any case, it is apparent that the issue as to whether a given person may be considered as one of the closest relatives entitled to reparation has to be determined on a case-by-case basis, depending on the specific circumstances of each case.

50. In the context and circumstances of the instant case, there is no doubt that many people suffered morally, in varying degrees, from the lack of due diligence on the part of the authorities of the Respondent State in apprehending, prosecuting and putting to trial the perpetrators of the quadruple assassination; but one may reasonably consider that those who acted (directly or by representation) on the very front line in this respect and suffered the most from the situation are the spouses, children, fathers and mothers of the deceased. These are therefore the persons who, in the instant case, may claim the status of victim, and therefore lay claim to reparation, if at least the concrete evidence of this status is duly adduced.¹⁸ Going by this reservation, the persons mentioned in the following paragraphs are entitled to reparation for the moral prejudice suffered:

- (i) As regards the beneficiaries of Norbert Zongo, the victims are Zongo Somda, Geneviève (spouse); Zongo Guy Bonaventure (son); Zongo, Antoine (son); Zongo, Arnold (son); Zongo, Judith (daughter); Zongo Constant (son); and Nana Augustine (mother).
- (ii) As regards the beneficiaries of Ernest Zongo, the victim is Yameogo, Talba Rosalie (mother).
- (iii) As for the beneficiaries of Blaise Ilboudo, the victims are Iloudo, Jonas (father); and Yanogo, Deborah (mother).

16 See for example: IACHR. *Bulacio v Argentina* (Merits, Reparation and Costs), Judgment of 18 September 2003, para 85; IACHR *Chitay Nech and Others v Guatemala* (Preliminary Objections, Merits, Reparations and Costs), Judgement of 25 May 2010, para 220: "... this Tribunal has found that it can declare a violation of the right to physical and moral integrity of the direct next of kin of victims of certain violations of human rights such as forced disappearance, by applying a presumption juris *tantum* regarding mothers and fathers, sons and daughters, husbands and wives, and permanent domestic partners (hereinafter, 'direct next of kin'), so long as this corresponds to the particular circumstances of the case. Regarding the said direct next of kin, it corresponds to the State to rebut the said presumption". IACHR: *Gonzalez Medina and Others v Dominican Republic* (Preliminary Objections, Merits, Reparations and Costs) Judgment of 27 February 2012, para 270.

17 See for example: para 264: "In keeping with its case law ... the Court considers that the adequately-identified immediate next of kin are the direct descendants and ascendants of the alleged victim, namely: mother, father, children, and also siblings, and spouse or permanent companion, or those determined by the Court based on the characteristics of the case and the existence of some special relationship between the next-of-kin and the victim or the facts of the case".

18 See *infra*, para 54.

- (iv) As regards the beneficiaries of Abdoulaye Nikiéma alias Ablassé, the victims are Ouedraogo, Kouiliga (mother); and Nikiéma Abdoul Kader (son).

b. Proof of status of victim

51. Whereas, basically, apart from cases where marriage certificates have been adduced, and the Applicants in some cases produced the birth certificates of beneficiaries; or life certificates; or at times both birth certificates and life certificates to establish their status as victim; or did not produce any document in support, the Respondent State submits that in conformity with extant national legislation, each beneficiary should produce not only the two above-mentioned documents at the same time, but also certificates of heredity.

52. The Court notes that according to Article 26(2) of the Protocol establishing it, “the Court may receive written and oral evidence including expert testimony and shall make its decision on the basis of such evidence”. This provision which highlights the principle of free admissibility of evidence implies in particular that the Court is not limited by internal restrictive rules of law with regard to admissible evidence. It may therefore decide that a type of evidence required under domestic law is not necessarily required before it as an international court.

53. Along the same lines, it has been ruled that: “This obligation to make reparations is regulated, in all its aspects [including the determination of beneficiaries] by international law, and cannot be modified by the Respondent State nor can it fail to comply with it, invoking to this end provisions of its domestic law.”¹⁹

54. In the instant case, the Court is of the opinion that to establish their status as victim, the Applicants, natural persons, mentioned earlier (para 50) do not need to produce a certificate of heredity as required under Burkinabe law. As the Court noted earlier (para 46), the relevant issue here is not to know whether or not a person is an heir but rather to know whether such a person is a recognized victim in light of international human rights law. In the view of the Court, spouses should produce only their marriage certificate and their life certificate or any other equivalent proof. As for the children, they only have to produce their birth certificate or any other equivalent evidence to show proof of their filiation, as well as their life certificate. Fathers and mothers must produce only an attestation of paternity or maternity as well as life certificate or any other equivalent proof.

c. Proof of causal link between the wrongful act and the moral prejudice

¹⁹ IACHR: *Caracazo v Venezuela* (Reparations and Costs) Judgment of 29 August 2002 para 77: “This obligation to repair is, in all its aspects, [including the determination of the beneficiaries] governed by international law and cannot be changed by the Respondent State and the latter cannot avoid it by invoking the provisions of domestic law in this regard” [Registry translation]; See also IACHR: *Montero-Artanguen and Others (Detention Center of Catia) v Venezuela* (Preliminary Objections, Merits, Reparations and Costs) Judgment of 5 July 2006, para 117.

55. Regarding the causal link between the wrongful act and the moral prejudice suffered, the Court is of the opinion that such link may result from the violation of a human right, as an automatic consequence, without any need to prove otherwise. In the jurisprudence of the Inter-American Court, there is even a presumption in that regard. This Court has indeed declared that there is “a presumption according to which violations of human rights and a situation of impunity regarding those violations cause grief, anguish and sadness, both to the victims and to their next of kin”,²⁰ and that in such circumstances no proof is required.²¹

56. In the instant case, there is hardly any doubt that the close relatives of Norbert Zongo and his three companions suffered moral damage arising from the shortcomings ascribable to the Respondent State for having failed to apprehend, prosecute and bring to trial those responsible for the quadruple murder on 13 December 1998, and in particular the unduly prolonged procedure which in the end turned out to be fruitless (see Judgement of 28 March 2014, paras 152 to 156).

d. The amount of reparations

57. Whereas the Applicants are claiming lump sums of money in reparation for the moral prejudice suffered (*supra*, para 36), the Respondent State is insistent in establishing that none of the beneficiaries has justified his/her status either as beneficiary or indirect victim, and that none of them is therefore in a position to lay claim to any reparation (*supra*, para 43).

58. The Court first recalls that it has already disposed of this issue of persons who can lay claim to the status of victims in the instant case (*supra*, para 50) and will not come back to it.

59. The Court further notes that the Respondent State does not contest the existence of moral prejudice to the detriment of the beneficiaries identified by the Court as the victims.

60. Regarding the quantification of reparation *per se*, the applicable principle is that of full reparation, commensurate with the prejudice suffered. As stated by the Permanent Court of International Justice in the above mentioned matter of *l’Usine de Chorzów (The Factory at*

20 IACHR: *Caracazo v Venezuela* Judgment of 29 August 2002, Reparations and Costs, para 50: “the presumption according to which violations of human rights and a situation of impunity regarding those violations cause grief, anguish and sadness, both to the victims and to their next of kin”. See in this same regard, *Idem: Aloeboetoe v Surinam* (Reparations and Costs), Judgment of 10 September 1993, para 76; *Idem: Loayza Tamayo v Peru* (Reparations and Costs) Judgment of 27 November 1998, para 140; *Idem: Gonzalez Medina and Others v Dominican Republic* 27 February 2012 (Preliminary Objections, Merits, Reparations and Costs) para 270; *Idem: Myrna Mack v Guatemala* Judgment of 25 November 2003 (Merits, Reparations and Costs) para 243.

21 IACHR: *Mapiripan Massacre v Colombia*, (Merits, Reparations and Costs) Judgment of 15 September 2005, para 146 “Beyond the above, in a case such as that of the Mapiripan massacre the Court deems that no evidence is required to prove the grave impact on the mental and emotional well-being of the next of kin of the victims.”

Chorzów), the State responsible for violation needs to make an effort “to wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”.²² In the same vein, the Inter-American Court of Human Rights stated that:

“Reparations consist of measures tending to eliminate the effects of the violations that have been committed. Their nature and amount depend on both the pecuniary and non-pecuniary damage that has been caused. Reparations should not make the victims or their successors either richer or poorer and they should be proportionate to the violations declared in the judgment.”²³

61. With regard in particular to determination of the amounts for pecuniary reparation of a moral prejudice, it is admitted that the determination should be done equitably taking into account the specific circumstances of each case. As stated by the Inter-American Court of Human Rights:

“Since it is not possible to allocate a precise monetary equivalent for non-pecuniary damage, it can only be compensated, in order to provide comprehensive reparation to the victims, by the payment of a sum of money or the delivery of goods or services with a monetary value, which the Court determines by the reasonable exercise of judicial discretion and based on the principle of equity.”²⁴

62. In the instant case, the Court notes in particular that the lump sum amounts submitted by the Applicants for each victim have not been formally contested by the Respondent State. In the circumstances, the Court, on grounds of equity, and considering that the sufferings of the victims concerned occurred over many years (*supra* paras 3 to 7) does

22 PCIJ *The Factory at Chorzów* (Merits) Judgment of 13 September 1928, Series A, No 17, p 47.

23 IACHR: *Goiburú and Others v Paraguay* (Merits, Reparations and Costs) Judgment of 22 September 2006, para 143: “Reparation consists of measures tending to eliminate the effects of the violations that have been committed. Their nature and amount depend on both the pecuniary and non-pecuniary damage that has been caused. Reparations should not make the victims or their successors either richer or poorer and they should be proportionate to the violations declared in the judgment.” See also: *Idem: Castillo-Paez v Peru* (Reparations and Costs) Judgment of 27 November 1998, para 51; IACHR “*Street Children*” (*Villagran-Morales and Others v Guatemala* (Reparations and Costs), Judgment of 26 May 2001, para 63; *Idem: Gonzales and Others (“Cotton Field”) v Mexico* (Preliminary Objections, Merits, Reparations).

24 IACHR: *Case of Goiburú et al v Paraguay* (Merits, Reparations and Costs) Judgment of 22 September 2006 para 156; “Since it is not possible to allocate a precise monetary equivalent for non-pecuniary damage, it can only be compensated, in order to provide comprehensive reparation to the victims, by the payment of a sum of money or the delivery of goods or services with a monetary value, which the Court determines by the reasonable exercise of judicial discretion and based on the principle of equity”. See also: IACHR: “*Enfants de la rue*” (*Villagran-Morales and Others v Guatemala* (Reparations and Costs) Judgment of 26 May 2001 para 84; IACHR: *Cantoral-Benavides v Peru* (Reparations and Costs) Judgment of 3 December 2001 para 53; ECHR: *Varnava and Others v Turkey* Judgment of 18 September 2009, GC, para 224: “The Court’s guiding principle is equity, which above all, involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the Applicant but the overall context in which the breach occurred”. ECHR *Al Jedda v U.K.* Judgment, GC, of 7 July 2011, para 114.

not see any reason why the said amounts should not be awarded as they are. The Court therefore grants the claims for reparation for moral prejudice suffered by the victims identified in paragraph 50 above, who would have to furnish the proof mentioned in paragraph 54 above, that is: 25 million CFA F per spouse, 15 million per child, and 10 million per father or mother. In the same vein, the Court dismisses the claims for reparation for moral prejudice submitted for the other persons listed by the Applicants, namely: step-mothers, uterine sisters and brothers, and step sisters and step brothers.

ii. The Burkinabe Movement on Human and Peoples' Rights (MBDHP)

63. In their Brief on Reparations, the Applicants stated that the MBDHP "claims from Burkina Faso a token amount for the damage caused to it for its involvement in the search for the truth ..."

64. In its Brief in Response, the Respondent State indicated that it "finds no inconvenience with paying" the token 1 CFA F "for the moral damage" [the MBDHP] "had suffered".

65. The Court accepts, firstly, that a legal entity can suffer a moral prejudice.²⁵ In the instant case, this prejudice may have resulted from the frustrations experienced for years by the MBDHP on account of the inconclusiveness of the action of apprehending, prosecuting and bringing to trial the assassins of Norbert Zongo and his companions.

66. In this regard, the Court is further of the opinion that in line with international practice,²⁶ the findings in its aforementioned Judgment of 28 March 2014 regarding the violation of the Charter by the Respondent State, already constitutes in itself a form of reparation for the moral prejudice suffered by the MBDHP.

67. Furthermore, in the special circumstances of this case, whereby the Respondent State has not raised any objection, the Court does not see any reason as to why it should not grant the symbolic reparation claimed by MBDHP as reparation for the moral prejudice it suffered. Accordingly, the Court further grants the claim made by the Applicants for one (1) symbolic CFA Franc to be paid to MBDHP.

²⁵ See on this score, ECHR: *Comingersoll S.A v Portugal* Judgment of 6 April 2000 para 35: "In light of its own case-law and that practice, the Court cannot (therefore) exclude the possibility that a commercial company may be awarded pecuniary compensation for non-pecuniary damage". *Idem: Parti de la liberté et de la démocrate (Ozdep) v Turkey* Judgment of 8 December 1999, paras 55 to 57.

²⁶ IACHR: *El Amparo v Venezuela* (Reparations and Costs) Judgement of 14 September 1996, para 35; IACHR: *Neira Alegria and Others v Peru* (Reparations and Costs) Judgment of 19 September 1996, para 56; IACHR: *Montero-Artanguren and Others (Detention Center of Catia) v Venezuela* Judgment of 5 July 2006, para 131: "Judgments, pursuant to repeated international precedents, constitute in and of themselves a form of reparation"; ECHR: *Varnava and Others v Turkey* Judgment of 18 September 2009, GC, para 224; ICJ *United Kingdom v Albania (Strait of Corfu)* (Merits) Judgment of 9 April 1949, *Compendium* 1949, p 36.

C. Claims for reparation for material prejudice

68. In their Brief on Reparations and, once again, in regard to MBDHP, the Applicants claimed “reimbursement of the expenses incurred between 1998 and 2013, for organizing demonstrations, particularly the International Day Against Impunity organized on 13 December of each year, both to force the authorities to track down the perpetrators of the assassination of the journalist and his companions and to rally the people of Burkina Faso to support the families of the beneficiaries”, that is, the amount of forty-five million seven hundred and thirty-four thousand seven hundred and five (45,734,705) CFA F.

69. Furthermore, in their letter dated 17 November 2014 submitted in Response, the Applicants rejected the claim according to which “the State of Burkina Faso contributes financially and yearly to the functioning of the MBDHP [Burkinabe Movement on Human and Peoples’ Rights] just like other associations”. According to them, since its creation on 19 February 1989, the MBDHP has never received any financial contribution whatsoever from the authorities.

70. In its Brief in Response, the Respondent State argued that the claim for reimbursement of the costs incurred for organising demonstrations has no material or legal grounds, for the following reasons:

- (i) the MBDHP has been existing well before the matter of Norbert Zongo and has organized demonstrations not related to this matter;
- (ii) Burkina Faso contributes financially and yearly to the running of the *MBDHP*, like other associations;²⁷
- (iii) the demonstrations in question were organised in conjunction with other organisations in a forum called “Group of mass organizations and political parties”, and did not therefore constitute actions specific and peculiar to MBOHP;
- (iv) the said demonstrations had always been directed against impunity in general and not solely in favour of the “Norbert Zongo” case;
- (v) the MBDHP did not present any document attesting to the costs that it claimed to have incurred to hold demonstrations, and did not even indicate when the said demonstrations took place. Consequently, the Respondent State prayed the Court, on grounds of the aforesaid, to throw out MBDHP’s request for reimbursement of the said costs as “fake and groundless.”

71. The Court recalls that the Burkinabe Movement on Human and Peoples’ Rights is, as the name indicates, a human and peoples’ rights advocacy organisation in Burkina Faso. It is therefore evident that the organization of human rights advocacy demonstrations in that country, including for the rights of the beneficiaries of Norbert Zongo and his companions, falls within its mandate and the ambit of its normal activities.

72. For this reason, the Court is of the opinion that there is no basis to grant the claim for reimbursement of the costs incurred by MBDHP in organising human rights advocacy demonstrations, including those in favour of the Applicants in the instant case.

²⁷ As earlier indicated (para 69), the Applicants categorically reject this allegation.

VI. Expenditure and costs incurred by the beneficiaries

73. Under this heading, the Applicants are asking the Respondent State to reimburse not only lawyers' fees but also the expenses incurred for transport to the Seat of the Court.

A. Lawyers' fees

74. In their Brief on Reparations, the Applicants submit that reimbursement of the expenses incurred at both the national and international levels in the quest for justice is one of the appropriate measures prescribed by Article 27(2) of the Protocol establishing the Court [para 17]. They argue that "these are mostly the charges and fees of Counsel for the beneficiaries and of the *MBDHP* during the entire juridical procedure in Burkina Faso and in Tanzania" [at the Seat of the Court].

75. According to the Applicants, "the fees include: the total amount owed by the client to the Counsel for services rendered by the latter; the costs and outlay corresponding to the costs indicated by Counsel in accomplishing his mission, and outlay paid on behalf of the client ... ; emoluments corresponding to taxes and charges received by Counsel for procedural acts, in accordance with tariff fixed by the instruments in force".

76. The Applicants submit that their Counsel have been working on the case since 1999 "with all political, financial, moral, etc.) toll it has taken on them" and therefore prayed the Court "to arbitrate these fees to the sum of twenty-five (25) million CFA F exclusive of related taxes and emoluments."

77. In the Corrigendum on the Reparations, the Applicants however indicate that the figures contained in the Brief are inexact because they do not conform to the agreements signed between the two lawyers and the beneficiaries in 2010, based on the Indicative Scale of Costs and Fees of Lawyers of Burkina Faso. Consequently, they pray the Court "to adjudicate these fees at the sum of twenty-five million (25) CFA F per family, subject to the related taxes and emoluments as had been approved by them" ... thus bringing "the total sum to a hundred (100) million CFA F".

78. In its Brief in Response, the Respondent State, after analysing the Indicative Scale of Costs and Fees of Lawyers of Burkina Faso submitted by the Applicants, argued that the Agreements on lawyers' fees referred to by the Applicants, "are complaisant as they do not state the well-known fees". It further argues that lawyers' fees are part of damages, which in its view, are the only claims made by the Applicants in the instant case; but argues that if, by an unlikely chance, the Court agrees that the Counsel fees for the Applicants are part of damages, then "the sum of twenty-five (25) million claimed by the said Counsel for each victim's family is exorbitant and out of proportion with the socio economic realities of Burkina Faso". The Respondent State "believes that the sum of 20,000,000 CFA F that is, 5,000,000 per family would be a fair remuneration for the lawyers of the victims".

79. In the opinion of the Court, the reparation paid to victims of human rights violation may also include the reimbursement of lawyers' fees. This was the position held by the Court in the afore-cited case of *Rev Mtikila v United Republic of Tanzania*:

"The Court notes that expenses and costs form part of the concept of 'reparations'. Therefore. Where the international responsibility of a State is established in a declaratory judgment, the Court may order the State to compensate the victim for expenditure and costs incurred in his or her efforts to obtain justice at the national and international levels".²⁸

80. This position is consistent with that of other international human rights jurisdictions. The Inter-American Court of Human Rights, for example, expressed this position in the following terms:

"... costs and expenses are included in the concept of reparations ... because the activity deployed by the next-of-kin of the victims or their representatives in order to obtain justice at both the national and the international level entails expenditure that must be compensated when the State's international responsibility is declared in a judgment against it."²⁹

81. In determining the amount to be paid in the matter of *Rev. Mtkila* mentioned above, the Court has held that in the opinion of the Court, the reparation paid to victims of human rights violation may also include the reimbursement of lawyers' fees.³⁰

82. This is also the position of the Inter-American Court of Human Rights which, in a matter, declared that: "... the Court considers that it is not sufficient to remit probative documents; rather the parties must develop the reasoning that relates the evidence to the fact under consideration, and, in the case of alleged financial disbursements, the items and their justification must be described clearly."³¹

28 Judgment of 13 June 2014, para 39.

29 IACHR: *Goiburú and Others v Paraguay* Judgment of 22 September 2006 (Merits, Reparations and Costs) para 180: "... costs and expenses are included in the concept of reparations because the activity deployed by the next of kin of the victims or their representatives in order to obtain justice at both the national and the international level entails expenditure that must be compensated when the State's international responsibility is declared in a judgment against it". See also IACHR: *Caballero-Delgado and Santana v Colombia* (Merits) Judgment of 8 December 1995) para 71, IACHR: *Garrido and Baigorria v Argentina* (Reparations and Costs) Judgment of 27 August 1998, para 79: "Costs are one element to be considered under the concept of reparations to which Article 63(1) of the Convention refers since they are a natural consequence of the effort made by the victim, his or her beneficiaries, or representatives to obtain a court settlement recognizing the violation committed and establishing its legal consequences"; IACHR: *Loayza Tomayo v Peru* (Reparations and Costs) Judgment of 27 November 1998 para 176; IACHR: *Cesti Hurtado v Peru* (Reparations and Costs) Judgment of 31 May 2001, para 72.

30 *Mitkila v United Republic of Tanzania* Judgment of 13 June 2014, para 40.

31 IACHR: *Chaparro Álvarez and Lapo Íñiguez v Ecuador* (Preliminary Objections, Merits, Reparations and Costs) Judgment of 21 November 2007 para 277; See also: ECHR *Sahin v Germany* Judgement of 8 July 2003, para 105: "Costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred and are also reasonable as to the quantum Furthermore, legal costs are only recoverable in so far as they relate to the violation found."

83. In the instant case, the Applicants presented an extract of the Indicative Scale of Costs and Fees of Lawyers of Burkina Faso dated 20 December 2003 as well as the fees agreements signed with the lawyers in 2010.

84. If we take the Indicative Scale into account, it becomes apparent that the lawyers would be entitled to 150,000 CFA F for opening the case; 150,000 CFA F for legal assistance and representation; 25,000 per session before the Court of First Instance; 350,000 for legal assistance and representation before the Court of Appeal and a percentage of the amount of the reparation which would have been paid to the victims in the civil suit. Considering that in the instant case no civil damages were paid to the victims by the domestic jurisdictions, it would not be possible to set with clarity, any global amount based on the Indicative Scale.

85. Going by the fees agreements, the lawyers would be entitled to 250,000 CFA F for the opening of the case, and 25,000,000 for their legal assistance and representation. This will give 25,250,000 CFA F per family, or a total of 101,000, 000 CFA F which the Applicants have rounded up at 100,000,000 CFA F.

86. In the opinion of the Court, the amount calculated on the basis of the Indicative Scale would be too low if account is taken, *inter alia*, of the difficulties the lawyers must have faced during the domestic proceedings, especially on account of the length of the proceedings and the highly political sensitivity of the case; and also when we take into consideration the qualitative requirements of the procedure before an international court.³² The Respondent State itself admits that a global amount of nearly twelve times higher, that is, 20,000,000 CFA F would be reasonable. On the other hand, the amount of 100,000,000 CFA F based on the lawyers' fees agreement seems to be too high in the circumstances, particularly if account is taken of the fact that there was only one matter for the four families.

87. In the circumstances, the Court has to determine the amount of lawyer's fees on the basis of equity, going by what it considers reasonable in each case.³³ In its opinion, in the instant case, and considering both the amounts set by the Indicative Scale, the amounts stipulated in the fees agreement and the amounts proposed by the

32 See IACHR: *Garrido and Baigorria v Argentina* (Reparations and Costs) Judgment of 27 August 1998, para 83: "There are ... important factors to be weighed when assessing the performance of the attorneys in a proceeding before an international tribunal, such as the evidence introduced to demonstrate the facts alleged, full knowledge of international jurisprudence and, in general, everything that would demonstrate the quality and relevance of the work performed".

33 See in particular: IACHR: *Garrido and Baigorria v Argentina* (Reparations and Costs) Judgment of 27 August 1998, para 80; IACHR: *Constitutional Court v Peru* (Merits, Reparations and Costs) Judgment of 31 January 2001, para 125; IACHR: "*White Van*" (*Paniagua-Morales and Others*) *v Guatemala* (Reparations) Judgment of 25 May 2001, para 213, IACHR: *Cesti Hurtado v Peru* (Reparations and Costs) Judgment of 31 May 2001, para 72; IACHR: *Goiburú and Others v Paraguay* (Merits, Reparations and Costs) Judgment of 22 September 2006 para 180: "This assessment [of expenses and costs] may be based on the principle of equity and taking into account the expenses indicated by the parties, provided the *quantum* is

Respondent State itself, a total lump sum comprising expenses and lawyers' fees in the amount of 40 million would be equitable and reasonable.

B. Transport and sojourn expenses at the Seat of the Court

88. In their Brief on Reparations, the Applicants once again argue that reimbursement of transport and sojourn expenses for their Counsel and the representative of MBDHP in Arusha for their participation in the public hearing of the African Court forms part of the appropriate orders of reparation prescribed in Article 27 of the Protocol establishing the Court. The said expenses are in respect of the travels made between March and November 2013 for the purpose of attending the public hearings of the Court, and the Applicants estimate the said expenses at seven million two hundred thousand (7,200,000) CFA F.

89. However, in their Corrigendum to the Brief on Reparations, the Applicants reduced this amount to six million five hundred and forty-two thousand five hundred (6,542,500) CFAF.

90. In its Brief in Response, the Respondent State submits that the transport and sojourn costs in Arusha incurred to follow the proceedings should have been supported by documents issued by the transport companies, hotels and restaurants, and that it leaves the determination of the right amount to the wisdom of the Court, considering that the said costs are not mentioned in the lawyers' fees agreements.

91. The Court is of the opinion that the reparation payable to the victims of human rights violation can also include reimbursement of the transport fares and sojourn expenses incurred for the purposes of the case by their representatives at the Seat of the Court.³⁴

92. The Court notes that, in the instant case, the Parties do agree on the principle of reimbursement of transport fares and sojourn expenses in Arusha for the representatives of the Applicants. The Court further notes that the Applicants produced written documents aimed at substantiating the amounts claimed. It however finds that the Applicants did not submit a complete set of the supporting materials (*supra*, para 16).

93. The Court is of the opinion that, with regard to reimbursement of the expenses actually incurred, only the expenses supported by proof of payment such as receipts or equivalent documents can be considered for the purposes of reparation.

94. Based on the aforesaid, it is apparent from the records that the travel and sojourn costs to be reimbursed are in the amount of US\$1,106 for Mrs Genevieve Poda Zongo, spouse of Norbert Zongo;

reasonable"; cf. ECHR: *Thomas v United Kingdom* Judgment of 17 July 2008, para 32: "The Court reiterates that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to *quantum* are recoverable under Article 41 of the Convention".

34 See *supra* notes 28 and 29.

US\$1,106 for Chrysogne Zougmore, President of MBDHP; US\$1,106 for Advocate Benewende Stanislas Sankara, Counsel; US\$1,827.37 for Advocate Ibrahima Kane, Counsel; and US\$50 for Prosper Farama, Counsel. The Court therefore grants the claim for reimbursement in favour of the Applicants in the total amount of US\$5,195,37 equivalent to 3,135,405.80 CFA F at Central Bank of West African States (BCEAO) rate.

VII. Measures of satisfaction and guarantees of non-repetition

A. Measure of satisfaction: publication of the Court's decision

95. In their Brief on Reparations, the Applicants prayed the Court to order “the publication of [its] Judgment in the Official Gazette, the national Daily *Sidwaya* and two of the most read private newspapers in the country, in order that the national public opinion, particularly judicial authorities and security officials [might] be aware of the wrong caused to the State and its human rights protection system by the poor functioning of its public justice and security services”.

96. In its Brief in Response, the Respondent State noted that, in principle, it finds no inconvenience with publishing the Court's decision, but argued that in international human rights law, “measures of satisfaction should not lead to humiliation of the State against which human rights violations had been established”. It submitted further that, in the instant case, the reasons given by the Applicants in support of their request for publication

“are motivated more by a desire to humiliate the State of Burkina Faso and tarnish its image, than promoting and protecting human rights”. The Respondent State therefore prays the Court to reject the measure of satisfaction and guarantees of non-repetition as requested by the indirect victims as inadequate and irrelevant.

97. The Court notes that the principle itself of publication of the Court's decision is not in dispute between the parties.

98. The Court also notes that the publication of decisions of international human rights courts as a measure of satisfaction is of current practice.³⁵ Thus, in the case of *Rev Christopher Mtikila v United Republic of Tanzania*, the Court itself decided *proprio motu* to order the publication of one of its decisions as a measure of satisfaction.³⁶

99. The Court further notes that measures regarding the publication of its decision, if couched in reasonable terms, will not in any way amount to humiliation for the Respondent State.

35 See in particular: IACHR: *Massacre du Plan de Sanchez v Guatemala* (Reparations) Judgment of 19 November 2004, paras 102 and 103; IACHR *Heliodoro Portugal v Panama* (Preliminary Objections, Merits, Reparations and Costs), Judgment of 12 August 2004, para 248.

36 Judgment of 13 June 2014, paras 45 and 46(5).

100. Relying on its own jurisprudence afore-mentioned (*supra*, para 98), the Court is of the opinion that as a measure of satisfaction, the Respondent State should, within six months from the date of this Judgment, publish: (i) the official summary of this Judgment drafted by the Registry of the Court in French, once in the official gazette, and once in a widely read national Daily; (ii) the same summary on an official internet website of the Respondent State, and maintain the publication for one year.

B. “Guarantees of non-repetition”

101. In their Brief on Reparations regarding what they characterize as “guarantees of non-repetition”, the Applicants prayed the Court to order “the re-opening of investigations so that the perpetrators of the assassination may be apprehended and brought before national courts”, and “to order Burkinabe authorities to submit [to the Court], all information concerning the initiatives taken to that effect within six (6) months”.

102. In its Brief in Response, still basing its argument on humiliation, the Respondent State indicates that “exacting the immediate resumption of investigations and production within a time limit of six months, of all information on measures taken to that effect, is contemptuous to the provisions of the Criminal Procedure Code of Burkina Faso”, specifically Articles 188 and 189³⁷ thereof. It further argues that “it continues to make the commitment that, as soon as new facts or new charges will be discovered in terms of the above mentioned provisions of the Criminal Procedure Code, it will reopen investigation as long as the 10 (ten) years prescription provided for crimes would not have elapsed”.

103. On the Application for resumption of investigations into the murder of Norbert Zongo and his three companions, the Court notes that this is not really a measure of non-repetition, but rather one of cessation of a violation already established.

104. Be that as it may, the Court is of the opinion that this is indeed a legitimate measure likely to forestall the continued violation of Article 7 of the Charter in this case.

105. This position is consistent with the jurisprudence of some international courts. For instance, the Human Rights Committee held the view in a case that:

“The State party should investigate the events complained of and bring to justice those held responsible for the author’s treatment; it further is under

37 These provisions read as follows: Article 188: “the indicted person whose case the investigating magistrate has ruled should not continue can no longer be pursued on the basis of the same facts unless new evidence is discovered; Article 189: considered as new charges are: witness statements, documents and reports, which having not been submitted for consideration by the investigating Magistrate are however likely to back up the charges which would have been considered too weak, i.e. to provide facts regarding new developments useful in determining the truth” (Registry translation).

an obligation to take effective measures to ensure that similar violations do not occur in the future.”³⁸

106. For its part, the African Commission on Human and Peoples’ Rights frequently recommends to States to take certain measures to prevent a repetition of the violations it has established. In the matter of *Gabriel Shumba v Zimbabwe*, for example, it recommends “that an enquiry and investigation be carried out to bring those who perpetrated the violations to justice”.³⁹

107. The Court is further of the opinion that such a measure hardly amounts to contempt of Burkinabe legislation, since all it does is to offer the possibility of reopening investigations after the matter had been dismissed by the national court for lack of evidence; and the Respondent State itself is disposed to the reopening of investigations into the matter (*supra*, para 102).

108. The Court would also like to emphasize that whereas it may indeed order the State to adopt certain measures, the Court does not however deem it necessary to indicate to the State how it should comply with the Court’s decision, that being left to the discretion of the said State.

109. Based on the foregoing considerations, the Court grants the Applicants’ request to order the Respondent State to reopen investigations with a view to prosecute and bring to trial the perpetrators of the murder of Norbert Zongo and his three companions, and thus shed light on this matter and do justice to the families of the victims.

110. On the Applicant’s request to require the Respondent State to furnish all information concerning the measures taken in this respect within six months, the Court is of the opinion that it is not necessary to set a specific time limit for implementation of the measures in question, considering that it will determine later (*infra*, para 111) the time limit within which the Respondent State should notify the Court of its execution of all the measures it would have taken in the instant case.

111. *For these reasons,*

The court:

(i) Unanimously

38 The Committee on Human Rights: *M’Boissona v Central African Republic (for François Bozizé)* Decision of 7 April 1994, Communication No 428/1990, para 7.

39 ACHPR: Communication 288/04, *Gabriel Shumba v Zimbabwe* 51st Session, 2 May 2012, para 194(2) “that an inquiry and investigation be carried out to bring those who perpetrated the violations to justice”; See in this regard *Idem*: Communications 54/91-61/91-98/93-164/97-196/97-210/98 *Malawi Africa Association, Amnesty International, Ms Sarr Diop, Inter African Union of Human Rights and RADDHO, Group of widows and beneficiaries, Mauritanian Human Rights Association v Mauritania*, 27th Session, 11 May 2000, the operative section; Communication 241/01, *Purohit and Moore v The Gambia*, 33rd Session, 29 May 2003, the operative section, Communication 279/03-296/05, *Sudan Human Rights Organization and Centre on Housing Rights and Evictions (COHRE) v Sudan*, 45th Session, 27 May 2009, the operative section; Communication 236/00, *Curtis Francis Doebbler v Sudan*, 46th Session, 25 November 2009, the operative section; Communication 334/06, *Egyptian Initiative for Personal Rights and Interights v Egypt*, 9th Extraordinary session, 1 March 2011, the operative section.

Decides, with regard to the moral prejudice suffered by the Applicants natural persons in the instant case, that only the spouse, the sons and daughters, and the fathers and mothers of the deceased persons mentioned in paragraph 50 of this Judgment are entitled to reparation;

(ii) Unanimously

Orders the Respondent State, in consequence, to pay twenty-five (25) million CFA F to each spouse; fifteen (15) million CFA F to each son and daughter; and ten (10) million CFA F to each father and mother concerned;

(iii) Unanimously

Declares that for the purposes of the payments prescribed in the preceding paragraph, the following documents must be presented by the Applicants to the competent Burkinabe authorities: marriage certificate and life certificate or any other equivalent proof for the spouse; birth certificate and life certificate or any other equivalent proof for the sons and daughters; attestation of paternity or of maternity, and a life certificate or any other equivalent proof for the fathers and mothers;

(iv) Unanimously,

Declares that the Judgment of 28 March 2014 on this matter represents a form of reparation for the moral prejudice suffered by the Burkinabe Movement on Human and Peoples' Rights (*MBDHP*); and *orders* the Respondent State in addition to pay a token sum of one (1) CFA F to the MBDHP, as reparation for the said prejudice;

(v) Unanimously,

Dismisses the claim made by the MBDHP for compensation for having organized human rights demonstrations regularly, including demonstrations for the Applicants;

(vi) Unanimously

Orders the Respondent State to pay the Applicants the sum of forty (40) million CFA F being the fees owed to their Counsel;

(vii) Unanimously

Orders the Respondent State to reimburse the Applicants the out-of-pocket expenses incurred by their Counsel during their stay at the Seat of the Court in Arusha in March and November 2013, in the amount of three million one hundred and thirty-five thousand, four hundred and five CFA F and eighty cents (3,135,405.80);

(viii) Unanimously

Orders the Respondent State to pay all the amounts mentioned in subparagraphs (ii), (iv), (vi) and (vii) of this paragraph within six months as of today, failing which interest will accrue for delayed payment, calculated at the rate applicable at the Central Bank of the Community of West African States (BCEAO), for the entire duration of the delay until the full payment of the amounts owed;

(ix) Unanimously

Orders the Respondent State to publish within six (6) months of the date of this Judgment: (a) the summary of this Judgment in French drafted by the Registry of the Court, once in the Official Gazette of Burkina Faso and once in a widely read national Daily; (b) the same summary on the website of the Respondent State and retain the publication on the said website for one year;

(x) By ten votes to one, Judge Tambala dissenting,

Orders the Respondent State to reopen investigations with a view to apprehend, prosecute and bring to justice the perpetrators of the assassination of Norbert Zongo and his three companions;

(xi) Unanimously

Orders the Respondent State to submit to it within six months effective from this day, a report on the status of compliance with all the Orders contained in this Judgment.

Urban Mkandawire v Malawi (admissibility) (2013) 1 AfCLR 283

Urban Mkandawire v The Republic of Malawi

Judgment, 21 June 2013. Done in English and French, the English text being authoritative.

Judges: AKUFFO, OUGUERGOUZ, NGOEPE, NIYUNGEKO, RAMADHANI, THOMPSON, ORE, GUISSÉ and KIOKO

Recused under Article 22: TAMBALA

Failure to exhaust local remedies in a case dealing with alleged wrongful dismissal.

Jurisdiction (continuous violation, 36)

Admissibility (failure to exhaust local remedies, 40.1)

Separate opinion: NIYUNGEKO and GUISSÉ

Sequence of judgment (Court should first deal with jurisdiction and then admissibility, 3, 4)

Jurisdiction (temporal jurisdiction, entry into force of Protocol, 8; continuous violation, 9)

Admissibility (exhaustion of local remedies, Court should have convincing reasons to depart from State's admittance that local remedies were exhausted, 13-18)

The Court issued an erratum (not dated) with regard to the dissenting opinion of Judges Niyungeko and Guissé which has been incorporated in the text below.

I. The Parties

1. The Applicant, Urban Mkandawire, is a Congolese born Malawian national. He brings this Application to seek redress following his dismissal as lecturer by the University of Malawi ("the University").

2. The Respondent is the Republic of Malawi. It has ratified the African Charter on Human and Peoples' Rights ("the Charter"); it did so in 1989. Respondent is also a State Party to the Protocol, having ratified it on 9 September 2008. Respondent has also made a declaration in terms of Article 34(6) of the Protocol, accepting to be cited before this Court by an individual; the declaration was made on 9 October 2008.

II. Procedure

3. The Application was received at the Registry of the Court on 13 March 2011 by electronic mail and notified to the Respondent, and other entities under Rule 35 of the Rules of Court, by separate letters of 17 June, 2011.

4. As the Applicant had indicated in his Application that he had submitted his complaint to the African Commission on Human and Peoples' Rights ("the Commission") and that he has withdrawn it, the Registry, by letter of 28 March, 2011, inquired from the Commission, in conformity with Rule 29(6) of its Rules, whether the matter had been formally withdrawn, and by letter of 19 May, 2011, the Commission confirmed that it is so.

5. The Applicant also requested by letter dated 10 May 2011, that the then Acting Registrar and Justice Tambala, a national of Malawi, be excluded from the proceedings, and during its 21st Ordinary Session held from 6-17 June, 2011, the Court noted that Justice Tambala has already recused himself and that in accordance with Article 22 of the Protocol, he would not hear the matter. It also noted that the Acting Registrar would in any case not participate in the deliberations of the Court as he is not one of the Judges. By a letter of 8 July, 2011, the Registrar informed the Applicant accordingly.

6. The Registry by *Note Verbale* dated 9 January 2012, which was received on 7 February, 2012, was notified by the Respondent of its representatives, and also sent its response to the Application, and the same were served on the Applicant on the same day.

7. On 14 March, 2012, the Registry received the Applicant's reply to the Respondent's response to the Application and on the same date served the same on the Respondent.

8. During its 24th Ordinary Session held from 19 to 30 March, 2012, the Court ordered the Respondent to substantiate, within thirty (30) days, and in accordance with Rule 52(4) of the Rules of Court, the preliminary objections it raised in its response to the Application. The order was served on both parties on 2 April, 2012.

9. As the Respondent failed to comply with the order, the Applicant by a letter of 21 May 2012, received at the Registry on 22 May 2012, requested the Court to proceed with the matter.

10. At its 25th Ordinary Session held from 11 to 26 June 2012, the Court decided to schedule a public hearing on the matter for 20 and 21 September 2012 and by separate letters dated 3 July 2012, both parties were notified of the decision.

11. The Respondent, by *Note Verbale* dated 14 July 2012, received at the Registry on 27 August 2012, requested for postponement of the hearing, and requested the Court to re-schedule the hearing to either the last week of October or the first week of November 2012, on the ground that both the Minister of Foreign Affairs and the Respondent's two legal representatives would be committed at the United Nations General Assembly in New York, United States of America.

12. The Applicant by a letter dated 28 August, 2012, informed the Registry that if the hearing was adjourned to the 27th Ordinary Session, scheduled for Mauritius, he would not be able to attend due to the cost, and invoked Rule 55 of the Rules, requesting the Court to consider proceeding with the hearing of the case as scheduled, even if the Respondent had not confirmed its availability.

13. During its 26th Ordinary Session held from 17 to 28 September, 2012, the Court decided that the hearing should take place from 29 – 30 November, 2012, at its 21st Ordinary Session in Mauritius, and decided that it will provide assistance to the Applicant to enable him attend the session in Mauritius. That was done and at the 27th Ordinary Session held from 26 November to 7 December, 2012, the Court held a public hearing where both parties presented oral arguments.

14. Public hearings were held on 29 and 30 November, 2012 during which oral arguments were heard on both the preliminary objections and the merits. The parties were represented as follows:

For the Applicant:

Mr Urban Mkandawire - self-represented

For the Respondent:

Mr Zolomphi Nkowani- Counsel.

15. At the hearing, questions were put by Members of the Court to the Parties; the replies were given orally.

III. Brief facts

16. The Applicant had entered into an employment contract with the University as a lecturer in French to some junior students. He says he signed the contract of employment with the University on 1 December 1998 and started teaching on 5 July 1999, joining the French Department, which had its own head.

The employment was for an indefinite period. One of the terms of the contract was that either party could terminate the contract on a three months' notice, or with a three months' payment *in lieu* of notice. The contract was with effect from 1 December 1998.

As a result of certain complaints against him, the Applicant was dismissed from his post through a letter, written by the Registrar of the University, dated 2 December 1999. He took his case through Malawian Courts, including the Industrial Relations Court, right up to the Supreme Court of Appeal, the latter being the highest judicial authority in Malawi.

The Applicant was still not satisfied; he therefore took the matter to the Commission. He later withdrew the matter before the Commission, and lodged this Application.

IV. Applicant's case

17. The Applicant contends that the termination of his employment violated several of his rights under the Charter. Although the Applicant mentions Articles 4, 5, 7, 15 and 19 of the Charter, it appears from the

Applicant's papers both to the Commission and to this Court, and also from his overall presentation of his case, that the rights alleged to have been violated are his rights under Articles 7 and 15 of the Charter. Article 7(1) reads:

"1. Every individual shall have the right to have his cause heard. This comprises:

(a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws,

regulations and customs in force; ... "

For its part, Article 15 of the Charter provides: "Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work".

A. Remedies sought by the Applicant

18. In his Application, the Applicant presents the following as a summary of his claims:

1. An order reinstating me in my erstwhile position as a lecturer in the French department at Chancellor College.
2. A payment of the lump sum of Malawi Kwacha 12, 839,059.00 being the sum of: a) Mk 8, 000,000.00 being damages and legal costs claimed. b) Mk 3,416,845.60 being my immediate loss claimed. c) Mk 1,350,000.00 being the debt of my 9 months' salary that I should have received during my counselling period if I was not prematurely dismissed. d) Mk 56,813.40 being the salary of my two months' pay e) Mk 15,400.00 being the balance of my rent money paid to Mrs Eurita Ibrahim Khofi.
3. A payment of my entitlement under the scheme run (sic) by National Insurance Company on my 9 months' salary as if I was contributing towards the scheme during my counselling period if I was not prematurely dismissed".

B. Circumstances leading to the termination of the Applicant's services

19. Shortly after Applicant commenced lecturing at the beginning of July 1999, his seniors started receiving complaints against him from students. The nature of the complaints was that he was not a competent lecturer. His own version of events is that he was being victimized because he refused to treat favourably some students who he says were well connected within the University. For this reason, he refused to attend a meeting, scheduled for 27 August 1999, called by the head of his department to discuss the complaints against him. He was later charged for failing to attend this meeting and, by a letter dated 9 September 1999, he was summoned to appear before a disciplinary committee. He appeared before this committee on 16 September 1999.

According to the Applicant, he was briefed on 20 September 1999 on the outcome of the hearing. By a letter of 8 November 1999, the Vice Chancellor of the University, as had been recommended by the Disciplinary Committee, issued a warning of insubordination against the Applicant, and arranged that he be counselled on class conduct.

20. Two lecturers were mandated to, and did attend, some of the Applicant's lectures for observation and assessment. They subsequently submitted a report to the Principal, dated 30 November 1999. The report was adverse. In effect, it said the Applicant was not a competent lecturer. After receiving this report, the Principal in turn wrote a letter on 30 November 1999 to the Vice-Chancellor of the University calling for the dismissal of the Applicant in the interests of the students. According to the Applicant, the Vice-Chancellor called him to his office and briefed him about what transpired at the college by showing the Applicant the adverse report of 30 November 1999, as well as the Principal's letter, also of 30 November 1999. On 2 December 1999, the Applicant received a letter, dated the same day, from the Registrar of the University, informing him that his employment had been terminated with immediate effect. It stated, amongst others, that it was clear from the report that the Applicant had taken no steps to change his manner of teaching, which had been criticized by the lecturers who assessed him, and then filed the adverse report dated 30 November 1999.

C. Recourse to the national courts of Malawi

21. To vindicate the alleged violation of his rights, the Applicant turned to various courts in Malawi.

22. The Applicant lodged a case in the High Court against the University of Malawi for, amongst others, his reinstatement. In its judgment dated 27 November 2003, the High Court found that the Applicant had not been given a fair hearing to defend himself against the adverse report, and therefore that his dismissal was wrongful. The Court, however, held that he could not be reinstated. It ordered that he be given a further 2 month's payment (the University had on its own already paid him for one month); the order was to put him in the same position as if a three months' notice had been given. Furthermore, the High Court awarded the Applicant damages for wrongful dismissal, the quantum of which would have to be established before the Registrar of that Court.

23. The University appealed against the above judgment to the Malawi Supreme Court of Appeal. One of the grounds of appeal was that the High Court had erred in awarding damages to the Applicant for the wrongful dismissal in addition to the three months' notice pay awarded to him. The Supreme Court of Appeal, in its judgment dated 12 July 2004, held that the High Court erred in awarding the damages for wrongful dismissal, over and above the three months' pay award. It ruled that if the Applicant had "desired to contend that rules of natural justice were not observed by the University when terminating his employment, he was perfectly entitled to have appropriately stated the issue in the pleadings as a separate cause of action". As he had not done so, this claim was not before court; the High Court was therefore wrong in awarding such damages. The payment for the three months *in lieu* of notice was, however, confirmed by the Supreme Court of Appeal, and to date still stands.

24. Subsequently, the Applicant again approached the Supreme Court of Appeal, asking it to review its judgment of 12 July 2004. The Applicant was relying on sections 31 and 43 of the Constitution of Malawi. Section 31 guarantees the right to fair labour practice, and section 43 ensures administrative justice. As the Applicant was invoking the provisions of the Constitution, the Supreme Court of Appeal referred the matter to the Constitutional Court, which is a chamber of the High Court, comprising three judges.

25. The matter was duly enrolled before the Constitutional Court. The Constitutional Court held that the case was well governed by the employment legislation, namely, the Employment Act, 2000. It found that the case could be disposed of by invoking section 57(2) of the Employment Act, which protected an employee against unfair dismissal.

It held that the matter would therefore best be handled by the Industrial Relations Court, which, in terms of the Constitution of Malawi, was also a court of law. The matter was accordingly referred to the Industrial Relations Court.

26. Applicant's case was indeed enrolled in the Industrial Relations Court of Malawi. The court had to consider whether the Applicant's dismissal was unfair in that it was, for no valid reason and whether he had been given the opportunity to be heard. As the Applicant's dismissal was before the enactment of the Employment Act 2000, the Court dealt with the matter on the basis of section 43 of the Constitution which, as stated earlier, provided for the right to fair labour practice. The court went into the history of the matter; it held that the Applicant had refused to attend a meeting called by his superior to discuss students' complaints, that he failed to adapt or change his teaching methods, and that he had been found to be incompetent; that, by 30 November 1999 when his dismissal was recommended, he had not shown any improvement, hence his dismissal on 2 December 1999. Furthermore, the court held that the Applicant had been afforded the opportunity to be heard; in this respect, the following appears in the last paragraph of page 4 of the judgment of that Court: The dismissal was held to be fair, and the action dismissed.

27. The Applicant appealed against the above judgment to the High Court as he was not satisfied with it. When the Applicant, who is neither a licensed practitioner nor a lawyer, appeared before the High Court, he wanted to address that court from the Bar where licensed practitioners would do. This was denied to him in terms of the practice before the courts in that country; he was, however, free to argue his case from where people who were not practitioners would do. He however decided not to argue from anywhere else; instead, he decided to appeal to the Supreme Court of Appeal, for the third time.

28. The Applicant's appeal was enrolled and heard in the Supreme Court of Appeal, and judgment was delivered on 11 October 2007. The judgment summarizes the Applicant's grounds of appeal into two. Firstly, "that his employment is terminated unlawfully since he was not given the opportunity to be heard by the University Disciplinary Committee to refute the allegations made against him, and secondly

that he was not allowed to address the judge in the High Court in order to argue his appeal because he was not a licensed legal practitioner". Regarding the first ground, the Malawi Supreme Court of Appeal held that the matter was *res judicata* and it could therefore not consider the point again; it referred to its judgment of 12 July 2004, already referred to and quoted above. In that judgment, the Supreme Court of Appeal had held, *inter alia*, that for this claim of unlawful dismissal, based on a breach of the rule of natural justice, the Applicant should have approached the Court by stating "the issue in the pleadings as a separate cause of action." In declaring the ~ issue as *res judicata*, the Supreme Court of Appeal was in effect maintaining the view it had taken in its judgment of 12 July 2004.

29. To bolster his case regarding the alleged violation of Article 7 of the Charter, the Applicant made several unsubstantiated allegations against some of the judges, some of which allegations are not worthy of repeating here. He alleged, for example, that one of the judges of the Supreme Court of Appeal was the biological father of one of the students who had lodged complaints against him. During the hearing and in response to a question by this Court, counsel for the Respondent pointed out that the allegation was not true; the Applicant was unable to dispute this. Again, without any substantiation, the Applicant ascribed prejudice against Judges and the Registrar, and in some instances, used unbecoming language in criticizing some judgments.

V. Respondent's case

30. Preliminary Points: The Respondent has raised two preliminary points.

30.1 The first point relates to the admissibility of the Application, namely, that the Application is not admissible as the matter is already before the Commission, and therefore that it is *sub judice* before the latter. In this respect, Respondent argues that it would be undesirable to allow litigants some forum shopping.

30.2 The second point raises the Court's lack of jurisdiction. Respondent contends that this Court lacks jurisdiction over this matter because the Protocol came into operation only on 25 January 2004, whereas the Applicant's cause of action arose in 1999. The Respondent also argues, in this respect, that it ratified the Protocol only on 9 September 2008, and deposited the instrument of ratification on 9 October 2008. The Respondent does not, however, develop any argument around the fact that Respondent made the Article 34(6) declaration only recently; long after the cause of action had arisen.

31. Regarding the merits of the case: As far as the merits of the case are concerned, the Respondent denies that the Applicant's rights have been violated. Regarding the alleged violation of Article 7 of the Charter, the Respondent argues that the Applicant exercised his right to go to the national Courts, and was given a fair hearing. The Respondent says further that the Courts of Malawi did in fact lean backwards to assist the Applicant. As regards the alleged violation of Article 15 of the Charter, the Respondent argues that the Applicant was employed by the University under a contract, one of the terms of which

was that the contract could be terminated by either party on three months' notice or a three months' payment *in lieu* of notice. The Respondent therefore argues that, as the Supreme Court of Appeal has already ordered that the Applicant be paid for the three months, the alleged right has not been violated. The Respondent further argues, in this respect, that the Industrial Relations Court has found the dismissal to be fair.

32. As said earlier, the Respondent's preliminary objection against the Court's jurisdiction is that whereas the Applicant's alleged violation of his rights took place in 1999, the Protocol came into operation in respect of the Respondent only after the Respondent ratified it on 9 October, 2008. The Court notes that the Charter came into operation on 21 October, 1986 and the Respondent ratified the Charter in 1989. It is the view of the Court, therefore, that at the time of the alleged violation of the Applicant's rights in 1999, the Charter was already binding on the Respondent; the latter was under the duty to protect the Applicant's rights alleged to have been violated. Furthermore, the Court notes that the Applicant's case is that the alleged violation of his rights under Articles 7 and 15 is continuing. For the above reasons, the preliminary objection raised by the Respondent cannot succeed.

VI. The Court's ruling on the preliminary point relating to admissibility

33. Respondent's argument on this point is that the Application is not admissible as it is pending before the Commission. This Court does, however, find that the Applicant did formally withdraw his communication from the Commission before lodging his Application in March 2011. The Applicant submitted to this Court two copies of his letters to the Commission, dated 7 and 17 February 2011, withdrawing his communication. The Commission also confirmed to the Court, in its letter of 29 March 2011, that the Applicant had indeed withdrawn the matter before it. The matter is therefore not pending before the Commission. Once the Applicant has withdrawn his communication before the Commission, he has the right to approach another forum and, in the view of this court, there is nothing untoward about this. The Respondent's objection is therefore not valid. However, this finding does not necessarily mean that the Application is admissible because the Application must still meet other requirements of admissibility; in particular, the Applicant must satisfy the provisions of Article 6(2) of the Protocol, read together with Article 56(5) of the Charter, namely, that he has exhausted local remedies. This aspect is dealt with later.

A. The Court's jurisdiction in terms of the Protocol

34. The jurisdiction of the Court *ratione materiae* is set out in Article 3 of the Protocol. Article 3(1) of the Protocol provides that: "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." Article 3(2) provides that "in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide". The

provision is quite broad as it extends to all cases and disputes, on human rights issues, concerning the interpretation and Application of the Charter, the Protocol and other relevant human rights instruments ratified by the State concerned. In the instant case, the requirements of the subject matter jurisdiction have been met, as the rights alleged to be violated are human rights enshrined in the Charter.

35. With regard to *ratione personae* jurisdiction, the Applicant is a national of Malawi, a state that has ratified the Protocol and also filed the required declaration in terms of Article 34(6) as read together with Article 5(3) of the Protocol, accepting the competence of the Court to deal with cases against it from individuals and Non-Governmental Organizations.

36. Regarding *ratione temporis* jurisdiction, even though the facts giving rise to the Application arose before the Respondent filed the declaration, the Court has already made a finding that the alleged violation is continuing. Taking all the above into consideration, the Court does have jurisdiction to deal with this matter.

B. The Court's finding on the exhaustion of local remedies as required by Article 6(2) of the Protocol read together with Article 56(5) of the Charter

37. As said earlier, the Application must satisfy the requirements of Article 6(2) of the Protocol, read together with Article 56(5) of the Charter; that is, the Applicant must have exhausted local remedies. Article 6(2) of the Protocol provides that the court "shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter." For its part, Article 56(5) of the Charter requires the exhaustion of "local remedies, if any, unless it is obvious that this procedure is unduly prolonged" (See also Rule 40 of the Rules of Court). From the pleadings submitted by both parties, as well as copies of various judgments of the courts in Malawi relied upon and submitted by the Applicant himself, a question arises whether the Applicant did exhaust local judicial remedies as required by the above Articles, before coming to this Court, or whether he was faced with a procedure which was unduly prolonged. The Respondent did not raise any objection based on failure to exhaust local remedies. It, however, remains the duty of this Court to enforce the provisions of the Protocol and of the Charter. The Court is enjoined to ensure that an Application meets, amongst others, the requirements for admissibility which are stipulated in the Protocol and the Charter. The law does not have to be pleaded. Failure by the Respondent to raise the issue of non-compliance with the requirements stipulated in the Protocol and the Charter cannot render admissible an Application which is otherwise inadmissible. The requirement of exhaustion of local remedies is fundamental in the inter-action between State Parties to both the Protocol and the Charter, and their national courts, on the one hand, and this Court, on the other hand. State Parties ratify the Protocol on the understanding that local remedies would first be exhausted before recourse to this Court; the making of the declaration in terms of Article 34(6) of the Protocol is also on this understanding.

38. Some jurisprudence on the requirement of the exhaustion of local remedies:

38.1. By exhaustion of local remedies, this Court is referring primarily to judicial remedies.

This Court has recently confirmed the jurisprudence that what is envisaged by local remedies is primarily remedies of a judicial nature. In the Consolidated Matter of *Tanganyika Law Society and the Legal and Human Rights Centre v The United Republic of Tanzania*, Application No 009/2011 and *Reverend Christopher R Mtikila v the United Republic of Tanzania*, Application No 011/2011 paragraph 82.3, the Court held that: “The term local remedies is understood in human rights jurisprudence to refer primarily to judicial remedies as these are the most effective means of redressing human rights violations.” What the Court needs to determine in this case is whether the Applicant has exhausted local judicial remedies.

38.2 The Inter-American Commission of Human Rights (IACHR) stated in *Mariblanca Staff Wilson and Oscar E Ceville v Panama*. Case 12.303. Report No 89/03, OEA/Ser.UV/11.118 Doc 70 rev 2 at 531 (2003), paragraph 35 and 36 as follows:

“35. In the present situation, the State argues that the petitioners did not exhaust domestic remedies because the ‘amparo’ brought by the presumed victim was not the appropriate remedy. It argues that in reality the petitioners should have presented a motion of unconstitutionality...

36. In support of its arguments, the State invokes the decision of the Supreme Court ... in which the court, analyzing the ‘amparo’ brought by the alleged victim, ruled that the ‘amparo’ was not the appropriate remedy because the challenged law was a legislative act of a general nature issued by an authority constitutionally empowered to do so ... and that it was not susceptible to challenge through ‘amparo’ for constitutional protection ... The court concluded that this type of challenge must be pursued through independent action for unconstitutionality. The State argues that the petitioners failed to exhaust this remedy.”

After considering the matter further, the IACHR upheld the above argument. The petitioners having failed in the Supreme Court as a result of approaching that court, wrongly, by way of “an ‘amparo’ for constitutional protection” instead of “through independent action for constitutionality” could not claim to have exhausted judicial local remedies.

39. To resolve whether or not the Applicant has exhausted local remedies in compliance with Article 6(2) of the Protocol read together with Article 56(5) of the Charter, it is necessary to look again at the judgments of the national courts of Malawi.

39.1. Judgment of the High Court, 27 November 2003: The Court held that the employment contract could be terminated by either party, upon three months’ notice or by a three months’ payment *in lieu* of such notice. The University had done neither; instead, it paid the Applicant for only a month. The Court, in its judgment of 27 November 2003, added two months’ payment; this award was confirmed by the Supreme

Court of Appeal in its judgment of 12 July 2004. The award still stands; whether the Appellant has collected it or not, is irrelevant.

39.2. The Industrial Relations Court: The Court held that the dismissal was fair and that the Applicant had been given the opportunity to be heard, and had in fact appeared before a disciplinary committee on 16 September 1999, and also before the Vice-Chancellor on 2 December 1999. The Appellant did not seize the opportunity to challenge and argue against the decision of the Industrial Relations Court in the High Court.

Although he did appear in the High Court, he declined to argue his case when he was told that he could not do so from a place reserved for licensed practitioners only. This practice is endorsed by the highest court in Malawi and certainly without knowing the reasons and practices behind it, it would not be for our Court to adjudicate on its correctness or otherwise. What is of importance is that there is no indication that by arguing his case from where he was supposed to be, the Applicant would be prejudiced; nor was this his case before our Court. The Applicant should have agreed to argue, and then argued, the merits of his appeal against the judgment of the Industrial Relations Court in the High Court; if not satisfied with the High Court, appealed to the Supreme Court of Appeal. The Applicant has, to date, not done either.

39.3. Judgments of the Supreme Court of Appeal: As already mentioned, in its judgment of 12 July 2004, that court confirmed the three months' salary payment, but dismissed the claim for wrongful dismissal based on the alleged breach of the rule of natural justice; the court's reasons have already been mentioned and quoted above. In its subsequent judgment of 11 October 2007, the court holding that it was faced with the same issue, found the issue to be *res judicata*, thereby reaffirming its earlier decision, namely, that the Applicant could not present his claim for wrongful dismissal in the way he did. The correctness of the two judgments of the Supreme Court of Appeal depends on whether or not indeed in terms of the national law of procedure, the Applicant was supposed to have stated the issue in the pleadings as a separate cause of action in claiming damages for wrongful dismissal. The Supreme Court of Appeal, being the final court has the last word on what the correct national law is. It has, in its two judgments, said that the Applicant did not state the claim as a separate cause of action. It is important to note that the Applicant was not barred from pursuing his claims, but merely told that he was adopting a wrong procedure. In fact, the High Court had advised him to get the assistance of a lawyer to help him, but he declined.

C. Findings of the Court

40. It is clear from the foregoing summary of the judgments that, as at the time the Applicant lodged his Application:

40.1. The avenue to claim damages for alleged wrongful dismissal and the avenue to challenge in the High Court the judgment of the Industrial Relations Court which had ruled that his dismissal was fair and lawful, were still open to the Applicant; however, he did not use these avenues. It was open for him to argue before the High Court against the judgment

of the Industrial Relations Court and, if he did not succeed, to argue on further appeal to the Supreme Court of Appeal.

As a result of his failure to do so, the High Court and the Supreme Court of Appeal have not had the opportunity to deal with the merits of the claim for wrongful dismissal, as determined by the Industrial Relations Court.

40.2. There has not been any undue delay in the disposal of Applicant's cases before the highest judicial institution in Malawi; namely, the Malawi Supreme Court of Appeal. A case number allocated to a case indicates the year in which a case was registered, and the date of judgment would not be too long thereafter: in the Supreme Court Case No 38 of 2003, the judgment, referred to earlier, was handed down on 12 July 2004; and in Case No. 24 of 2007 the judgment, also referred to earlier, was handed down on 11 October 2007.

For the above reasons:

41. The Court declares this Application inadmissible in terms of Article 6(2) of the Protocol, read with Article 56(5) of the Charter.

D. Costs

42. In accordance with Rule 30 of the Rules of Court, each Party shall bear its own costs.

In conclusion, the Court, by a majority of six votes to three, Vice President Ouguerouz, Judges Niyungeko and Guisse dissenting, decides:

- i. that the Application is not admissible.
- ii. that the Application is struck out.

Joint dissenting opinion: NIYUNGEKO AND GUISSÉ

1. In its judgment of 21 June 2013 in the matter of *Urban Mkandawire v the Republic of Malawi*, the Court concluded *proprio motu* that the Application was not admissible due to failure to exhaust local remedies. We beg to disagree with the conclusion reached by the Court with regard to the exhaustion of local remedies; the Court's reasoning and position regarding its jurisdiction *ratione temporis*; as well as the structure of the judgment with regard to its jurisdiction and the admissibility of the Application.

I. The structure of the judgment with regard to the Court's jurisdiction and the admissibility of the Application

2. In its judgment, the Court successively dealt with the preliminary objection on its jurisdiction *ratione temporis* raised by the Respondent State (paragraph 32); the preliminary objection on the inadmissibility of the Application drawn from the fact that the Application had been submitted to the African Commission on Human and Peoples' Rights

(paragraph 33); the Court's jurisdiction pursuant to the Protocol (paragraphs 34 to 35); and lastly, the exhaustion of local remedies (paragraphs 37 to 40), which is once again relating to the admissibility of the Application. In doing so, the Court mixed up the consideration of the jurisdiction of the Court with that of the admissibility of the Application. This mixed consideration poses a problem and creates confusion between two separate legal issues.

3. Whereas indeed, jurisdiction concerns the *Court*, admissibility concerns the *Application*, and naturally, it is necessary to treat these two issues separately without mixing them. On the order of consideration of these issues, it is clear from the general past practice of the Court, from logic and common sense, as well as from Rule 39 of the Rules of Court, that the Court has to first determine whether or not it has jurisdiction before considering the admissibility of the Application.¹

4. In our opinion, in the instant case, the Court ought to *have first considered separately* all issues relating to its jurisdiction (both the preliminary objection and its jurisdiction pursuant to the Protocol), *and then* all issues relating to the admissibility of the Application (both the preliminary objection and the question of exhaustion of local remedies). The judgment would only have been clearer.²

II. Determining the *ratione temporis* jurisdiction of the Court

5. On the jurisdiction of the Court, *the* Respondent State had raised an objection on the *ratione temporis* jurisdiction of the Court, drawn from the fact that the alleged violation of articles 7 and 15 of the Charter occurred before the entry into force, with regard to Malawi, of the Protocol establishing the Court on 9 October 2008 (paragraph 30(2) of the judgment).

6. The Court overrules this objection on the grounds contained in the following passage:

The Court notes that the Charter came into operation on 21 October, 1986 and the Respondent ratified the Charter in 1989. It is the view of the Court, therefore, that at the time of the alleged violation of the Applicant's rights in 1999, the Charter was already binding on the Respondent, the latter was under the duty to protect the Applicant's rights alleged to have been violated. Furthermore, the Court notes that the Applicant's case is that the alleged violation of his rights under articles 7 and 15 is continuing. For the above reasons, the preliminary objection raised by the Respondent cannot succeed. (paragraph 32).

7. The first reason advanced by the Court (the prior ratification of the Charter) is incomprehensible and confusing, within the context of the

1 For further details, see the separate opinion of Judge Gerard Niyungeko, annexed to the judgment of 14 June 2013 in the matter of *Tanganyika Law Society et al v The United Republic of Tanzania*, paragraphs 2-7.

2 In the matter of *Tanganyika Law Society et al v The United of Tanzania* cited in the preceding paragraph, the Court had treated both issues distinctly, except that, in our opinion, it unduly reversed the order of treatment, *ibidem*.

specific objection raised by the Respondent. In fact, whereas the objection by the Respondent State is based, as far as it was concerned, on the date of entry into force of the protocol to establish the Court, the Court's response is to invoke the date of entry into force of the Charter which was not an issue for the Respondent State. And one does not quite see what the Court draws as conclusion from the date of entry into force of the Charter, regarding the Respondent State's argument of non-retroactivity of the Protocol.³

8. In our opinion, the Court ought to have been unequivocal on this point and should have indicated that though the Respondent State was already bound by the Charter, the Court lacks temporal jurisdiction with respect to it, as long as the Protocol conferring jurisdiction on it is yet to become operational, unless of course the argument of the alleged continuing violation is invoked.

9. Regarding the second reason given by the Court (the continuation of the alleged violations), the Court ought to have examined these allegations more closely and possibly establish a distinction between the "instantaneous" and the "continuous" facts, as it appropriately did in another judgment delivered on the same day, in the matter of the *Beneficiaries of late Norbert Zongo et al v Burkina Faso*.⁴ It should have asked itself whether the alleged violation of Article 15 of the Charter (the dismissal of the Applicant by the University of Malawi) was not an "instantaneous" fact outside the *ratione temporis* jurisdiction of the Court, and whether on the contrary the alleged violation Article 7 of the Charter (the manner in which the local courts handled the matter) was not a "continuous" fact, which falls within its temporal jurisdiction. An in depth analysis of these issues would have enabled the Court to arrive at a more informed conclusion with regard to its jurisdiction *ratione temporis*.

10. In our opinion, the Court therefore missed an opportunity to make clear jurisprudence on an issue which will likely resurface in the future.

III. The issue of exhaustion of local remedies

11. The most serious problem raised by the judgment of the Court however is its approach and decision on the question of exhaustion of local remedies. After a summary of how the various local courts handled the matter on several occasions (paragraphs 21 to 28 and 39), the Court concludes in substance that the Applicant did not exhaust local remedies, because he did not argue the appeal which he had brought before the High Court against a decision of the Industrial Relations Court, and that under such conditions, he could not go to the Supreme Court of Appeal if he were not to be satisfied with the decision of the High Court regarding his claims for reparation for unlawful dismissal (paragraph 40(1)).

3 The same problem arose in the matter of the *Tanganyika Law Society et al v the United Republic of Tanzania*, the 14 June judgment. See the separate opinion of Judge Gerard Niyungeko, paragraph 8-17.

4 The 21 June 2013 judgment, paragraph 63.

12. Firstly, it should be noted that the Court raised this issue *proprio motu* without the Respondent State raising a preliminary objection in that respect. On the contrary, before the African Commission on Human and Peoples' Rights, according to the latter, the Respondent State had earlier declared that "it does not dispute that the complainant exhausted all available local remedies and that as a matter of fact, his claims before Malawi Courts were duly entertained..."⁵ The Commission itself concluded the consideration of the issue of exhaustion of local remedies in this matter, in the following terms: "Thus, there is no contention regarding the exhaustion of local remedies by the Complainant from the Respondent State. In this regard, Article 56(5) has been duly complied with."⁶

13. Without doubt, the Court has the power and even the duty, under Rule 39 of its Rules, to consider the admissibility of an Application even if the Respondent State did not raise any preliminary objection to that effect. But when the Respondent State itself – which is supposed to have a good knowledge of the remedies available in its judicial system and which has an interest in challenging the admissibility of the Application – admits that the local remedies had been exhausted, when the Commission arrives at the same conclusion after examining the circumstances surrounding the matter, the Court must have very convincing reasons to go against this common position, and decide that local remedies had not been exhausted.

14. In the judgment of the Court, such convincing reasons are missing. Here is an Applicant who seized with the same matter the High Court on three occasions (once sitting as a constitutional court), the Supreme Court of Appeal on three occasions, as well as the Industrial Relations Court, and the conclusion is that he has not exhausted local remedies because he could have appealed again before the same High Court and the same Supreme Court of Appeal?

15. The subtle distinction between an action for wrongful termination of a contract of employment under the terms of the said contract and an action for wrongful dismissal based on the rules of natural justice, which the Court seems to rely on (paragraph 40(1)) does not hold in the face of the general impression that emerges from the manner in which the domestic courts dealt with the matter and the Respondent State's admission that domestic remedies have been exhausted.

16. Lastly, it seems to us that the Court, having taken the initiative of treating the issue of exhaustion of local remedies, it should have examined all its facets and ensure especially that the remedies it was referring the Applicant to, were still available and effective. However, since the issue was not discussed by the parties and since the Court itself raised no questions on the matter, no one knows, legally speaking, whether recourse to the High Court is still possible for the Applicant. Be it as it may, there is no guarantee that this remedy will be effective, especially as the Supreme Court of Appeal had decided in its

5 Communication 357/2008- *Urban Mkandawire v Republic of Malawi*, Decision of the Commission, paragraph 102.

6 *Ibidem*.

judgment of 2007 that the principle of *res judicata* would apply to the case of the Applicant on unlawful dismissal.⁷

17. The African Court therefore took its decision without any certainty on the availability of remedies and on their effectiveness. In our opinion, under the circumstances, it should at least have, pursuant to Rule 41 of the Rules of Court, requested parties to provide more information on the exhaustion of local remedies, on their availability and effectiveness. By failing to do so, it took the risk of making a decision on a fragile basis.

18. As far as we are concerned, the Applicant may be considered as having exhausted local remedies, as recognized by the Respondent State itself, and as noted by the African Commission on Human and Peoples' Rights; consequently, we are of the opinion that the Application is admissible.

19. Had the Court reached the same conclusion, it would have had the opportunity to examine the merits of the matter and to make a decision on alleged violations which fall within its jurisdiction, and to settle the matter. In the present situation, in our opinion, the judgment of the Court leaves regrettably, the impression of an uncompleted process.

7 The 11 October 2007 judgment: "We shall now deal with the first ground of appeal which is that his employment was unlawfully terminated. Upon regaining the judgment of this Court which was delivered on 12 July 2004 which we have partly cited earlier in this judgment, we are satisfied that the issue for determination and the parties to the appeal are the same. It is very clear that this case falls into a classic definition of *res judicata*."

Urban Mkandawire v Malawi (review and interpretation) (2014)
1 AfCLR 299

Urban Mkandawire v The Republic of Malawi

Judgment, 28 March 2014. Done in English and French, the English text being authoritative.

Judges: AKUFFO, NGOEPE, NIYUNGEKO, OUGUERGOUZ, RAMADHANI, THOMPSON, ORE, GUISSÉ and KIOKO

Recused under Article 22: TAMBALA

Did not participate: ABA

Application for the review of the Court's inadmissibility decision and for the interpretation of the judgment.

Interpretation of judgment (purpose of interpretation of judgment is to execute it, 6)

Review of judgment (evidence not known when judgment was delivered, 12)

Separate opinion: NIYUNGEKO

Interpretation of judgment (interpretation can only deal with operative part of judgment, 6)

Separate opinion: OUGUERGOUZ

Interpretation of judgment (Court going beyond its interpretation mandate, 8)

Review of judgment (Court should clearly spell out circumstances under which review may take place, 10, 16, 17)

I. The nature of the matter

1. The Court handed down its judgment on 21 June 2013 in an Application which had been brought by the Applicant against the Respondent. By a letter dated 16 August 2013, the Applicant made an Application to the Court containing two requests: for the review of the Court's judgment and also for the interpretation of the judgment. The Application was purportedly brought in terms of Rules 67 and 66, respectively, of the Rules. In this Application, the Applicant is self-represented.

2. The Registrar served the Application on the Respondent on 28 August, 2013, requiring him to respond within thirty (30) days of the

receipt of the notification. That time was extended by fifteen (15) days, that is, up to 19 October, 2013. Still there was no response. The Court decided to proceed with the Application.

3. In his Application, as stated earlier, the Applicant submitted two requests; the Court has dealt with the request for interpretation first.

II. Request for interpretation in terms of Rule 66

4. The request for interpretation contains the following eight 'points' seeking the so called interpretation:

- a. Paragraph 29 of the judgment in terms of Art 15 of the African Charter on Human and Peoples' Rights (the Charter): The Applicant complains that his exhibits "UM Potani" and "UM HC Appeal" were not referred to in the judgment.
- b. Paragraph 29 of the judgment in terms of Art 7 of the Charter: The Applicant wants the Court to interpret that paragraph and determine whether or not the Industrial Relations Court of Malawi violated Art 7 of the Charter and whether or not that Court violated some provisions of the Constitution of Malawi when it overruled the High Court of Malawi.
- c. Paragraphs 34-40 of the judgment in terms of Art 56(5) of the Charter: The Court decided that the Applicant had not exhausted local remedies while the African Commission of Human and Peoples' Rights (the Commission) in its 46th Ordinary Session found that he had done so. So, the Applicant wants the Court to interpret paragraph 38.2 of the judgment to determine whether or not he had exhausted local remedies.
- d. Paragraph 41 of the judgment in terms of Art 56(7) of the Charter: The Applicant wants the Court to determine whether or not it is still open to him to re-file this case with the Commission since the Court did not "settle" his case in terms of Art 56(7) of the Charter.
- e. Paragraphs 19 and 29 of the Judgment in terms of Art 26 of the Charter: The Applicant points out that the Court rejected his legitimate complaint of the existence of a blood relationship between Justice Tembo of the Supreme Court of Appeal of Malawi and the student called Tembo who was one of the complainants against the Applicant. So, the Applicant wants to know whether or not the Court resorted to Rule 44 D4 of the Rules of the European Court of Human Rights in making that determination.
- f. Interpretation of the date of the judgment in terms of Art 28(1) of the Protocol and Rule 59(2) of the Rules of Court: The two cited provisions require the Court to give judgment within ninety (90) days after deliberation. The Applicant wants to know whether it was within the province of the Court to deliver the judgment on 21 June, 2013, instead of 10 June, 2013.
- g. Interpretation of the date of judgment in terms of Art 15(2) of the Rules of Procedure of the IACHR: The Applicant points out that whereas nine judges heard the case in Mauritius the judgment indicates that it is by a majority of seven to three, that is, a total of ten judges.
- h. Interpretation of the judgment in terms of Art 30(3) of the Rules of Procedure of the IACHR and Rule 36 of the Rules: In paragraph 29 of the judgment the Court made a finding that the Applicant had not refuted the Respondent's submission regarding the relationship of Justice Tembo and student Tembo contained in documents "Malawi 1"

and “Malawi 2” which were sent to him on 30 November, 2012. He asks “How can one respond to a document that I don’t know the content?”

5. The Applicant has correctly referred to Rule 66 of the Rules but the authority for that Rule is Article 28(4) of the Protocol which reads: “4. The Court may interpret its own decision”. For its part, Rule 66 reads: “1. Pursuant to Article 28(4) of the Protocol, any party may, for the purpose of executing a judgment, apply to the Court for interpretation of the judgment. 2. The Application shall state clearly the point or points in the operative provisions of the judgment on which interpretation is required”.

6. Interpretation of a judgment can be sought from the Court “for the purpose of executing” the judgment. In the present case the judgment dismissed the Application on the grounds that local remedies had not been exhausted; it imposes no positive obligation capable of being executed. Therefore, there cannot be an Application for interpretation of the judgment in terms of Art 28(4) of the Protocol as read together with Rule 66 of the Rules because there is no execution that is possible under the judgment of the Court.

7. Moreover, the Application does not comply with Rule 66(2) in that it does not “state clearly the point or points in the operative provisions of the judgment on which interpretation is required”. On the contrary, the Application is generally incoherent and incomprehensible. The eight ‘points’ posed by the Applicant can never be points for interpretation as they do not relate to the operative paragraphs of the judgment. On a number of issues the Applicant asks for the Court’s opinion, such as whether he can go back to the Commission.

8. However, there are two points which, for the avoidance of confusion, need to be explained. One, the Applicant asked whether it was within the province of the Court to deliver judgment on 21 June, 2013, instead of 10 June, 2013. The Applicant does not tell us from where he came up with the date of 10 June, 2013. In any case, it is not important for the Court to determine that request, since it has already cited what Art 28(1) of the Protocol and Rule 59(2) of the Rules provide. To clear the mind of the Applicant of any confusion, the President when closing the hearing in Mauritius on 30 November, 2012, clarified it further: “Not 90 days as of today, 90 days of completion of deliberation. When the Court is ready with its judgment for delivery, parties will be notified by the Registrar, and, therefore, this matter is adjourned *sine die*.” It should be noted that when deliberations are concluded is an internal matter of the Court.

9. The second point is that the Applicant recollects, and rightly so, that he appeared before nine judges in Mauritius but the judgment states that seven judges voted for the decision and three judges voted against it. He points out that it is six judges, not seven, who voted for the judgment. The Court concedes that there is a typographical error and the record should have read six and three judges instead of seven and three and a corrigendum has been issued. Nevertheless, this is not a point for interpretation.

10. The request for the interpretation of the judgment satisfies the requirements of Rule 66(1) with regard to the time limit of 12 months

within which to file an Application for interpretation of a judgment. However, it fails to satisfy the requirements of Article 28(4) of the Protocol, and of Rule 66(2) of the Rules. In view of the foregoing, the Application for interpretation of the judgment cannot be entertained.

III. Applicant's request for review in terms of Rule 67

11. The Court has power provided by Art 28 of the Protocol to review its decision: "2. The judgment of the Court decided by the majority shall be final and not subject to appeal. 3. Without prejudice to sub-Article 2 above, the Court may review its decision in the light of new evidence under conditions set out in the Rules of Procedure". Rule 67(1) of the Rules reads:

"Pursuant to Article 28(3) of the Protocol, a party may apply to the Court to review its judgment in the event of the discovery of evidence, which was not within the knowledge of the party at the time the judgment was delivered. Such Application shall be filed within six (6) months after the party acquired knowledge of the evidence so discovered".

12. An Applicant must therefore show in the Application "the discovery of evidence, which was not within the knowledge of the party at the time the judgment was delivered".

13. In his Application, the Applicant purports to quote two portions of the Court's judgment, which he claims constitute, as he puts it, "new piece of information".

13.1. Firstly, he claims that the first "piece of information" is "presented" in paragraph 27 of the judgment, which he inaccurately quotes as follows:

"In Malawi there is a law or custom which precluded a litigant who is not a licensed practitioner or a lawyer to address the Court from the Bar and when I appealed in the High Court against the decision of the Industrial Relations Court, I reneged (sic) to ague (sic) my appeal from anywhere else but decided to filed (sic) by appeal to the Supreme Court against the decision of the Industrial Relations Court".

13.2. Secondly, he says that the next "new piece of information" is "presented" in paragraph 37 of the judgment, which, he again inaccurately quotes as follows: "I was the one who curtailed the itinerary of the recourse my case to the national courts in Malawi by submitting five copies out of seven copies of various judgments of the courts in Malawi relied upon by the African Court in its judgment dated June 21, 2013".

14. It should be noted, from the outset, that Article 28(3) requires that the process of review must be without prejudice to Article 28(2); in other words, such a process may not be used to undermine the principle of finality of judgments enshrined in Article 28(2), which states that there shall be no appeal. It is against this background that the Applicant's Application for review must be considered.

14.1 The Applicant inaccurately cites the Court's judgment in respect of both paragraphs of its judgments. Paragraph 27 of the judgment reads:

“The Applicant appealed against the above judgment to the High Court as he was not satisfied with it. When the Applicant, who is neither a licensed practitioner nor a lawyer, appeared before the High Court, he wanted to address that court from the Bar where licensed practitioners would do. This was denied to him in terms of the practice before the courts in that country; he was, however, free to argue his case from where people who were not practitioners would do. He however decided not to argue from anywhere else; instead, he decided to appeal to the Supreme Court of Appeal, for the third time”.

As far as paragraph 37 of the Judgment is concerned, the contents thereof are not anywhere near what Applicant claims it contains; what he presents as paragraph 37 cannot be located in the judgment. Therefore, while what the Applicant inaccurately presents as paragraph 27 of the judgment at least captures the paragraph’s substance, what he presents as paragraph 37 is incomprehensible and is not part of the judgment.

14.2 Furthermore, what the Applicant presents as “new piece of information” is in fact neither new, nor “evidence” at all as contemplated in Article 28 of the Protocol, or Rule 67(1) of the Rules, as it purports to be the findings of the Court, contained in its judgment. The new evidence contemplated by the Article and the Rules is evidence, which was not previously known by the party concerned. Nothing contained in the Applicant’s submissions constitutes any “evidence” which was not known to the party at the time the Court handed down its judgment.

15. The request for review satisfies the requirements of Rule 67(1) with regard to the time limit of six (6) months within which to file an Application for review of the judgment. However, it fails to comply with the requirements of Article 28(3) of the Protocol, as well as Rule 67(1) and (2) of the Rules.

16. Although the Respondent has not filed a reply to the Application, this does not cure the defects in the Application, or add to it. For all the reasons given above, the Court decides as follows:

1. The Applicant has complied with Rule 66(1) with regard to the time limit of 12 months within which to file an Application for interpretation of a judgment;
2. The Application for interpretation of the judgment fails and is struck out;
3. The Applicant has complied with Rule 67(1) with regard to the time limit of six (6) months within which to file an Application for review of a judgment from alleged date of discovery of new facts;
4. The request contained in the Application for the review of the Court’s judgment of June 2013 is inadmissible and is struck out. The Court will not therefore go into the merits of the request.

Pursuant to Article 28(7) of the Protocol and Rule 60(5) of the Rules of Court, the individual opinions of Judges Niyungeko and Ouguerouz are annexed to this Ruling.

Separate opinion: NIYUNGEKO

1. In its judgment of 28 March 2014, in the matter of *Urban Mkandawire v The Republic of Malawi*, Application for interpretation and review of the judgment of 21 June 2013, the Court concluded that the request for review was inadmissible, in the absence of new evidence which was not known to the Applicant when the previous judgment of the Court was rendered (Article 28(3) of the Protocol establishing the Court) (herein after the Protocol) and Rule 67 of the Rules of Court (herein after, the Rules) (paragraphs 16 and 15).

It also concludes that the Application for interpretation fails and is struck out, notably on the ground that the points raised are not related to the operative provisions of the judgment in question (Article 28(4) of the Protocol and Rule 66 of the Rules) (paragraphs 16 and 7).

2. I agree with the conclusions reached by the Court on both issues; I however differ with it on the fact that, with regard to the Application for interpretation, in spite of its principled position stated above, it decided to interpret Article 28(1) of the Protocol and Rule 59(2) of the Rules, and to consider the Applicant's grievance on the composition of the Court which rendered the judgment of 21 June 2013 mentioned above.

I. Interpretation of Article 28(1) of the Protocol and Rule 59(2) of the Rules

3. Article 28(1) of the Protocol provides that "[t]he Court shall render its judgment within ninety (90) days of having completed its deliberations".¹ Rule 59(2) of the Rules, which is aligned to the English version of Article 28(1) of the Protocol, provides that "[t]he decision of the Court shall be rendered by the Court within ninety (90) days from the date of completion of the deliberations".

4. In his Application, the Applicant requested for the interpretation of the date of the judgment rendered on 21 June 2013 in terms of these two provisions, and asked the Court whether it was "within the province of Article 28(1) of the Protocol and Rule 59(2) of the Rules of the Court for the Court to deliver its judgment on 21/6/2013; 11 days after the due date of 10/6/2013 had elapsed".

5. In its judgment of 28 March 2014, the Court considered this matter and responded in substance that the deadline of ninety days starts running from the end of deliberations and that the final date is an internal matter of the Court (paragraph 8).

6. In my view, the Court did not have to respond to such a question. In fact, first of all, this question is not related to the operative provisions of the judgment to be interpreted. In terms of Rule 66(2) of the Rules, the Application for interpretation of a judgment must "state clearly the point or points in the operative provisions of the judgment on which interpretation is required". This means that the Application for

¹ In its French version, this provision provides for a different rule : «La Cour rend son arrêt dans les quatre-vingt-dix (90) jours qui suivent *la clôture de l'instruction de l'affaire* » (italics added).

interpretation can only concern the operative provisions (which excludes notably, the part of the judgment dealing with reasons), and that in the same manner, therefore, the Court can only interpret a point which is part of the operative provisions of the judgment in question. The operative provisions of the judgment of 21 June 2013 provide as follows: “The Court declares this Application inadmissible in terms of Article 6(2) of the Protocol, read with Article 56(5) of the Charter” (paragraph 41). The Applicant’s Application for the interpretation of Article 28(1) of the Protocol and Rule 59(2) of the Rules mentioned above is in no way related to these operative provisions which have to do with the inadmissibility of the Application for failure to exhaust local remedies. It clearly even has no relation to the reasoning of the judgment, and concerns an issue clearly outside the scope of the judgment. Besides, the Court itself has just admitted this in one of the preceding paragraphs of its judgment where it declared that “[t]he eight ‘points’ posed by the Applicant can never be points for interpretation as they do not relate to the operative paragraphs of the judgment” (paragraph 7).

7. The Court justifies its decision to consider this point in spite of the affirmation it just made, in saying that there was a need to remove any doubt on the issue. This justification is however not convincing. The same need to remove any doubt could also be felt in relation to the six other points raised by the Applicant in his Application for interpretation which the Court however decided to ignore; and the Court also failed to explain why the interpretation of Article 28(1) and Rule 59(2) had to be treated differently from the other points. The selection of points which the Court did not have to interpret, but which it nevertheless interpreted, certainly appears to be arbitrary.

8. Further, parts of the judgment in which the Court gives its interpretation of Article 28(1) of the Protocol and Rule 59(2) of the Rules do not even constitute *obiter dicta*. It is generally acknowledged that a judge may include *obiter dicta* in his judgment. An *obiter dictum* is a Latin expression which means ‘said in passing’, which “qualifies an argument which does not fall within the ambit of *ratio decidendi*, which is not invoked to make a decision”.² It is an argument which is not strictly necessary to justify the decision of the judge.

In the instant case however, these parts want to express a decisive and compulsory interpretation of the Article and Rule concerned.

9. Furthermore, in any case, the Court does not have to, without cause, exercise incidentally, its mandate of interpreting human rights legal instruments. The Court is charged with the interpretation of human rights legal instruments both in contentious matters (Article 3 of the Protocol) and in advisory matters (Article 4 of the Protocol). It is a mandate which it has to carry out primarily and autonomously within the framework of its dual jurisdiction and in respect of laid down procedure,

2 *Lexique des termes juridiques 2014*, Serge GUINCHARD et al. ed. , 21^e éd., 2013, p. 635. According to *Black’s Law Dictionary* , *obiter dictum*, is “[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)” (Bryan A. GARNER, ed., 9th ed. , 2009, p. 1177).

not just in passing and not at the sidelines of the interpretation of the operative provisions of a judgment. It is also a mandate which it has to discharge in a proper manner, that is, by applying notably, the rules of interpretation of international treaties, as provided under Articles 31 to 33 of the Vienna Convention on the Law of Treaties of 23 May 1969. In the instant case, by giving a hasty and incidental interpretation of Article 28(1) of the Protocol, the Court took the risk of giving a summarized and incomplete interpretation of this Article, without paying adequate attention to the above-mentioned provisions of the Vienna Convention on the Law of Treaties.

10. Lastly, if it was the intention of the Court to provide an advisory opinion, it is evident, under Article 4 of the Protocol, that it does not have the jurisdiction to do so when the request is made by an individual. It is important to underscore this fact because the Court seems to understand the Applicant's requests as requests for the "Court's opinion" "on a number of issues" (paragraph 7).

11. For all these reasons, the Court ought to have abstained from responding to the Application for interpretation of Article 28(1) of the Protocol and Rule 59(2) of the Rules, in its judgment of 28 March 2014.

II. Consideration of the Applicant's grievance on the composition of the Court which rendered the judgment of 21 June 2013 mentioned above.

12. In his Application for interpretation of the Judgment of 21 June 2013, the Applicant also requested for the interpretation of "the date of the Judgment dated June 21, 2013 in terms of Article 15(2) of the Rules of Procedure of the IAHRIC" [sic], in pointing out that whereas in the public hearing he appeared before nine judges, the judgment states that it was rendered by ten judges.

13. In its 28 March 2014 judgment, the Court took time to respond in the following words: "The Court concedes that there is a typographical error and the record should have read six and three judges instead of seven and three and a corrigendum has been issued. Nevertheless, this is not a point for interpretation" (paragraph 9).

14. In my view, as admitted by the Court, this is not a matter for interpretation, (this thus places it outside the jurisdiction of the Court in the interpretation of judgments). In any case, the Court does not have to correct simple typographical errors in a judgment on the interpretation of an earlier decision. In its practice, the Court corrects such errors through an *erratum* attached to the judgment in question. This approach would have been sufficient to solve the problem. In my view, a judicial decision of the Court does not seem to be the right place to deal with such issues.

Separate opinion: OUGUERGOUZ

1. Even though I subscribe to the conclusions reached by the Court concerning the inadmissibility of the Applications for interpretation and

review of its judgment of 21 June 2013, filed by Mr Urban Mkandawire, I do not entirely share the reasoning adopted to arrive at these conclusions and would like to explain why.

I. Concerning the Application for interpretation

2. In paragraph 6 of the present judgment, the Court notes, and rightly so, that in terms of Rule 66(1) of the Rules, any party may request the Court to give an interpretation “for the purpose of executing a judgment”, and that in the instant case, the judgment for which interpretation is sought, has declared that the Application is inadmissible for failure of exhaustion local remedies by the Applicant. The Court then points out that the judgment in question imposes no obligation capable of being executed and concludes that the Application for interpretation is not possible in terms of the relevant provisions of the Protocol and the Rules. In my opinion, that is what would have been enough to say on the matter.

3. The Court however deemed it necessary to consider whether a second condition under Rule 66 of the Rules was met, that is to say that the Application shall “state clearly the point or points in the operative provisions of the judgment on which interpretation is required”.

4. In that regard, the Court notes that the Application is, on the contrary, “generally incoherent and incomprehensible”, and concludes that the nine “points” mentioned by the Applicant can never be points for interpretation.¹ In my view, the Court ought to have ended its analysis on this conclusion and proceeded to consider the Application for review.

5. In spite of this negative conclusion, the Court however decided that there were two “points” which needed clarification “for the avoidance of doubt”. By doing that, the Court does not only implicitly accept the Application for interpretation filed by the Applicant, but does so without explaining why it focuses on these two “points” in particular. Equally unclear is the assertion made in Paragraph 8 of the judgment that “it is not important for the Court to determine the request, since it has already cited what Article 28(1) of the Protocol and Rule 59(2) of the Rules provide”.

6. The Court further gave clarification on the 90 days Rule contained in Article 28(1) of the Protocol by noting that “when deliberations are concluded is an internal matter of the Court” and admitted that there was a typographical error in the judgment of 21 June 2013 which resulted in the publication of a *corrigendum*.

7. I am of the view that the developments in paragraphs 8 and 9 of this judgment are tantamount to “justifications” which should not have been given, especially with regard to the Application of the 90 days rule, the

¹ I would like to underline here that one of the nine “points” referred to by the Applicant in his Application relates to paragraph 41 of the 21 June 2013 judgment, that is to say its operative part (See paragraph 4 (d) of the present judgment); it is however for the African Commission and not for the African Court to respond to such a question.

meaning of which remains up to now ambiguous.² The Court should have therefore avoided such developments.

8. To summarize, the Court, in the instant case, could simply have rejected the Application without going into all the different considerations contained in paragraphs 7, 8 and 9 of the judgment. In the examination of similar Applications, which are manifestly unfounded, the Court could in the future draw inspiration from Rule 80(3) of the Rules of the European Court of Human Rights which provides that “the original Chamber may decide of its own motion to refuse the request on the ground that there is no reason to warrant considering it”.

II. Concerning the Application for review

9. I do not share the interpretation of paragraphs 2 and 3 of Article 28 of the Protocol made by the Court in paragraph 14 of the present judgment. The expression “without prejudice” used in paragraph 3 of this Article should, in my opinion, simply be conceived as providing for an exception to the principle of the “final” character of the judgments of the Court enshrined in the preceding paragraph.

10. I am also of the view that the Court should have clearly spelt out the three conditions *for* admissibility of an Application for review as provided for by the Protocol and the Rules, that is to say that the Application 1) must contain new evidence, 2) which the Court “or” the Applicant had no knowledge of when the judgment was being rendered, and 3) to be submitted within six months of the date the said party discovered the new evidence.

11. In so doing, the Court could have taken advantage of this occasion to make a useful clarification on some or the weaknesses contained in the Protocol and the Rules on this issue.

12. The discrepancy between the English and French versions of paragraph 3 of Article 28 of the Protocol could indeed explain why one of the three conditions which it poses is not identical to that of paragraph 1 of Rule 67 of the Rules.

13. The French version of paragraph 3 of Article 28 of the Protocol makes it possible for the Court to review its judgment in the light of new evidence “which was not within its knowledge at the time of its decision”; for its part, the English version of this paragraph does not contain such a condition.

14. As for paragraph 1 of Rule 67 of the Rules, both the English and French versions provide that it is the “party” which files the Application for review that is not supposed to have had knowledge of the new evidence at the time the judgment was rendered.

2 It should indeed be noted that there is a discrepancy between the English and French versions of this provision: the English version refers to the completion of the “deliberations” of the Court while the French version refers to the completion of the “instruction” of the case, that is to say all the procedural steps (filing of written and oral arguments by the parties) before the matter can actually be decided by the Court.

15. In this regard, it is important to point out that the instruments governing the functioning of other international Courts and dealing with the issue of revision or review, require that both the Court and the party requesting the review must have been unaware of the new fact; this is for example provided for by Article 25 of the Protocol establishing the Court of Justice of the Economic Community of West African States,³ Article 48(l) of the Protocol establishing the African Court of Justice and Human Rights,⁴ Article 61(l) of the Statute of the International Court of Justice,⁵ and Article 80(l) of the Rules of the European Court of Human Rights.⁶

16. What is even more fundamental is the fact that these three instruments refer to the existence of a new “fact” and not to a new “evidence”, which is quite different; they also provide for two other important conditions, that the party applying for revision did not negligently ignore the new fact and that this new fact should be of such a nature as to be a “decisive factor” on the verdict of the matter decided by the disputed judgment.

17. In my view, these questions relating to the meaning to be given to Article 28(3) of the Protocol and Rule 67(l) of the Rule sought to have been given at least as much attention by the Court as the question relating to the meaning to be given to Article 28(l) of the Protocol and Rule 59(2) of the Rules, relating to the 90 days deadline in which the Court must render its judgments.

18. Lastly, I would like to underline that in the operative part of the judgment, the Court decided to reject the Application for interpretation whereas in its reasoning it made a decision on two of the nine “points” contained in the request of the Applicant.

3 “An Application for revision for a decision may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the decision was given, unknown to the Court and also to the party claiming revision, provided always that such ignorance was not due to negligence”.

4 “An Application for revision of a judgment may be made to the Court only when it is based upon discovery of a new fact of such nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, provided that such ignorance was not due to negligence”.

5 “An Application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence”.

6 “A party may, in the event of the discovery of a fact which might by its nature have a decisive influence and which, when a judgment was delivered, was unknown to the Court and could not reasonably have been known to that party, request the Court, within a period of six months after that party acquired knowledge of the fact, to revise that judgment”. The American Convention of Human Rights, the Statute as well as the Rules of the Inter-American Court of Human Rights, do not contain provisions dealing with revision of judgments; these three instruments make reference only to the issue of interpretation of judgments.

Lohé Issa Konaté v Burkina Faso (provisional measures)
(2013) 1 AfCLR 310

Lohé Issa Konaté v Burkina Faso

Order (provisional measures), 4 October 2013. Done in English and French, the French text being authoritative.

Judges: AKUFFO, NGOEPE, NIYUNGEKO, OUGUERGOUZ, RAMADHANI, TAMBALA, THOMPSON, ORE, GUISSÉ, KIOKO and ABA

The editor-in-chief of a newspaper was sentenced to one-year imprisonment and a fine for libel. The Court held, by majority, that to order Mr Konaté's immediate release would prejudice the merits of the case. The Court therefore only ordered provisional measures in relation to access to health care and required medication.

Jurisdiction (*prima facie* jurisdiction before provisional measures, 13)

Provisional measures (release, 19, 20; adequate medical care, 22)

Separate opinion: RAMADHANI, TAMBALA and THOMPSON

Provisional measures (release, 1-4)

I. Subject of the Application

1. The Applicant, Lohé Issa Konaté, who is the Editor-in-Chief of "Ouragan", a Burkinabé weekly, filed an Application dated 14 June 2013, which was received at the Court on 17 June 2013, and registered as Application No. 004/2013.
2. The Applicant is represented by Advocates Yakare Oule (Nani) Jansem and John RW D Jones
3. In a criminal matter brought against him, the Ouagadougou High Court in its ruling sentenced the Applicant to a one year term of imprisonment for libel and to a fine of 1,500,000 Francs (USD 3,000). In a civil suit, the same Court ordered the Applicant to pay the sum of 4,500,000 Francs (or USD 9,000) as damages to the parties and 250,000 Francs (USD 500) as costs.
4. The Applicant submits that his sentence to a one-year term of imprisonment and to the payment of a substantial fine as damages and costs are in breach of his right to freedom of expression, which is protected by various treaties to which Burkina Faso is party. He alleges, in particular, the violation of his rights under Article 9 of the African Charter on Human and Peoples' Rights and Article 19 of the International Covenant on Civil and Political Rights.
5. On the merits, the Applicant prays the Court:

- “1. To declare that his sentence, in particular, to a term of imprisonment and to the payment of a substantial fine as damages and costs, amounts to a violation of his right to freedom of expression;
 2. To declare that the laws of Burkina Faso with regard to libel and slander are inconsistent with the right to freedom of expression or, failing that, to find that the term of imprisonment for slander is inconsistent with the right to freedom of expression and therefore, to order Burkina Faso to amend its legislation accordingly; and
 3. To order Burkina Faso to pay him compensation, *inter alia* for the loss of income and benefits, and as damages for the moral hardship he has suffered”.
6. In his Application, the Applicant, who was immediately sent to prison, seeks provisional measures “requiring Burkina Faso to release him immediately or, alternatively, to provide him with adequate medical care”.

II. Proceedings before the Court

7. By letter dated 10 July 2013, addressed to Counsel for the Applicant, the Registrar acknowledged receipt of the Application pursuant to Rule 34(1) of the Rules of Court.

8. By another letter dated 10 July 2013, addressed to the Foreign Minister of Burkina Faso, the Registrar forwarded a copy of the Application to the Respondent, pursuant to Rule 35(2) of the Rules. In the letter, the Respondent was asked to indicate, within thirty (30) days of receipt of the Application, the names and addresses of its representatives as required under Rule 35(4) of the Rules and to respond to the Application within sixty (60) days as required under Rule 37 of the Rules.

9. By letter dated 10 July 2013, addressed to the Chairperson of the African Union Commission, the Registrar informed her and through her, the Executive Council of the African Union and other States Parties to the Protocol establishing the Court (hereinafter referred to as “the Protocol”) of the filing of the Application, pursuant to Rule 35(3) of the Rules.

10. By *Note Verbale* dated 18 July 2013, addressed to the Court, the Embassy of Burkina Faso and Permanent Mission to the African Union in Addis Ababa, acknowledged receipt of the Registrar’s letter mentioned in the preceding paragraph.

III. On the *prima facie* jurisdiction of the Court

11. As stated in paragraph 6 above, the Applicant prays the Court to Order provisional measures.

12. In considering an Application, the Court must ensure that it has jurisdiction to hear the case, pursuant to Articles 3 and 5 of the Protocol.

13. However, before ordering provisional measures, the Court need not conclusively satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction;

14. Article 3(1) of the Protocol provides that “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”.

15. Burkina Faso ratified the Charter on 6 July 1984 and the Protocol on 31 December 1998, and is therefore party to both instruments; it has equally on 28 July 1998, made the declaration accepting the competence of the Court to receive cases from Individuals and non-governmental organisations, within the meaning of Article 34(6) of the Protocol.

16. In light of the above, the Court finds that it does have *prima facie* jurisdiction to hear the Application.

IV. On the provisional measures sought

17. Article 27(2) of the Protocol provides that “in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary”.

18. The first provisional measure sought by the Applicant is his immediate release.

19. The Court observes that consideration of the measure sought here, corresponds in substance, to one of the reliefs sought in the substantive case, namely that the punishment of imprisonment is in essence a violation of the right to freedom of expression, in the opinion of the Court, consideration of this prayer would adversely affect consideration of the substantive case.

20. For this reason, the Court cannot grant the Applicant’s request for his immediate release within the framework of a provisional measure.

21. The second provisional measure sought by the Applicant is that, in the event his immediate release is denied, the Respondent be ordered to provide him with adequate medical care. He states that his health had deteriorated since his detention and that he needed medication and adequate medical care.

22. The Court observes that, the Respondent, having been duly informed of these allegations, has not raised any objection. In the opinion of the Court, the situation in which the Applicant finds himself appears to be a situation that can cause irreparable harm. The Court is therefore of the opinion that the Applicant is entitled to access all medical care that his health condition requires.

23. For these reasons

The Court

(i) By majority (Justices Ramadhani, Tambala and Thompson dissenting),

Rejects the Applicant’s request for immediate release;

(ii) Unanimously,

Upholds his request to be provided with medication and health care for the entire period of his detention, in view of his health situation,

Consequently, Orders the Respondent to provide the Applicant with the medication and health care required;

Further Orders the Respondent to report to the Court within 15 days from the receipt of this Order on the measures it has taken to enforce the said Order.

Joint dissenting opinion: RAMADHANI, TAMBALA and THOMPSON

1. We have had the privilege of reading the Order of Provisional Measures in draft. We are however having great difficulty agreeing with the reasoning of the majority for refusing the first request by the Applicant, that is, "his immediate release". Surely the Applicant is not saying that he be released without more. He is asking that he be released provisionally pending the determination of his Application before this Court.

2. There is no reason why this cannot be done, especially when the Respondent that has been served with the Application which incorporates the request for provisional measures has not raised any objection.

3. The granting of this leg of the request for provisional measure will in no way touch or prejudice the substantive Application. If the Application is refused the Applicant will simply be sent back to jail to complete his sentence.

4. Failure to grant this leg of the Application will cause irreparable harm. Admittedly, every case has to be judged on its own merits, but generally it can be said that personal freedom cannot be compensated by monetary damages. In the present case, the Applicant's release from prison will aid, to a great extent, his request for medication and healthcare.

Lohé Issa Konaté v Burkina Faso (merits) (2014) 1 AfCLR 314

Lohé Issa Konaté v Burkina Faso

Judgment, 5 December 2014. Done in French and English, the French text being authoritative.

Judges: RAMADHANI, THOMPSON, AKUFFO, NGOEPE, NIYUNGEKO, TAMBALA, ORE, HADJI-GUISSE, KIOKO and ABA

The case concerned the imprisonment of a journalist for 12 months for publishing three articles about alleged corruption. The publication of the newspaper in which the articles were published was suspended for six months. The Court held that the sentences handed down by the domestic courts were disproportionate to the aim pursued by the domestic legislation. The Court further decided that, since the State was responsible for the conduct of domestic courts, the former was to be blamed for failing to comply with the provisions of the African Charter and the ECOWAS Treaty. The Court consequently ordered the State to amend its legislation.

Jurisdiction (court to determine *proprio motu*, 30)

Admissibility (failure to refer correctly to the name of the State party, 47-48, 72; exhaustion of local remedies, effectiveness assessed in each case, 94-95, five days to appeal not an obstacle, 107, national legal system does not provide for remedy sought, 113)

Expression (custodial sentence for defamation, 164-167)

Separate opinion: THOMPSON, AKUFFO, NGOEPE and TAMBALA

Sequence of judgment (incorrect that Rules require jurisdiction is dealt with before admissibility, 1-2)

Expression (criminal conviction for defamation violates freedom of expression, 4, 5)

I. Subject of the Application

1. The Court is seized of this matter by way of an Application dated 14 June 2013 and filed by Barristers John RWD Jones, QC and Yakaré-Oulé (Nani) Jansen, acting on behalf of Lohé Issa Konaté, a Burkinabé national and Editor-in-Chief of *L'Ouragan Weekly* published in Burkina Faso; the Application was received at the Registry on 17 June 2013 and registered as No. 004/2013.

2. Attached to the Application is a request for provisional measures on which the Court ruled by Order dated 4 October 2013.

A. Facts of the case

3. Prosecution for defamation, public insult and contempt of Court was initiated against the Applicant following the publication, in *L'Ouragan* on 1 August 2012, of an Article written by him and titled "*Contrefaçon et trafic de faux billets de banque – Le Procureur du Faso, 3 policiers et un cadre de banque, parrains des bandits*" ("Counterfeiting and laundering of fake bank notes – the Prosecutor of Faso, 3 Police Officers and a Bank Official – Masterminds of Banditry") as well as an Article by Roland Ouédraogo titled "*Le Procureur du Faso: un torpilleur de la justice*". ("The Prosecutor of Faso – a saboteur of Justice"). The Applicant had published a second Article written by himself in another issue of *L'Ouragan* dated 8 August 2012; that Article was titled "*Déni de justice – Procureur du Faso: un justicier voyou?*". ("Miscarriage of Justice – the Prosecutor of Faso: a rogue officer").

4. Having been accused in all three above-mentioned articles, the Prosecutor, Placide Nikiéma, filed a complaint for defamation, public insult and contempt of Court, against the Applicant and Mr Ouédraogo. It is on these grounds that criminal proceedings were brought and damages sought, against the Applicant, before the Ouagadougou High Court.

5. On 29 October 2012, the Ouagadougou High Court sentenced the Applicant to a twelve (12) month term of imprisonment and ordered him to pay a fine of 1.5 Million CFA Francs (an equivalent of 3000USD), the same court ordered the Applicant to pay the Complainant damages of 4.5 Million CFA Francs (an equivalent of 9000 USD) as damages and interest, and court costs of 250,000 CFA Francs (an equivalent of 500 USD).

6. Further, as additional penalties, the Court ordered that *L'Ouragan* Weekly be suspended for a period of six (6) months and for the operative provisions of the judgment to be published in three successive issues of *L'Evenement*, *L'Observateur Paalga*, *Le Pays* and *L'Ouragan* newspapers and, in the case of the latter, in its first issue upon its resumption of activity and for a period of four months, at the cost of the Applicant and Mr Roland Ouedraogo.

7. On 10 May 2013, the Ouagadougou Court of Appeal confirmed the judgment of the Ouagadougou High Court.

8. The Applicant alleges that *L'Ouragan* is a private Weekly with "an independent editorial policy focussing mainly on political and social issues"; that the paper "has been the object of various legal proceedings in Burkina Faso due to its style in news reporting".

B) Alleged violations

9. The Applicant submits in his Application that "the jail term, huge fine, damages as well as the court costs violate his right to freedom of expression which is protected under various treaties to which Burkina Faso is a Party"; he also alleges notably the violation of his rights under Article 9 of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter"), and Article 19 of the

International Covenant on Civil and Political Rights (hereinafter, referred to as “the Covenant”).

10. Article 9 of the Charter provides as follows: “1) Every individual shall have the right to receive information. 2) Every individual shall have the right to express and disseminate his opinions within the laws and regulations”.

11. Article 19 of the Covenant, for its part, provides that:

- “1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order or of public health or morals.”

12. The Applicant also refers to the violation of Article 66(2)(c) of the Revised Treaty of the Economic Community of West African States (ECOWAS) of 24 July 1993, (hereinafter referred to as “the Revised ECOWAS Treaty”) in which State Parties undertook to protect the rights of Journalists, which according to him is, “the profession in the exercise of which the Applicant’s rights were violated”

13. On the merits, the Applicant prays the Court to:

- “1. Declare in law that his punishment, especially his conviction as well as his being ordered to pay a huge fine, civil damages and court costs are in violation of the right to freedom of expression;
2. Note that Burkina Faso laws on defamation and insult are repugnant to the right to freedom of expression or, failing this, declare that the jail term for defamation is a violation of the right to freedom of expression, and order Burkina Faso to amend its laws accordingly;
3. Order Burkina Faso to compensate him, in particular, for loss of income and profit and to award him damages for the moral prejudice suffered.”

14. The Applicant reiterates his prayers in his Reply dated 18 November 2013.

II. Procedure before the Court

15. The Court was seized of the matter by an Application dated 14 June 2013. By letter dated 10 July 2013, addressed to Counsel for the Applicant, the Registrar acknowledged receipt of the Application, pursuant to Rule 34(1) of the Rules of Court (hereinafter referred to as “the Rules”).

16. In his Application, the Applicant, who was promptly imprisoned after judgment was delivered by the Ouagadougou High Court on 29 October 2012, also sought provisional measures which “involve

requiring Burkina Faso to have him released immediately or, alternatively, provide him with adequate medical care”.

17. Pursuant to Rule 35(2) of the Rules, the Registrar forwarded a copy of the Application to the Respondent State by letter dated 10 July 2013, addressed to the Minister of Foreign Affairs of Burkina Faso, via the Embassy of Burkina Faso in Addis-Ababa, Ethiopia. In the same letter, the Registrar requested the Respondent State to provide, within thirty (30) days of receipt of the Application, the names and addresses of its representatives, in conformity with Rule 35(4) of the Rules and to respond to the Application within (60) days, as required under Rule 37 of the Rules.

18. Pursuant to Rule 35(3) of the Rules, by another letter of the same date, the Registrar forwarded a copy of the said Application to the Chairperson of the African Union Commission and through her, to the Executive Council of the African Union and to all the other States Parties to the Protocol on 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”).

19. By *Note Verbale* dated 18 July 2013, the Embassy of Burkina Faso and Permanent Mission to the African Union in Addis Ababa, Ethiopia, acknowledged receipt of the letter from the Registrar dated 10 July 2013.

20. On 26 November 2013, a request to appear as *Amici Curiae* was submitted by the following non-governmental organizations: Centre for Human Rights, *Comite Pour la Protection des Journalistes*, Media Institute of Southern Africa, Pan African Human Rights Defenders Network, Pan African Lawyers’ Union, Pen International and National Pen Centres (Pen Malawi, Pen Algeria, Pen Nigeria, Pen Sierra Leone and Pen South Africa), Southern Africa Litigation Centre and World Association of Newspapers and News Publishers.

21. The *Amici Curiae* Briefs were submitted to the Registry of the Court on 12 February 2014.

22. On 16 September 2013, the Respondent State submitted its Response.

23. On 4 October 2013, the Court ruled on the Applicant’s request for provisional measures by Ordering the Respondent State to provide “the medical care and medication required in view of his health situation.”

24. On 18 November 2013, the Applicant submitted his Reply.

25. The Court having decided to hold a Public Hearing, the said hearing was held at the Seat of the Court in Arusha on 20 and 21 March 2014, in the course of which the Parties and the representatives of organizations appearing as *amici curiae* made their oral submissions and observations.

For the Applicant:

- Yakare-Oule (Nani) Jansen, Counsel
- John RWD Jones, QC

For the Respondent State:

- Antoinette OUEDRAOGO, Counsel
- Anicet SOME, Counsel

Appearing as *Amici Curiae*: Centre for Human Rights, *Comite Pour la Protection des Journalistes*, Media Institute of Southern Africa, Pan African Human Rights Defenders Network, Pan African Lawyers Union, Pen International and National Pen Centres (Pen Malawi, Pen Algeria, Pen Nigeria, Pen Sierra Leone and Pen South Africa), Southern Africa Litigation Centre and World Association of Newspapers and News Publishers.

- Donald DEYA, Advocate
- Simon DELANEY, Advocate

26. At the Public Hearing, Members of the Court put questions to the Parties and the latter responded.

27. On 22 March 2014, Counsel for the Parties and organizations appearing as *Amici Curiae* forwarded their submissions to the Court.

28. As part of the written proceedings, the following submissions are made by the Parties:

On behalf of the Applicant,

In the Application, the Applicant submits that his sentence, the fines and damages ordered against him, as well as the closure of his Newspaper, are a violation of his right to freedom of expression.

In the Reply,

The Applicant prays the Court:

1. To Declare the preliminary objections raised by Burkina Faso as unfounded and to Rule the Application admissible;
2. To Rule in favour of the Applicant on the merits, Grant the relief sought, Allow and Order the damages as set out in paragraph 131 of the Application.

On behalf of the Respondent State,

1. On the objections: in the main

To note that Application No. 003/2013 of 14 June 2013 by the Applicant does not comply with the admissibility requirements as set out in Articles 56(2), (3) and (5) of the African Charter, as well as in Rules 34(2), 40(2), (3) and (5) of the Rules of Court and should therefore be declared inadmissible;

2. In the alternative, on the merits:

And, in the event of the Court ruling that the Application is admissible and contrary to all expectations, to dismiss it as unfounded;

29. During the Public Hearings of 20 and 21 March 2014, the Applicant does not amend his submissions; the Respondent State for its part maintains its position but raises a new objection, challenging the Applicant's status as a Journalist.

III. Jurisdiction of the Court

30. Rule 39(1) of the Rules (hereinafter referred to as "the Rules"), provides that the Court must first conduct preliminary examination of its

jurisdiction. The Court notes in this regard that even if the Respondent State raises no objections; it is still required to satisfy itself, *proprio motu*, that it has the jurisdiction *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci*, to hear the Application.

31. First, on its *ratione personae* jurisdiction, the Protocol requires the State against which action is brought to have ratified the said Protocol and other relevant human rights instruments mentioned in Article 3(1) thereof, but also, in regard to Applications from individuals or non-governmental organizations, to have made the declaration accepting the jurisdiction of the Court to consider such Applications, in conformity with Article 34(6) of the Protocol (Article 5(3)).

32. In the present case, the Court notes that Burkina Faso became a Party to the Charter and to the Protocol on 21 October 1986 and 25 January 2004 respectively, and that the declaration required under Article 34(6) of the Protocol was deposited on 28 July 1998 and took effect on the date of entry into force of the Protocol, that is, 25 January 2004. The Court therefore finds that it has jurisdiction over the Respondent State.

33. The Court must however satisfy itself that it also has jurisdiction over the Applicant. In this regard, the Court notes that the Application is filed on behalf of an individual, Issa Lohé Konaté, by Barrister John RWD Jones and Barrister Yakaré-Oulé (Nani) Jansen.

34. The Court therefore finds that it has the *ratione personae* jurisdiction to hear this matter both in regard to Applications by the Respondent State as well as by the Applicant.

35. Secondly, on the jurisdiction *ratione materiae* of the Court, Article 3(1) of the Protocol provides that the Court's jurisdiction "shall extend to all cases and disputes submitted to it concerning the interpretation and Application of the Charter, this Protocol and any other human rights instruments ratified by the States concerned".

36. In the instant case, the Applicant alleges violation, by the Respondent State, of Article 9 of the Charter, Article 19 of the Covenant as well as Article 66(2)(c) of the Revised ECOWAS Treaty. The Court notes in this regard that the Respondent State is a Party to the Charter and also to the Covenant as of 4 April 1999, when the latter instrument became enforceable in regard to the Respondent, as well as the Revised ECOWAS Treaty which it ratified on 24 June 1994.

37. Consequently, the Court has the *ratione materiae* jurisdiction to consider the matters raised in the Application.

38. On its *ratione temporis* jurisdiction, the Court is of the view that in the instant case, the relevant dates are those of the entry into force, with regard to the Respondent State, of the Charter (21 October 1986), the Protocol (25 January 2004), and the Covenant (4 April 1999) as well as the optional declaration accepting the jurisdiction of the Court to hear Applications from individuals or non-governmental organizations (25 January 2004).

39. The alleged violation of the Applicant's right to freedom of expression stems from the latter's conviction by the Ouagadougou High

Court and the fact that the conviction was upheld on 10 May 2013 by the Ouagadougou Court of Appeal.

40. Hence, the Court notes that the alleged violation of the Applicant's right to freedom of expression is likely to have occurred on 10 May 2013 or well after the Respondent State had become Party to the Charter and the Covenant, and had made the declaration accepting the Court's jurisdiction to receive Applications from individuals or non-governmental organizations. Consequently, the Court finds that it has the *ratione temporis* jurisdiction to hear the allegation of violation of the right to freedom of expression raised in this case.

41. The Court finally notes in regard to its *ratione loci* jurisdiction that this is an issue not disputed by the Respondent State; further, it is of the opinion that the *ratione loci* jurisdiction cannot be disputed as the alleged violations occurred in the territory of the Respondent State.

42. It therefore follows from the above considerations that the Court has jurisdiction to consider the human rights violation alleged by the Applicant.

IV. Admissibility of the Application

43. The Respondent State raises objections based on Rule 40 of the Rules, which reiterates the provisions of Article 56 of the Charter. However, it also raises an objection relating to the failure to identify the Respondent State as well as the capacity of the Applicant as a journalist.

A. Objection relating to the failure to identify the Respondent State

44. In its Response to the Application, the Respondent State submits that:

"Although the Applicant in his Application provided correct information on himself (Lohé Issa Konaté), as well as the names and addresses of the persons designated as his representatives, however, in the case of the Respondent, the information provided was neither specific nor correct.

In fact, the Respondent indicated that in the Application, mention was made of the "People's Democratic Republic of Burkina Faso" which does not refer to the State of Burkina Faso".

[...]

"Burkina Faso therefore humbly prays the Court to note that the Party mentioned in Lohé Issa Konaté's Application (People's Democratic Republic of Burkina Faso) does not refer to it. Moreover, it has no capacity to appear as Respondent in this Application filed against *The People's Democratic Republic of Burkina Faso*."

45. In his Reply dated 18 November 2013, the Applicant concedes that an error had been made in writing out the name of Burkina Faso on the cover page, as well as on pages 2 and 7 of the Application, and apologized for the typographical error as follows:

"The Applicant concedes that an error was made in writing out the name of the Respondent State on the cover page as well as on pages 2 and 7. The Applicant regrets having made that error and apologizes for any

inconvenience it might have caused though he also contends that, that error cannot be equated to a “failure to identify the Respondent State”. Except for the pages mentioned, the Respondent State is properly identified throughout the Application as “Burkina Faso”, which (as stated on several occasions in the response) is the official name of the Respondent State.”

46. In the view of the Court, an error as such in the title of the Application, though related to the identity of the Applicant or the Respondent State, cannot therefore be deemed to constitute a ground for the inadmissibility of the Application. In its Order *in the Matter of Karata Ernest and Others v The United Republic of Tanzania*, in which the Court was required to rule on the issue of whether it may amend the title of an Application before it, by substituting the name of a Party which was erroneously mentioned with the name of the proper Party, the Court ruled that it had the discretion to effect such amendment to the title of the Application if it were deemed necessary and that the change of the title of the Application would not adversely affect either the procedural or substantive rights of the Respondent”.¹

47. In the instant case, it would appear that even if the Applicant has on occasion, in his Application used the name “Peoples’ Democratic Republic of Burkina Faso”, the alleged violations by the Applicant clearly stem from a decision of the Burkinabé courts. That aside, Burkina Faso has filed a Response to the Application; it has even complied with some of the 4 October 2013 interim measures required by the Court in the Order on Provisional Measures in this same matter.

48. On these grounds therefore, the Court finds that the Party designated in the Application as “People’s Democratic Republic of Burkina Faso” is indeed Burkina Faso, the Respondent State.

B. Objection relating to Applicant’s lack of status as a Journalist

49. During the Public Hearing of 20 and 21 March 2014, the Respondent State objected to the admissibility of the matter due to the Applicant’s lack of capacity as a Journalist. It argued that: “The basic instruments of your Court require that the Applicant provide all the particulars concerning him in his Application. Maybe we do regret somewhat for having responded in too much of a haste to this Application. As, subsequently, we did notice that Konaté Lohé Issa was not even a Journalist and not registered with the administrative services which are supposed to legalize the creation and existence of a Newspaper. He does not have a Press Card which was instituted some three or four years ago. [...]”

50. The Respondent State also alleges that the Applicant was engaged in “illegal practice”, in that, “he was not registered with the taxation services”, and that his “Newspaper was not registered as a media outlet with the taxation services.”

1 African Court on Human and Peoples Rights, *in the Matter of Karata Ernest and Others v The United Republic of Tanzania*, Application No. 001/2012, Order, 27 September 2013, paras 6 and 7.

51. The Court notes that this issue was only raised by the Respondent State at the Public Hearing of 20 March 2014. The Court nevertheless granted the late submission and allowed the Applicant to respond to the allegations; which response was provided at the same Hearing. Counsel for the Applicant submits that the Applicant was convicted and punished as a Journalist who had written an Article, because he had complied with the requirements of the Information Code. In their view, that was the judgement that was delivered.

52. The Court notes further that the Respondent State does not rely on the provisions of either the Charter, the Protocol or the Rules in support of its allegations.

53. The status of the Applicant as a Journalist is however of some significance, considering the facts of this case; the Court therefore deems it useful to rule on this issue.

54. As said earlier, the Respondent argues that the Applicant (including *L'Ouragan* Newspaper) has no Press Card and is not registered with the taxation services or the administrative authorities which are in charge of legalizing the existence of a Newspaper, which allegation is not challenged by the Applicant.

55. The issue here is whether, by not complying with the above administrative formalities, the Applicant cannot claim to be a journalist.

56. In this regard, the Court notes that it is in his capacity as a Journalist that the Applicant was punished by the Courts of Burkina Faso; that his weekly newspaper *L'Ouragan*, has been in existence since January 1992.

57. In the view of the Court, assuming that Applicant has not complied with some of the administrative requirements in Burkina Faso, he all the same has the *de facto* status of a Journalist, on the basis of which he was convicted by the courts of that country.

58. The Court notes that at any rate Articles 9 of the Charter and 19 of the Covenant guarantee the right of freedom of expression to anyone regardless and not only to journalists.

59. The Court therefore concludes that the Respondent's allegation that the Applicant did not have the status of a journalist is unfounded and the Application cannot therefore be declared inadmissible on those grounds.

C. Objections based on Article 40 of the Rules

i. Objections to the admissibility of the Application drawn from the incompatibility of the Application with the Constitutive Act of the African Union and the Charter

60. Rule 40(2) of the Rules provides as follows: "to be compatible with the Constitutive Act of the African Union and the Charter".

61. The Respondent State claims that the name mentioned in the Application, not being that of Burkina Faso, a State Party to the Constitutive Act of the African Union and the Charter, the Application

should be declared inadmissible as it is inconsistent with Rule 40(2) of the Rules, for being incompatible with the Charter.

62. The Court notes in this regard that the argument of the Respondent State rests on the allegation that the name on the Application, which is “People’s Democratic Republic of Burkina Faso”, does not refer to it. As the Court has already decided, in the present case, the Respondent State is Burkina Faso. The Application is not therefore incompatible with the Constitutive Act of the African Union or the Charter.

63. The Court therefore holds that the Application cannot be deemed inadmissible in this case on the grounds of the alleged failure to comply with the provisions of Rule 40(2) of the Rules.

ii. Objection based on the nature of the language used in the Application

64. Rule 40(3) of the Rules provides that [the Application] “must not contain disparaging and insulting language”.

65. The Respondent State alleges that the Applicant uses disparaging language in referring to its identity. At the Public Hearing of 20 March 2014, it states that:

“When, instead of ‘Burkina Faso’, one says ‘People’s Democratic Republic of Burkina Faso’, the Court should take note that this refers, in a devious and biased manner, to the former peoples democracies of Eastern Europe and to a sadly notorious People’s Republic in Asia over which everyone agrees that its main characteristics were or are dictatorship and massive violations of human rights. Therefore, to refer to Burkina Faso as ‘People’s Democratic Republic’ in a case where it stands accused of violating freedom of the press and freedom of expression, cannot be deemed to be trivial or considered as a mere oversight, as the Applicant claims; it is indeed disparaging within the meaning of Rule 40 of the Rules and Article 56 of the Charter.”

66. The Applicant however submits that the name “People’s Democratic Republic” is merely an unfortunate typographical error and that the Respondent State has not shown how such an error would be prejudicial to its position in the present case.

67. The basic concern here is to ascertain whether the name “People’s Democratic Republic” as used by the Applicant in designating the Respondent State may be considered as disparaging or insulting towards the latter and as a result, invalidate the Application on the basis of Articles 56(3) of the Charter and Rule 40(3) of the Rules.

68. Rule 40(3) of the Rules provides that an Application must “not contain any disparaging or insulting language”. Article 56(3) of the Charter further states that the language in question must not be directed against “the State concerned and its institutions or the OAU”.

69. The Court recalls in this regard that the African Commission on Human and Peoples’ Rights (hereinafter referred to as “the Commission”), when considering Communication No 284/2003 (2009), has established the criteria for what would amount to disparaging or insulting language within the meaning of the two provisions cited above, when used in an Application.

70. The Commission has stated that:

“The operative words in Article 56(3) are *disparaging* and *insulting* and these words must be directed against the State Party concerned or its institutions or the African Union. According to the Oxford Advanced Dictionary, *disparaging* means to speak *slightingly of ... or to belittle ...* and *insulting* means to *abuse scornfully or to offend the self-respect or modesty of ...*”²

Again, according to the Commission:

“In determining whether a certain remark is *disparaging* or *insulting* and whether it has dampened the integrity of the judiciary, the Commission has to satisfy itself whether the said remark or language is aimed at unlawfully and intentionally violating the dignity, reputation and integrity of a judicial official or body and whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence on the administration of justice. The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute [...]”.³

71. The Commission concludes its consideration of the matter as follows:

“... The Respondent State has not established that by stating that one of the judges of the Supreme Court “was omitted”, the complainants have brought the judiciary into disrepute. The State has not shown the detrimental effect of this statement on the judiciary in particular and the administration of justice as a whole [...], no evidence to show that it was used in bad faith or calculated to poison the mind of the public against the judiciary”.⁴

72. In the present case, the Court is of the opinion that the Respondent State has not shown in what manner the name “People’s Democratic Republic”, as used by the Applicant, undermines the dignity, reputation or integrity of Burkina Faso. It has also failed to prove that such designation is used for the purpose of poisoning the minds of the public or of any reasonable person or that it is intended to subvert the integrity and status of Burkina Faso or to bring it to disrepute. Furthermore, it has not shown that such designation is used in bad faith by the Applicant.

73. The Court therefore holds from the above that the term “People’s Democratic Republic” is not *disparaging* or *insulting* towards the Respondent State. The Application therefore complies with the requirements of Article 56(3) of the Charter and Rule 40(3) of the Rules and will not be declared inadmissible based on the above provisions.

2 African Commission on Human and Peoples’ Rights, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe*, Communication n° 284/2003, 3 April 2009, para 88 (French version).

3 *Id.*, para 91.

4 *Id.*, para 96.

iii. Objection to the admissibility of the Application drawn from failure to exhaust local remedies

74. Rule 40(5) provides that: [the Application] “be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged”.

75. In its Response, the Respondent State also objects to the admissibility of the Application for failing to exhaust local remedies.

76. The records show that, the Applicant does not dispute the fact that he has not exhausted all the local remedies available within the Burkinabé legal system. The matter in contention between the Parties however lies on the one hand, in ascertaining if the duration of proceedings at the *Cour de Cassation* in Burkina Faso may be considered as unduly prolonged within the meaning of Articles 56(5) of the Charter and Rule 40(5) of the Rules; and on the other hand, to know whether remedy at the *Cour de Cassation*, neglected by the Applicant, was available, effective and sufficient.

a. General Observations

77. The first limb of the phrase of this Rule provides that [the Application] “be filed after exhausting local remedies” and the second “... unless it is obvious that this procedure is unduly prolonged.” The Court notes that in addition to this exception, there are other criteria listed by the Commission and other international human rights courts based on the criteria of availability, effectiveness and sufficiency of local remedies. The Court will come back to the details of these criteria.

78. The rule regarding the exhaustion of local remedies prior to referral to an international human rights court is one that is recognized and accepted internationally.⁵ Referral to international courts is a subsidiary remedy compared to remedies available locally within States. The Commission has so underscored in several of its decisions.

79. For instance, in its consideration of the Communication: *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe*, it states that:

“It is a well-established rule of customary international law that before international proceedings are instituted, the various remedies provided by the State should have been exhausted”.

[...]

“International mechanisms are not substitutes for domestic implementation of human rights, but should be seen as tools to assist the domestic authorities to develop a sufficient protection of human rights in their territories. If a victim of a human rights violation wants to bring an individual case before an international body, he or she must first have tried to obtain a remedy from the national authorities. It must be shown that the State was

5 See European Convention on the Protection of Human Rights and Fundamental Freedoms (Article 35(1)), American Convention on Human Rights (Article 46(1)(a)), Optional Protocol to the Covenant (Article 5(2)(b)).

given an opportunity to remedy the case itself before resorting to an international body. This reflects the fact that States are not considered to have violated their human rights obligations if they provide genuine and effective remedies for the victims of human rights violations".⁶

80. As seen from the jurisprudence of the Commission, States are not considered to have violated their human rights obligations if their internal laws provide effective and sufficient remedy for victims.

b. The issue of unduly prolonged process of appeal at the Cour de Cassation

81. In response to the Application, the Respondent State argues that the Applicant relies solely on information obtained from the website of the *Cour de Cassation* in Burkina Faso to argue that appeals took on average seven years. It submits that the Applicant does not provide any precision as to his real source of information, the type and number of cases involved. The Respondent concludes that based on its jurisprudence, the arguments tabled by the Applicant are unfounded.

82. In its Reply, the Applicant notes that it is difficult to establish the average duration of a case at the *Cour de Cassation* in Burkina Faso because the public has no easy access to such information. However, he concludes that relying on the information contained in expert reports, the average duration of a case on appeal in Burkina Faso may be between five (5) and nine (9) years.

83. The Applicant is of the view that the duration of four (4) years having been considered as unduly prolonged by the Commission and other international human rights institutions, his appeal in this case would have been unduly prolonged and therefore he stood a better chance before the African Court than before the *Cour de Cassation*.

84. The Court is of the view that since the alleged unduly prolonged procedure before the *Cour de Cassation* concerns only a remedy which has not been resorted to, the issue will be combined with the efficiency and sufficiency of remedies at the *Cour de Cassation*, which will be considered later.

c. Availability, efficiency and sufficiency of remedies at the Cour de Cassation

85. In its Response, the Respondent State argues that the Applicant had not availed himself of all the local remedies at his disposal which might have enabled him to repair any alleged violations; he had therefore failed to provide Burkina Faso with the opportunity to repair the alleged violations, whereas such remedy did exist within the legal structures of Burkina Faso, by way of an appeal, as provided in Articles 567 to 598 of the Criminal Procedure Code.

6 *African Commission on Human and Peoples Rights, Zimbabwe Lawyers for Human Rights and Associated Newspapers v Zimbabwe*, Communication No. 284/03, paras 99 and 100. See also *African Commission Sir Dawda K Jawara v Gambia*, African Commission No 1495-149/96. Para 31.

86. Relying on the jurisprudence of the Commission in regard to the criteria of availability, effectiveness and sufficiency of remedies, the Respondent State maintains that in the instant case, the remedy exist, is effective and available, easily accessible and capable of repairing the alleged violations. It further submits that the Applicant has failed to show in practical terms how an appeal at the *Cour de Cassation* is not accessible, effective or sufficient to redress the alleged violations.

87. At the Public Hearing of 20 March 2014 and in its oral submissions, the Respondent State maintains the same position, casting doubt on the good faith of the Applicant in this case. It argues that the Applicant has been given a fair trial in open court, assisted by counsel and has acknowledged the facts and even sought forgiveness from the tribunal and then asked for presidential pardon, thus demonstrating his acceptance of the judgments of the local courts.

88. The Applicant states in his Application that although an appeal is possible in formal terms, it is not effective as a remedy under the terms of Article 56(5) of the Charter. He submits that for local remedies to be exhausted, they have to be “available, effective and sufficient”. However, in the present case, the period of five clear days provided by the laws of the Respondent State for filing an appeal is unreasonably short, particularly as he does not have a complete text of the judgment on which to rely in lodging his appeal. He argues that the unreasonably short period renders the process ineffective.

89. Relying also on the jurisprudence of the Commission in regard to the criteria of availability, effectiveness and sufficiency of remedies, the Applicant argues that if local remedies do not meet the criteria, he is not obliged to exhaust them before taking the matter to an international court.

90. At the Public Hearing of 20 March 2014, the Applicant reiterates his position on the effectiveness of an appeal at the *Cour de Cassation*; which according to him, could not hear the merits of the case and therefore could not have satisfied his prayer and approve payment for reparation.

91. The Court notes that in the Burkinabé legal system, an appeal is a remedy that seeks to reverse, a final ruling or judgment which is at variance with the law (Articles 567 et seq of the Criminal Procedure Code of 21 February 1968 as updated on 30 April 2005).

92. As was held in the Court's judgment in the Matter of *the Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo and the Burkinabé Movement for Human and Peoples Rights v Burkina Faso* in ordinary language, being effective refers to “that which produces the expected result and therefore the effectiveness of a remedy as such is measured in terms of its ability to solve the problem raised by the complainant.”⁷

93. In the circumstance, the Court had held the view that the appeal at *Cour de Cassation* as provided for in the Burkinabe Legal system is an

⁷ African Court on Human and Peoples' Rights, Application No. 013/2011, Judgment of 28 March 2014, p 24, para 68.

effective remedy that individual Applicants could resort to in order to comply with the requirement regarding the exhaustion of local remedies as set out in Article 56(5) of the Charter and Rule 40(5) of the Rules.

94. The Court however stresses the fact that although it could be said that the appeal at the *Cour de Cassation* in the Burkinabé judicial system exists and is an effective remedy in theory, the issue of its effective Application in the present case is a matter that requires closer attention.

95. In the instant case, the concern is whether the remedy, that is, appeals at the *Cour de Cassation* was available (or accessible), effective and sufficient.

iv. Availability of remedy at the *Cour de Cassation*

96. The Court shares the view of the Commission that a remedy is available if it can be pursued by the Applicant without any impediment.⁸

97. In the instant case, the Respondent State argues that the Applicant cannot rely on the fact that the five day period was short as a reason for refraining from appealing to the *Cour de Cassation* whereas this could have been done by way of a simple declaration and that consequently, the argument on the unavailability of court judgments and the brevity of the time limit for appealing to the *Cour de Cassation* would not be sufficient reason for failing to exhaust that local remedy. He points out that the only obligation which the Applicant has is to deposit or request to be deposited within a period of two (2) months following his declaration of appeal, a submission to the Registry of the jurisdiction where the appeal was filed.

98. The Applicant submits that he has not appealed to the *Cour de Cassation* because the five-day deadline for such appeals under the Burkinabé judicial system is unreasonably short, especially as he did not have the complete text of the judgment on which he could have relied in his appeal. He contends that the unreasonably short time limit rendered the process ineffective. He further contends that a remedy not mentioned in the reasons or grounds of appeal may not be raised subsequently, hence the importance of having the judgement.

99. In the view of the Court, the issue of the brevity of the five-day time limit for appeals, and of the unavailability of the impugned court judgments are related.

100. The Court notes that Article 575(1) of the Criminal Procedure Code of Burkina Faso provides that “to appeal to the *Cour de Cassation* ... the State and the parties are allowed five clear days after the impugned judgment is delivered *inter partes* against them”. Article 590 of the same Code for its part provides that, “an Appellant may either make a

8 African Commission on Human and Peoples Rights, *Sir Dawda K. Jawara v Gambia*, Communication No 147/95-149/96, para 31; African Commission on Human and Peoples’ Rights, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe*, Communication No. 284/03, para 116

statement or, within a period of two months, submit a Brief setting out his grounds of appeal to the Registry of the Court with which the appeal is lodged ...”.

101. Appeals at the *Cour de Cassation* may therefore be brought in two different ways: either through a notice of appeal together with the submission of a head of argument within a time limit of five days from the pronouncement of the impugned judgement or through a notice lodged within the same five day time limit and the submission of a brief of argument within two months after the said statement is made. The appellant is not therefore required to submit his brief at the time of the notice of appeal, or within five days after the impugned judgment. The issue at hand is in regard to the content of the notice of appeal. Can an appeal be properly lodged when the appellant is not in possession of the impugned judgment at the time of drafting his notice of appeal?

102. The Respondent State claims that the full judgment was pronounced in the presence of the Applicant and his Counsel. Moreover, it alleges that parties are allowed to obtain an extract from the Registrar in Court; which extract contains all the operative provisions and suffices for use in lodging appeals. Furthermore, while in detention, the Appellant may still appeal.

103. The Court notes that Article 485 of the Burkinabé Criminal Procedure Code provides that:

“Judgements must include the grounds and the operative paragraph or paragraphs. Grounds constitute the basis for the judgment. The operative paragraphs layout the offences on the basis of which the indictee is found guilty or held liable as well as the punishment, the applicable law and the damages. Judgement is pronounced by the presiding Judge. The operative paragraphs state the crimes, of which the indictee is declared guilty or liable, as well as the sentence, the law applied and the damages. The judgment is read by the Presiding Judge.”

104. The reasoning is therefore an important component of the judgment as highlighted in Article 569(1) of the Burkinabé Criminal Procedure Code which states that “Judgments of the lower Courts as well as the rulings and judgments of the Courts of last resort shall be declared null and void if they do not provide the reasons or if such reasons are insufficient or contradictory and do not enable the Cour [de cassation] to consider and to determine whether its operative provisions comply with the law”.

105. The reasoning being the basis for the impugned judgment enables the Appellant to prepare his grounds of appeal. The said reasons need not be known to the Appellant at the time of lodging the notice of appeal within five clear days of the pronouncement of the impugned judgement: they become or are necessary for the Appellant’s brief for submission within two months, as from the date on which the notice is made.

106. It is therefore not necessary, in the Court’s view, for the Applicant to be availed of the impugned judgement at the time of the notice of appeal. Besides, the Court notes that it is possible for the Appellant, while in detention to lodge his notice of appeal by making his intention known through the submission of a simple letter to the Senior

Superintendent of the Prison (Criminal Procedure Code of 1968, Article 584).

107. The Court concludes that in the instant case, the time limit of five (5) days for the Applicant to lodge his notice of appeal, though short, was not an obstacle for him to appeal. The Court therefore finds that the appeal at the *Cour de Cassation* is a remedy available to the Applicant.

v. The effectiveness and sufficiency (or adequacy) of the remedy at the *Cour de Cassation*

108. The Court is of the view, same as the Commission, that a remedy is deemed effective if it offers prospects of success, is found satisfactory by the complainant or is capable of redressing the complaint.

109. It should be noted that the remedy envisaged under Rule 40(5) of the Rules of the Court are considered in the Application submitted to the African Court. In the present matter, the Applicant essentially prays the Court to declare that the Burkinabé Laws on the basis of which he was held criminally and civilly liable are in breach of the right to freedom of expression. The issue therefore is to ascertain if the *Cour de Cassation* could, under Burkinabé Law, rule on such a request and thus ultimately overturn the laws in question.

110. As the Court had already noted in the matter of *Norbert Zongo and Others v Burkina Faso* "...in the Burkinabé Legal system, the appeal to the *Cour de Cassation* is a remedy intended to repeal, for violation of the law, a judgment or a ruling delivered as a last resort (criminal procedure Code of 21 February 1968, Article 567 et seq). The appeal does not therefore allow for the law itself to be annulled but only applies to the Judgment in question, either due to wrongful Application or interpretation of the law. Far from causing an annulment of a law, the *Cour de Cassation* is on the contrary charged with ensuring the strict observance of the law by other lower domestic courts.

111. In such circumstances, it is clear that the Applicant in the instant case was not in a position to expect anything from the *Cour de Cassation* in relation to his request for the annulment of the Burkinabé laws, in pursuit of which he was convicted.

112. Indeed, in the Burkinabé judicial system, it is the Constitutional Council that is responsible for overseeing compliance of such laws with the Constitution, including in the provisions of the latter which guarantee human rights (Article 152 of the Constitution). In addition, Article 157 of the Constitution which provides for the institutions entitled to bring matters before the Constitutional Council for the purpose of determining the compliance of laws with the Constitution does not make reference to individuals. As a result, the Applicant could not seize the Constitutional Council in order to have the laws, on the basis of which he was convicted, overturned.

113. On the basis of all the foregoing considerations, it could be said that the Burkinabé Legal System does not afford the Applicant in the present matter any effective and sufficient remedy to enable him overturn the Burkinabé laws which he is complaining about.

Consequently therefore, the Applicant did not have to exhaust the remedy at appeal or any other remedy for that matter, after his final conviction on the merits by the Ouagadougou Court of Appeal on 10 May 2013.

114. The Court, having concluded that the remedy at appeal was ineffective and insufficient and, further that the appeal to the Constitutional Council was unavailable, does not need to rule on the submissions made by the Applicant regarding the risk of an unduly prolonged process of appeal that he might have had to undergo before the *Cour de Cassation*.

115. Having ruled that it has the jurisdiction to hear the matter, and having concluded on the admissibility of the Application, the Court will now consider the merits of the matter.

V. MERITS OF THE MATTER

116. The Applicant contends in his Application that his sentence to a term of imprisonment, the huge fine and damages as well as the Court costs violate his right to freedom of expression protected by various treaties to which the Respondent State is a party. More specifically, he accuses the Respondent State of violating Articles 9 of the Charter and 19 of the Covenant. He further alleges that Article 66(2)(c) of the Revised Treaty of the Economic Community of West African States of 24 July 1993 has been breached.

117. In its Response, the Respondent State argues that it has ratified “all international human rights conventions and treaties” and denies any violation of Article 9 of the Charter and 19 of the Covenant. It further argues that the provisions of the Information and Penal Codes, as well as their enforcement by Burkinabé Courts were neither vague nor uncertain. It submits that the sentence pronounced against the Applicant is consistent with recent European Court of Human Rights (ECHR) judgments and was a necessary and proportionate response aimed at protecting the rights of Placide Nikiema, the Prosecutor of the Republic, considering the prejudice he suffered and the gravity of the statements made against him by the Applicant.

118. To be able to rule on the allegation by the Applicant that his imprisonment, being ordered to pay a huge fine, damages and court costs, violate his right to freedom of expression, the Court will first mention the provisions of the relevant Burkinabé law in the instant case.

A. Provisions of Burkinabé law challenged in the instant case

119. The Court notes that the 2 June 1991 Constitution of Burkina Faso upholds freedom of expression and freedom of the press as fundamental liberties. Article 8 of the Constitution provides that “freedom of expression, the press and the right to information are guaranteed. Every individual has the right to express and disseminate his opinions within the limits of the laws and regulations in force”.

120. In the present case, the provisions of Burkinabé law challenged by the Applicant are those of Article 109, 110 and 111 of the Information

Code of 30 December 1993 and those of Article 178 of the Penal Code of 13 November 1996.

121. Articles 109, 110 and 111 of the Information Code provide as follows:

Article 109: "Any allegation or imputation of a fact which undermines the honour or image of a person or profession amounts to defamation. Direct publication or by way of reproduction of such allegation or imputation is punishable even if it is done in conditioned circumstances or if it is aimed at a person or profession not expressly identified, but which identity is made possible through speech, outcries, threats, written or in print form. Any disparaging, contemptuous or insulting language not leaning on any imputation is considered an insult."

Article 110: "Defamation committed by one of the names provided in Article 2 above against the Court's Tribunals, Armed Forces, State Officials shall be punished with a term of imprisonment of from 15 days to 3 months and a fine of from 10,000 – 500,000 Francs or one of either penalties".

Article 111: The same shall apply where defamation is committed using the same means, due to their functions or status, against Members of Parliament or Government, one or more members of the Supreme Judicial Council, a citizen in-charge of a service or entrusted with a temporary or permanent official duty, a Judge, a member of the Jury of Courts or Tribunals or a witness as a result of his or her testimony. Defamation committed against the same persons in regard to their privacy shall be dealt with under Article 110 above".

122. Article 178 of the Penal Code provides that:

"Where one or more Legal Officers, juries or Assessors are the object of contempt in the exercise of their duties or in the course of such performance whether such contempt be in words or in print or drawings not made public and intended in all these cases to tarnish their image and honour, the guilty party shall be punished with a term of imprisonment from six months to one year and a fine of from 100 000 to 500 000 CFA francs or one of the penalties."

123. The Applicant claims that "the provisions under which he was arrested are not sufficiently precise to qualify as 'law', and this could constitute sufficient reason to limit freedom of expression" and therefore do not meet the criteria contained under Articles 9 of the Charter and 19 of the Covenant.

B. Consideration of possible violation by the Respondent State of its international obligations

124. The Court will rule first on the allegation of violation by Burkinabé laws of the right to freedom of expression in light of Article 9 of the Charter and Article 19 of the Covenant. It will later consider the allegation of violation of the right to freedom of expression by Burkinabé Courts in the light of the same provisions.

i. Restrictions imposed by Burkinabé laws on freedom of expression

125. The Court will now consider whether restrictions on the freedom of expression imposed by the Respondent State are provided by “law”, within international standards, pursue a legitimate objective and are a proportionate means to attain the objective being sought.

a. The restriction must be provided by law

126. In the Applicant’s view, “the requirement for the restriction of the right to freedom of expression to be provided by law is more important than a mere existence of a law for that purpose in a country’s national legislation”. He notes that the law “must be clear enough such that individuals can adapt their conduct accordingly”.

127. The Respondent State notes that “the provisions of the Penal and Information Codes, relating to freedom of expression and of the press have been drafted virtually in the same words as those of the French Law of 29 July 1881 on press freedom” and that the “European Court of Human Rights has always considered the provisions of the 29 July 1881 Law on press freedom to be accessible and predictable in light of Article 10(2) of the Convention on the Protection of Human Rights and Fundamental Freedoms”. The Respondent State submits that “its national laws on freedom of expression are clear and precise enough”. This position was reaffirmed and defended at the Public Hearing of 20 and 21 March 2014.

128. The Court recalls that the UN Human Rights Committee defined in a relatively precise manner the concept of “law” as set out in Article 19(2) of the Covenant. In the Committee’s view:

“[...]to be considered as “law”, norms have to be drafted with sufficient clarity to enable an individual to adapt his behaviour to the rules and made accessible to the public. The law cannot give persons who are in charge of its Application unlimited powers of decision on the restriction of freedom of expression. Laws must contain rules which are sufficiently precise to allow persons in charge of their Application to know what forms of expression are legitimately restricted and what forms of expression are unduly restricted”.⁹

129. In its consideration of communications regarding Article 9 of the Charter, the Commission has held that “Though in the African Charter, the grounds of limitation to freedom of expression are not expressly provided as in other international and regional human rights treaties, the phrase “within the law”, under Article 9(2) provides a leeway to cautiously fit in legitimate and justifiable individual, collective and national interests as grounds of limitation.¹⁰ Here the phrase “within the law” must be interpreted in

9 Human Rights Committee, *Keun-Tae Kim v The Republic of Korea*, Communication No. 574/1994, CCPR/C/64/D/574/1994, 4 January 1999, para 25.

10 African Commission on Human and Peoples’ Rights, *Kenneth Good v The Republic of Botswana*, Communication No. 313/05, para 188.

reference to international norms which can provide grounds of limitation on freedom of expression".¹¹

130. In the instant case, the Court is of the view that restrictions on freedom of expression are indeed provided by law as they are part of the Penal and Information Codes of Burkina Faso. These two instruments therefore represent the law as it exists in Burkina Faso with regard to the right to freedom of expression.

131. The Court is of the view that Articles 109, 110, 111 of the Information Code and 178 of the Penal Code are drafted with sufficient clarity to enable an individual to adapt his/her conduct to the Rules and to enable those in charge of applying them to determine what forms of expression are legitimately restricted and which are unduly restricted.

b. The restriction must serve a legitimate purpose

132. The Court is of the view that for a restriction to be acceptable, it does not suffice for it to be provided by law and be written precisely; it must serve a legitimate purpose.

133. As the Commission noted, the Court is of the view that "the reasons for possible limitations must be based on legitimate public interest and the disadvantages of the limitation must be strictly proportionate to and absolutely necessary for the benefits to be gained."¹²

134. In exercising its function of protecting the rights and freedoms contained in the Charter, the Court is of the view that the only legitimate reasons to limit these rights and freedoms are stipulated in Article 27(2), namely that rights "shall be exercised in respect of the rights of others, collective security, morality and common interest."¹³

135. The Court further notes that the legitimate purpose of a restriction is stated in Article 19(3)(a) and (b) of the Covenant, and consists in respecting the rights and reputation of others or the protection of national security, public order, public health or public morality.¹⁴

136. In the instant case, the aim of Articles 109, 110 and 111 of the Information Code of Burkina Faso is to protect the honour and reputation of the person or a profession; that of Article 178 of the Criminal Code of Burkina Faso is more specifically to protect the honour and reputation of Magistrates, jurors and assessors in the performance of their duties or in the course of performing the duty.

137. The Court is of the view that this is a perfectly legitimate objective and therefore the limitation thus imposed on the right to freedom of

¹¹ African Commission on Human and Peoples' Rights, *Malawi African Association and Others v Mauritania*, Communication No. 54/91-61/91-98/93-164/97-196/97-210/98, para 102.

¹² African Commission on Human and Peoples' Rights, *Media Rights Agenda, Constitutional Rights Project v Nigeria*, Communication No. 105/93-128/94-130/94-152/96, para 69.

¹³ *Ibid* para 68.

¹⁴ Human Rights Committee, *Keun-Tae Kim v The Republic of Korea*, Communication No. 574/1994, CCPR/C/64/D/574/1994, 4 January 1999, para 12.2.

expression by the Burkinabé legislation is consistent with international standards in this area.

138. Having reached the conclusion that the limitation on freedom of expression is provided by the law of the Respondent State and that it responds to a legitimate objective, the Court must now examine if this restriction is necessary to achieve the objective.

c. Limitation must be necessary to achieve the set objective

139. In his Application, the Applicant argues that the protection of the reputation of others, including public figures, can be ensured “appropriately and proportionately” by civil law on defamation. He added that because of their severity, the sanctions meted out on him (imprisonment, fines, civil damages, shut down of his newspaper) violate his right to freedom of expression. The Applicant therefore contends that the Respondent State’s law violates the right to freedom of expression as it raises defamation and libel as criminal offenses or at the very least, because it punishes those offenses through a custodial sentence.

140. The Respondent State argues for its part that the sentences imposed by the Burkinabé Courts take into account the seriousness of the defamatory, libelous and derogatory statements made by the Applicant in his publication and its repeat, following his conviction in connection with another matter. It also argues that civil convictions against the Applicant are also commensurate to the severity of the immeasurable damage, especially moral, suffered by Mr Placide Nikiéma. The Respondent State also argues that its national legislation does not affect the right to freedom of expression; it further stresses that the latest report from the NGO, *Reporters Without Borders* ranks Burkina Faso among countries in the world where this freedom is most respected.

141. *The Amici curiae*, for their part, note that the 1993 Burkinabé law on information imposes criminal penalties for defamation, that is to say, in relation to exercising the right to freedom of expression which is protected by international instruments to which the Respondent State is a party and the latter therefore violates its international commitments to protect human rights. They state that Article 9 of the Charter guarantees the right to freedom of expression and that the decisions and publications of the Commission state clearly that criminal sanction for defamation against a public figure is a violation of that right.

142. Furthermore, according to the *amici curiae*, the Commission thus adheres to universal consensus that criminalization of defamation of or insulting a public figure, is against the right to freedom of expression and the functioning of a free society. Laws on criminal defamation according to them are a remnant of colonialism and they are inconsistent with an independent and democratic Africa; they are an obstacle to efforts aimed at ensuring accountability and transparency of government action.

143. The *Amici curiae* go on to suggest that the State can impose restrictions on freedom of expression but that these restrictions should be for legitimate purposes and be required to achieve these objectives. One of the main criteria for determining whether a measure is necessary in a democratic society is to determine if it is proportionate to the set objective. They argue that criminalizing the tarnishing of the image of a public figure is a disproportionate sanction in view of the interest that the Respondent State aims to protect. The *Amici curiae* add that criminalizing defamation not only disproportionately penalizes the accused, but also has a chilling effect on public discussions on matters of general interest.

144. Based on the foregoing, Counsel for the *amici curiae* contend that in so far as it provides for criminal sanctions, the Burkinabé information law goes counter to freedom of information.

145. In order to consider the need for a restriction on freedom of expression, the Court notes that such a need must be assessed within the context of a democratic society; it also notes that this assessment must ascertain whether that restriction is a proportionate measure to achieve the set objective, namely, the protection of the rights of others.

146. The general framework under which that need and proportionality should be assessed was also raised in Article 19(3) of the Covenant which provides that “the enjoyment of freedom ... comprises special duties and responsibilities. It may therefore be subject to certain restrictions which must be clearly laid down by the law and which are necessary: a) to the respect of the rights and reputation of others, b). to safeguard national security, public order, health or public morality”.

147. This general framework was also raised by the Commission, the UN Human Rights Committee, the European Court and the Inter-American Court.

148. As this Court noted above, the Commission stated that “any restriction on freedom of expression must be ... necessary in a democratic society”.¹⁵

149. As concerns proportionality of punishment against the right to freedom of expression, in its decision of 3 April 2009 on *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe*, the Commission considered that even when a State is concerned with ensuring respect for the rule of law, it should nevertheless adopt measures that are commensurate to this objective. The Commission in fact took into consideration the fact that “in law, the principle of proportionality or proportional justice is used to describe the idea that the punishment for a particular offense should be proportionate to the gravity of the offense itself. The principle of proportionality seeks to determine whether, by State action, there has been a balance between protecting the rights and freedoms of the

15 Principle II(2) of the *Declaration of Principles on the Freedom of Expression in Africa*, adopted by the Commission on 23 October 2002.

individual and the interests of society as a whole”.¹⁶ Thus, according to the Commission, in order to determine that an action is proportional, a number of questions should be asked, such as: Are there sufficient reasons to justify the action?, Is there a less restrictive solution? Does the action destroy the essence of the rights guaranteed by the Charter?”¹⁷

150. In considering *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, the Commission also noted that “the fact that the government bans a specific publication is disproportionate and unexpected. Laws made to be applied specifically to an individual or corporate body are likely to be discriminatory and to fall short of equal treatment before the law, as guaranteed by Article 3. The banning of these publications is therefore inconsistent with the law and is therefore a violation of Article 9(2)”.¹⁸ In the same vein, it said that restrictions on freedom of expression should be based on a legitimate public interest and the disadvantages of limitation should be strictly proportionate to and absolutely necessary to achieve the desired benefit.¹⁹

151. In its Declaration of Principles on Freedom of Expression in Africa mentioned above, the Commission had already laid down the rule that “sanctions should never be so severe as to interfere with the exercise of the right to freedom of expression”.²⁰

152. In its General Comment No 34, the UN Human Rights Committee stressed that: “Laws on defamation must be carefully formulated so as to ensure that they meet the necessity requirement stipulated in paragraph 3 and that they should not be used, in practice, to stifle freedom of expression.”²¹

153. It also considered that the limitations must be “proportional” to achieve a legitimate objective.²² It explained the notion of proportionality in the following manner:

16 African Commission on Human and Peoples’ Rights, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe*, Communication No 284/03, para 176.

17 *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe c. Zimbabwe*, Communication No. 284/03, para 176; by raising these issues when considering the case, the Commission was therefore of the view that the closing of the Newspaper of the Complainants amounted to a violation of their right to the Freedom of Expression *ibid.*, para 178.

18 African Commission on Human and Peoples Rights, *Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v Nigeria*, Communication No. 140/94-141/94-145/95, para 44.

19 *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v Nigeria*, Communication No. 105/93-128/94-130/94-152/96, para 69.

20 African Commission on Human and Peoples’ Rights, *Declaration of Principles on the Freedom of Expression in Africa*, paragraph 1 of Principle XII (“Protection of Reputation”).

21 Human Rights Committee, General Observation No 34, Article 19: Freedom of Opinion and Freedom of Expression, para 33.

22 *Idem*.

“Restrictions should not be too wide-ranging. The Committee noted in its General Comment No. 27 that “restrictive measures must comply with the principle of proportionality; they must be appropriate to achieve their protective function, they must be the least disturbing means among those that might help achieve the desired result and they must be proportionate to the interest to be protected [...]. The principle of proportionality must be respected not only in the law that institutes the restrictions, but also by the administrative and judicial authorities charged with enforcing the law.”²³

154. A similar position was adopted by the European Court in its decision on the case of *Tolstoy Miloslavsky v the United Kingdom*, where it concluded that although damages were provided by law, they are not necessary in a democratic society, “when there is no guarantee, given the magnitude of the combined lethargic state of the domestic rule of law at the time, a reasonable relationship of proportionality to the legitimate goal pursued”.²⁴ Jurisprudence of the Inter-American Court is in the same direction.²⁵

155. In assessing the need for restrictions on freedom of expression by the Respondent State to protect the honour and reputation of others, this Court also deems it necessary to consider the function of the person whose rights are to be protected; in other words, the Court considers that its assessment of the need for the limitation must necessarily vary depending on whether the person is a public figure or not. The Court is of the view that freedom of expression in a democratic society must be the subject of a lesser degree of interference when it occurs in the context of public debate relating to public figures. Consequently, as stated by the Commission, “people who assume highly visible public roles must necessarily face a higher degree of

²³ *Idem*.

²⁴ In several cases, the European Court, bearing in mind the earnings of the Complainants held that fines and/or damages charged to them were disproportionate when compared to the damage endured, see for instance, ECHR, *Steel and Morris v The United Kingdom*, Application No 68416/01 (2005); ECHR, *Tolstoy Miloslavsky v The United Kingdom*, Application No 18139/91 (1995); ECHR, *Koprivica v Montenegro*, Application No 41158/09 (2011); ECHR, *Filipovic v Serbia*, Application No 27935/05 (2007). It further takes into account the deterrent effect that such disproportionate fines and damages could have on newspapers in the country. For instance, in the case of *Tolstoy Miloslavsky v The United Kingdom*, the European Court held that the imposition of excessive penalties had a deterrent effect on the exercise of the freedom of expression and was of the view that the granting of excessive damages for defamation constituted a violation of Article 10 of the European Convention of Human Rights, ECHR, *Tolstoy Miloslavsky v The United Kingdom*, Application No 18139/91 (1995), para 55.

²⁵ “In a democratic society punitive power is exercised only to the extent that is strictly necessary in order to safeguard essential legally protected interests from the more serious attacks which may impair or endanger them. The opposite would result in the abusive exercise of the punitive power of the State”, *Tristant Donoso v Panama*, Series C, No 193 (2009), para 119; the Court further clarified as follows; “the Court does not deem any criminal sanction regarding the right to inform or give one’s opinion to be contrary to the provisions of the convention; however, this possibility should be carefully analysed, pondering the extreme seriousness of the conduct of the individual who expressed the opinion, his actual malice, the characteristics of the unfair damage caused, and other information which shows the absolute necessity to resort to criminal proceedings as an exception. At all stages the burden of proof must fall on the Party who brings the criminal proceedings”, *Ibid*, para 120.

criticism than private citizens; otherwise public debate may be stifled altogether".²⁶

156. The Court considers that there is no doubt that a prosecutor is a "public figure"; as such, he is more exposed than an ordinary individual and is subject to many and more severe criticisms. Given that a higher degree of tolerance is expected of him/her, the laws of States Parties to the Charter and the Covenant with respect to dishonouring or tarnishing the reputation of public figures, such as the members of the judiciary, should therefore not provide more severe sanctions than those relating to offenses against the honor or reputation of an ordinary individual.

157. In the instant case, the Court notes that Article 110 of the Information Code of the Respondent State provides that defamation committed against members of the judiciary, the army and the constituted corps shall be punishable by a prison term of fifteen (15) days to three (3) months and a fine of 100 000 to 500 000 or one of both fines only." And that Article 178 of its Penal Code provides that "when one or more Magistrates, jurors or Assessors are victims of contempt in words or in writing or in drawings not made public, while exercising their duties, which may tarnish their image and reputation, the culprit will be sentenced to a prison term of from six (6) months to one (1) year and a fine of 150 000 to 1,500,000 CFA francs.

158. The European Court points out that criminal defamation laws should be used only as a last resort, when there is a serious threat to the enjoyment of other human rights.²⁷ According to this Court, the exceptional circumstances justifying a prison term are for example, the case of hate speech or incitement to violence.²⁸ It was of the view that the use of civil proceedings in defamation cases should be preferred to criminal proceedings.²⁹

159. As for the Inter-American Court, it holds that States should use these laws only as a last resort³⁰ and rejected imprisonment for defamation, considering it as disproportionate and in violation of freedom of expression.³¹

26 *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v Nigeria*, Communication 105/93-128/94-130/94-152/96, para 74.

27 ECHR, *Gavrilovic v. Moldavia*, Application No 25464/05 (2009), para 60.

28 ECHR, *Cumpana and Mazare v Romania*, Application No 33348/96 92004), para 115; ECHR, *Mahmudov and Agazade v Azerbaijan*, Application No 38577/04 (2008), para 50.

29 ECHR, *Lehideux et Isorni v France*, September 1998, para 57 ; ECHR, *Radio France and all v France*, Application No 53984/00 (2004), para 40 ; ECHR, *Raichinov v Bulgaria*, Application No 47579/99 (2006), para 50; ECHR, *Kubaszewski v Poland*, Application No. 571/04 (2010), para 45; ECHR, *Mahmudov and Agazade v Azerbaijan*, Application No. 35877/04 (2008), para 50; ECHR, *Lyashko v Ukraine*, Application No. 210/40/02 (2006), para 41(f); ECHR, *Fedchanko v Russia*, Application No 33333/04 (2010); ECHR, *Krutov v Russia*, Application 15469/04 (2009); ECHR, *Lombardo et al v Malta*, Application No. 7333/06 (2007).

30 IACHR, *Trisant Donoso v Panama*, Series C, No 193 (2009), para 20.

31 See *inter alia*, IACHR, *Herrera-Ulloa v Costa Rica*, 2 July 2004, Series C, No 107, para 124-135; IACHR, *Palamara Iribarne v Chile*, 22 November 2005, Series C, No.

160. On this score, the U.N. Human Rights Commission recalls that some international bodies have condemned any attempts at custodial sentence, both in the specific case of defamation as, in general, the peaceful expression of an opinion.³² It cites the example of the Human Rights Commission which, since 1994, has expressed concern over the risk of custodial sanctions in cases of defamation in certain countries.³³

161. Having indicated that limitations should be proportionate to achieve a legitimate objective, the U.N. Human Rights Committee, on its part, also considers that:

“States Parties [to the Covenant] should take care to avoid excessively punitive measures and penalties. If necessary, Party States should put reasonable limits on the obligation of the defendant to reimburse court costs to the party which won the case. States parties should consider decriminalizing defamation and, in all cases, the Application of criminal law should be confined to the most serious cases and imprisonment is never an appropriate penalty.”³⁴

162. In the present case, the Court notes that the Respondent State recognizes all the merits of decriminalization in that it stated that the issue “is under discussion in Burkina Faso which has the concern, like many other countries around the world, to comply, as quickly as possible, with the guidelines on this subject issued by international and Community bodies”.

163. In essence, the Court notes that, for now, defamation is an offense punishable by imprisonment in the legislation of the Respondent State, and that the latter failed to show how a penalty of imprisonment was a necessary limitation to freedom of expression in order to protect the rights and reputation of members of the judiciary.

164. Accordingly, the Court opines that sections 109 and 110 of the Information Code and section 178 of the Penal Code of Burkina Faso on the basis of which the Applicant was sentenced to a custodial sentence is contrary to requirements of Article 9 of the Charter and Article 19 of the Covenant. The Applicant having also mentioned Article 66(2)(c) of the Revised ECOWAS Treaty under which States parties undertake to “respect the rights of journalists”, the Court finds that the Respondent State also failed in its duty in this regard in that the custodial sentence under the above legislation constitutes a disproportionate interference in the exercise of the freedom of expression by journalists in general and especially in the Applicant’s capacity as a journalist.

165. Apart from serious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, the Court is of the view that the violations of laws on

135, para 63; IACHR, *Canese v Paraguay*, 31 August 2004, Series C, No 111, p 104.

³² *Id.*

³³ *Id.*

³⁴ Human Rights Committee, General Comment No 34, Article 19: Freedom of Opinion and Freedom of Expression, para 47.

freedom of speech and the press cannot be sanctioned by custodial sentences, without going contrary to the above provisions.

166. The Court further notes that other criminal sanctions, be they (fines), civil or administrative, are subject to the criteria of necessity and proportionality; which therefore implies that if such sanctions are disproportionate, or excessive, they are incompatible with the Charter and other relevant human rights instruments.

ii. Consideration of allegations of violations relating to action by Burkinabé Courts

167. Regarding the sentencing of the Applicant by the Ouagadougou High Court to a twelve month term of imprisonment for defamation, contempt and insult, and the confirmation of that sentence by the Ouagadougou Court of Appeal, the Court recalls that it had already ruled that any custodial sentence relating to defamation is inconsistent with the Charter, the Covenant and the Revised ECOWAS Treaty. Consequently, the enforcement of such laws by the Burkinabe Courts also amounts to a violation of the relevant human rights provisions in this regard. At any rate, the Respondent State has not shown that such convictions were necessary and proportionate to protect the rights and reputation of Mr Placide Nikiema.

168. Regarding the overall costs charged to the Applicant, in the Application, he contends that “this amounts to one more violation of his right to freedom of expression”. He adds that the total amount of 6 Million CFA Francs (an equivalent of 12,000 USD) representing 20 times the GDP per capita in Burkina Faso, according to the World Bank. The Respondent submits in response that the civil sanctions were proportionate to the gravity of the considerable prejudice (above all, moral prejudice) suffered by Placide Nikiema.

169. The Court finds that the Respondent State has not demonstrated that the sentence of the Applicant as well as the suspension of the Weekly *L’Ouragan* for a period of six months was necessary to protect the rights and reputation of the Prosecutor of Burkina Faso.

170. From the foregoing, the Court concludes that all sentences pronounced by the High Court and confirmed by the Ouagadougou Court of Appeal were disproportionate to the aim pursued by the relevant provisions of the Information Code and the Burkinabé Penal Code. Since the conduct of the Burkinabé courts, fall squarely on the Respondent State,³⁵ the Court is of the view that the latter failed in its obligation to comply with the provisions of Article 9 of the Charter,

³⁵ Article 4 (“Conduct of Organs of a State”), of the Draft Articles on the responsibility of States for internationally wrongful acts adopted by the International Law Commission on 9 August 2001 provides as follows: “1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State, 2. An organ includes any person or entity which has that status in accordance with the international law of the State.”

Article 19 of the Covenant and Article 66(2)(c) of the revised ECOWAS Treaty with regard to the Applicant.

171. The Court adds that, as regards more specifically the payment of a fine, damages, interests and costs, the Respondent has failed to show that the amount fixed by the High Court of Ouagadougou and confirmed by the Court of Appeal does not excessively exceed the income of the Applicant. The amounts of the fine, damages, interests and costs seem all the more excessive in that the Applicant was deprived of revenue from publishing the weekly, due to its suspension for a period of six months.

C. Reparations

172. Both in his written submissions and at the Public hearing, the Applicant prays the Court to order the Respondent State to amend its legislation if it finds that it violates international obligations of the latter. He also prays the court to order the Respondent State to compensate, "particularly to offset the loss in income and profits and award him compensation for moral prejudice."

173. Pursuant to Rule 63 of the Rules, "the Court shall rule on the request for reparation, submitted in accordance with Rule 34(5) of these Rules, by the same decision establishing the violation of a human and peoples' rights or, if the circumstances so require, by a separate decision."

174. Having ruled on all the allegations made by the parties, the Court will rule on the request for compensation in a ruling, after the Parties have submitted their observations on the matter.

D. Costs

175. The Court notes that Rule 30 of the Rules provides that: "Unless otherwise decided by the Court, each party shall bear its own costs." Based on all the circumstances of the case, the Court finds that there is no reason to depart from the provisions of Rule 30 above.

176. On these grounds,

THE COURT

1) Unanimously,

Declares that it has jurisdiction to hear the Application;

2) Unanimously,

States that this Application is Admissible;

3) Unanimously,

Declares that the Respondent State violated Article 9 of the Charter, Article 19 of the Covenant and Article 66(2)(c) of the revised ECOWAS Treaty due to the existence of custodial sentences on defamation in its laws;

4) By 6 votes for and 4 votes against,

Declares that the Respondent State did not violate Article 9 of the Charter, Article 19 of the Covenant and Article 66(2)(c) of the revised

ECOWAS Treaty, due to the existence of non-custodial sanctions on defamation in its laws;

5) Unanimously,

States that the Respondent State violated Article 9 of the Charter, Article 19 of the Covenant and Article 66(2)(c) of the revised ECOWAS Treaty because of the conviction of the Applicant and sentence to a term of imprisonment;

6) Unanimously,

States that the Respondent State violated Article 9 of the Charter, Article 19 of the Covenant and Article 66(2)(c) of the revised ECOWAS Treaty because of the conviction of the Applicant to pay an excessive fine, damages, interests and costs;

7) Unanimously,

Says that the Respondent State violated Article 9 of the Charter, Article 19 of the Covenant and Article 66(2)(c) of the revised ECOWAS Treaty because of the conviction of the Applicant to the suspension of his publication for a period of six (6) months for defamation;

8) Unanimously,

Orders the Respondent State to amend its legislation on defamation in order to make it compliant with Article 9 of the Charter, Article 19 of the Covenant and Article 66(2)(c) of the Revised ECOWAS Treaty:

by repealing custodial sentences for acts of defamation; and

by adapting its legislation to ensure that other sanctions for defamation meet the test of necessity and proportionality, in accordance with its obligations under the Charter and other international instruments.

9) Unanimously,

Orders the Respondent State to report to the Court within a reasonable time, on the measures taken to implement the orders in 8 above, and in any case, not exceeding two years, from the date of this Judgment;

10) Unanimously,

Orders the Applicant to submit to the Court his brief on reparation within thirty (30) days from the date of delivery of this judgment; Also directs the Respondent State to file its brief in response on the reparation within thirty (30) days after receipt of the Applicant's brief;

11) Unanimously,

States that each party shall bear its own costs.

Joint separate opinion: THOMPSON, AKUFFO, NGOEPE and TAMBALA

1. While we agree substantially with the outcome of the majority judgment, there is **FIRSTLY**, one particular point on which we disagree. Although this point is not material to the outcome of the case, it is in our

view nevertheless important, inasmuch as the majority view on it purports to be an accurate reflection of the content of Rules 39(1) of the Rules of Court. We clarify from the outset that there is nothing wrong in starting with the examination of jurisdiction first, and then deal with admissibility later, as the majority judgment does. It, however, needs to be mentioned that there has never been unanimity in this Court that that should necessarily always be the case; there has always been a view that it would not necessarily be wrong, in a given case, to examine admissibility first.

2. The above debate cannot be resolved in favour of starting with jurisdiction, by, as the majority judgment seeks to do, importing into Rule 39(1) a word which is not in there, namely, the word “first”. Apparently, the importation is made to strengthen the case for starting with jurisdiction first as opposed to admissibility. The relevant paragraph of the majority judgment, being paragraph 30, reads: “Rule 39(1) of the Rules . . . provides that the Court must first conduct preliminary examination of its jurisdiction” (own underlining). Yet, with respect, the Rule does not say that; it reads: “The Court shall conduct preliminary examination of its jurisdiction and the admissibility of the Application ... “. The word “first” appears nowhere in the Rule, let alone specifically prescribing that one should start with jurisdiction first. Whatever reason may be behind importing that word into the Rule, it remains factually incorrect to say, as the majority judgment does, that the Rule contains that particular word, when it does not; accordingly, we disagree with that statement. It may well be that starting with jurisdiction may be justified on other premises. We say nothing more, as we do not wish to enter the debate referred to in paragraph 1 above.

3. SECONDLY, regarding the merits, we would, while agreeing with the outcome of the majority judgment, have in some respects approached the matter differently and also framed the Orders differently.

4. Having found that the Application is admissible and that the Court has jurisdiction, we would zoom onto the crisp question in the matter: are the Burkinabe laws in terms of which the Applicant was convicted of defamation, namely, Articles 109 and 110 of the Information Code, and Article 178 of the Penal Code, in conflict with Article 9 of the African Charter on Human and Peoples’ Rights, and other instruments relied upon and cited by the Applicant? In our view, the answer is in the affirmative. As presently framed, the above legislative measure are, for the reasons set out in the majority judgment, an unjustified restriction to the right of freedom of expression; that is, criminalization of defamation is not justified. If such criminalization can be justified under certain circumstances, such as prohibiting for example hate speech or incitement, the above legislative measures, as they currently read, are too broad and problematic. It must be mentioned though, that the possible exceptions referred to are more theoretical than real. This is because once a so-called criminal defamation amounts to say hate speech or incitement, it is no longer criminal defamation; it mutates into one of the already existing and well known specific crimes such as sedition or high treason and there would be no talk of criminal defamation. The State’s duty to enforce the obligation on an individual under Article 27(2) of the Charter to exercise rights “with due regard to

the rights of others, collective security, morality and common interest” cannot justify the criminalization of expression of speech by way of criminal defamation laws of any kind, whether punishable by incarceration or not. Access to civil action, civil sanction, together with specifically defined crimes for safeguarding national security, public peace and the common interest, should be sufficient. For this Court to hold otherwise would not only be a step backward in the evolution of human rights in Africa, but also out of consonance with the letter and spirit of the Charter, which it is established to uphold.

5. Finally, given our view that the Applicant’s conviction was in the first place invalid, it is immaterial whether the punishments imposed are excessive or lenient. There should have been no punishment based on criminal defamation at all; the aggrieved person should have resorted to other avenues than to criminal recourse. That being our view, we would therefore frame the Orders differently, as follows:

(A) Articles 109 and 110 of the Burkinabe Information Code, as well as Article 178 of the Burkinabe Penal Code, are in conflict with Article 9 of the African Charter on Human and Peoples’ Rights and therefore invalid;

(B) Consequently, the conviction of Lohe Issa Konate under the above Burkinabe laws, and all the sanctions imposed on him as a result of the conviction, are invalid.

Lohé Issa Konaté v Burkina Faso (reparations) (2016) 1 AfCLR 346

Lohé Issa Konaté v Burkina Faso

Judgment, 3 June 2016. Done in English and French, the French text being authoritative.

Judges: RAMADHANI, THOMPSON, NIYUNGEKO, OUGUERGOUZ, TAMBALA, ORE, KIOKO, BEN ACHOUR, BOSSA and MATUSSE

Reparation ruling following from a previous finding on merits in relation to the conviction and sentencing of the Applicant for defamation.

Reparations (State must make full reparation to the victim and his family, 16; restitution, erasure of judicial record as a remedy, 23, Court does not have appellate jurisdiction, 24; excessive claim for loss of income, 37; evidence for causal link between wrongful acts and damage suffered, 45-47; moral prejudice, 58-59)

I. Brief background of the matter

1. A suit was filed against the Applicant for defamation, public insult and abusive language against a judicial officer, following the publication in the newspaper “*L’Ouragan*” on 1 August 2012, of an Article written by the said Applicant titled “*Counterfeiting and trafficking of fake bank notes – the State Prosecutor of Faso, three Police Officers and a Senior Bank official, godfathers of bandits*”. The Applicant had published a second Article in the following edition of *L’Ouragan* on 8 August 2012, titled “*Denial of Justice - The State Prosecutor of Faso: a rogue dispenser of justice?*”

2. Having been mentioned in the aforesaid Articles, the State Prosecutor of Faso filed a suit against the Applicant for defamation, public insult and use of abusive language against a judicial officer before the Ouagadougou High Court.

3. On 29 October 2012, the Applicant was found guilty of the offences and sentenced to 12 months imprisonment with a fine of 1,500,000 CFA Francs (about US\$ 3,000),¹ 4,500,000 CFA Francs for damages (about US\$ 9,000) and costs put at 250,000 CFA Francs (about US\$ 500).

4. Publication of the Weekly *L’Ouragan* was also suspended for six months and the Applicant ordered to publish, at his expense, the judgment in three consecutive editions of the newspapers *L’Événement*, *L’observateur Paalga*, *Le Pays*, and in *L’Ouragan*, right

1 Equivalent calculated on the basis of 1US\$ = 500 CFA F.

from the first publication of the latter and for four months upon resumption of its activities.

5. On 10 May 2013, the Ouagadougou Court of Appeal upheld the foregoing decision.

6. Seised of this matter, the African Court on Human and Peoples' Rights (hereinafter referred to as "the Court") in a Judgment of 5 December 2014, held that the Respondent State violated Article 9 of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter"), Article 19 of the International Covenant on Civil and Political Rights (hereinafter referred to as "the Covenant"), and Article 66 (2) (c) of the Revised Treaty of the Economic Community of West African States (hereinafter referred to as "The Revised ECOWAS Treaty").

7. The Court unanimously found that the Respondent State violated the afore-mentioned instruments in four different ways, to wit: (1) the existence of custodial sentence on defamation, in its laws; (2) the conviction and sentence of the Applicant to a term of imprisonment for defamation; (3) the conviction of the Applicant to pay an excessive fine, damages and procedural costs; and (4) the suspension of his newspaper for six (6) months.

8. The Court therefore ordered the Respondent State to amend its legislation on defamation in order to make it compliant with Article 9 of the Charter, Article 19 of the Covenant and Article 66 (2)(c) of the Revised ECOWAS Treaty. It further ruled that the Applicant was entitled to reparations for the material and moral damage he suffered, and urged him to make a submission to that end.

II. Subject of the Application

9. In his Application for Reparations of 9 January 2015, the Applicant prays the Court to grant him the various forms of reparation set forth hereunder for the damages he suffered as a result of the violation of his fundamental rights by the Respondent State:

- a. Set aside his conviction;
- b. Set aside the Order to pay fines, damages and costs, rendered against him;
- c. Award him pecuniary damages in the amount of 154,123,000 CFA Francs;
- d. Award him non-pecuniary damages in the amount of US\$ 35,000;
- e. Pay him the entire financial compensation in CFA Francs, taking into consideration the rate of inflation;
- f. Pay him interest at the rate prevailing in the Respondent State as at the date of the Judgment, in the event of delay in payment.

III. Summary of the procedure before the Court

10. The Applicant filed his Application on reparations on 9 January 2015 and thereafter, on 27 January 2015, he submitted a *corrigendum* thereto.

11. By letter dated 11 February 2015, the Registry transmitted a copy of the corrected Application as well as the Annexes to the Respondent State.

12. On 13 May 2015, the Respondent State filed its Response to the Application in which it prayed the Court:

“On the request for restitution, to rule as provided by law:

- 1) On the request for the award of pecuniary and non-pecuniary damages
 - a) On the loss of income, to assess on equity basis, the amount of loss incurred and fix the award due to the Applicant at a total amount of 500,000 CFA francs;
 - b) On the loss of property, to reject as unfounded the request for the award for loss of equipment and for the refund of the cost of new equipment;
 - c) On the expenses listed by the family, to reject as unfounded requests by the Applicant for the refund of 160,000 CFA francs and 4,000 CFA francs paid to the Prison Guards respectively for visit permits and change of building and to rule on equity basis on the request for the refund of 78,000 CFA francs as travelling expenses and 30,000 CFA francs as cost of medical care;
- 2) On the request for compensation for the non-pecuniary or moral damages, to assess the moral damages within fair proportions and award the Applicant the sum of 500,000 CFA francs as compensation.”

13. On 29 June 2015, the Applicant filed his Reply in which he reiterated the prayers made in his Application of 9 January 2015 (see paragraph 9 above).

14. At its 38th Ordinary Session held in Arusha, United Republic of Tanzania, from 31 August to 18 September 2015, the Court decided not to hold a public hearing, and commenced deliberations after notifying the Parties.

IV. The Merits

15. As the Court already found in its earlier judgments on reparations,² the general principles applicable to reparation are the following:

- a) a State found liable of an internationally wrongful act is required to make full reparation for the damage caused;
- b) such reparation shall include all the damages suffered by the victim and in particular includes restitution, compensation, rehabilitation of the victim as well as measures deemed appropriate to ensure the non-repetition of the violations, taking into account, the circumstances of each case;
- c) for reparation to accrue, there must be a causal link between the established wrongful act and the alleged prejudice;
- d) the burden of proof lies with the Applicant to show justification for the amounts claimed.

16. In the instant case, the Court, having noted in its aforementioned Judgment of 5 December 2014, violations of the Charter, the Covenant and the Revised ECOWAS Treaty by the Respondent State, the latter

² Application 013/2011 *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo & The Burkinabe Movement on Human and Peoples' Rights v Burkina Faso* (Judgment on Reparations) 5 June 2015, paras 20 - 30 and Application 011/2011 *Reverend Christopher R Mtikila v United Republic of Tanzania* (Ruling on Reparations) 13 June 2014, paras 27 -29.

is required to make full reparation for the damage it has caused to the Applicant as well as to his family.

17. The Court notes finally that, in the instant case, the internationally wrongful acts which generated the international responsibility of the Respondent State are those referred to in paragraph 6 above. All the reparation claims therefore have to be considered and assessed in relation only to these wrongful acts.

18. In light of the foregoing principles and observations, the Court will now consider the different prayers for reparation made by the Applicant which consist of measures for restitution and repair of the damage, both material and moral, suffered by himself and members of his family.

A. On restitution

19. The Applicant maintains that he grounded his Application on the afore-mentioned principles as well as on the extensive jurisprudence on the issue of compensation in seeking full reparation for all the damage caused to him and to his family by the Respondent State.

20. With regard to restitution in particular, he contended that he had to be restored to the status quo ante prior to the violation of the aforementioned international obligations by the Respondent State.

21. As concrete measures of restitution, he prays the Court to order the Respondent State to expunge outright from his judicial records all criminal convictions against him and set aside the other pecuniary sanctions imposed on him.

22. In its Response, the Respondent State indicated that it has no objection to the criminal sentences being expunged from the judicial records of the Applicant, but that the latter has to execute the civil sentences because he had admitted the facts before domestic courts and pleaded guilty to the offence for which he was prosecuted and convicted. The Respondent State however stated that, in this regard, it would defer to the wisdom of the Court.

23. The Court notes from the outset the acceptance by the Respondent State to erase from the judicial record of the Applicant all criminal convictions against him; it therefore sees no reason why it should not endorse this agreement.

24. On the request “to set aside the Order on the payment of fines, damages and costs” issued against the Applicant by the Ouagadougou High Court, the Court wishes to emphasise the point that it is not an appellate jurisdiction to which decisions by national courts are referred and that, for that reason, the request cannot be granted. The Court however recalls its Order in its 5 December 2014 Judgment in this case, requiring the Respondent State to amend its legislation on defamation to make penalties compliant with the criteria of necessity and proportionality (see *supra*, para 8); the Court therefore urges the Respondent State to review downwards the amount charged as fines, damages and costs.

B. On compensation for material damage

25. The Applicant alleged having lost all his income as a result of his twelve months' imprisonment and the suspension of his weekly newspaper, *L'Ouragan*, for six months; that he lost an average of 6,000,000 CFA Francs per month, making a total of 108,000,000 CFA Francs between 29 October 2012 and 30 April 2014, not counting interest and inflation.

26. He then submits that he lost important equipment, staff and access to distribution networks as a result of his imprisonment and closure of *L'Ouragan*; that several computers and office equipment with an estimated value of 5,000,000 CFA Francs had to be sold; and that to be able to resume publication of *L'Ouragan*, he incurred further expenditure to replace some of the lost equipment, including new computers valued at 3,251,000 CFA Francs.

27. He further submits that it took him over six months after his release on 29 October 2013, to resume publication of his Weekly; that he could publish only seven editions between May and September 2014, and that he was compelled to reduce the number of copies per edition from 5,000 on the average to just 1,000 copies; that still, as a result of lack of resources, no edition of his newspaper was published in October 2014; that he was able to publish three editions in November 2014, with only 1,000 copies per edition; that because of the reduced number of editions between May and December 2014, he lost income estimated at 37,600,000 CFA Francs during this period, excluding interest and inflation; that according to these estimates, the loss of income recorded as at 29 October 2012 up to the day of seizure of the Court, stands at 147,851,000 CFA Francs, excluding 5,000,000 CFA Francs being the estimated cost of lost equipment.

28. On the expenses incurred by his family during his imprisonment, the Applicant submits that the latter was spending nearly 1,500 CFA Francs each week on transport to visit him, amounting to a total of 78,000 CFA Francs; that his family had to pay between 3,000 and 5,000 CFA Francs to *be able to visit him, which* amounts to about 160,000 CFA Francs (for 40 visits during the year at the rate of 4,000 CFA Francs per permit). According to the Applicant, his family has also spent 30,000 CFA Francs on medication because of the health problems he was experiencing while in prison; that his family further had to pay 4,000 CFA Francs for him to be moved to a more ventilated building; that in total, the Applicant's family spent an amount estimated at 272,000 CFA Francs, excluding meals and other subsidiary expenses.

29. The Applicant in conclusion maintained that by adding up the loss of income as a result of the closure of *L'Ouragan*, estimated at 147,851,000 CFA Francs, the loss of part of his equipment, estimated at 5,000,000 CFA Francs and the financial losses incurred by his family as a result of his imprisonment, estimated at 272,000 CFA Francs, he and his family suffered material damage amounting to 154,123,000 CFA Francs.

30. The Respondent State consistently refutes the claims made by the Applicant.

31. On the loss of commercial income and revenue, the Respondent State contests the claim that the Weekly, *L'Ouragan*, was published on a regular basis and that its Director of Publication was able to sell 5,000 copies per week, that is, 20,000 copies per month; it pointed out that in the absence of evidence on the existence of the said income and its loss, and specific information allowing for evaluation of the amounts thereof, the Court should calculate the said amounts on the basis of equity and scale down the compensation to be paid to the Applicant to 500,000 CFA Francs.

32. On the loss of property, the Respondent State submits that according to international and regional human rights protection mechanisms, the burden of proof lies with the Applicant; that in the complete absence of proof as to the existence of items he alleges to have lost, the purchase of new equipment and the causal link between the loss and the actions of the Respondent State, no compensation should accrue to the Applicant; and that consequently, it prays the Court to dismiss the claim as unfounded.

33. As regards the expenses incurred by his family as a result of his detention, the Respondent State argued that the said expenses are generally not supported by any documents.

34. On the amount of 160,000 CFA Francs, said to have been paid to secure permits for visits by members of the family, the Respondent State argues that the Applicant himself knows that only Legal Officers are empowered to issue permits to visit detainees and not prison wardens; that if the Applicant preferred to bribe the latter for his wife to visit him, he cannot seek reimbursement, and cannot invoke his own flaws as an excuse.

35. The Respondent State made the same observation regarding the payment for the transfer of the Applicant to a more ventilated part of the prison. It argues that this kind of conduct is tantamount to corruption or collusion and therefore that, same as the preceding prayer and for the same reasons, it was requesting the Court to dismiss the claims as manifestly unfounded.

36. After recalling that the Applicant did not adduce any evidence attesting to the expenses incurred by his family, the Respondent State stated in conclusion that it would defer to the wisdom and decision of the Court.

37. The Court notes that the Respondent State does not contest the fact that the Applicant incurred loss of income but regards as excessive the amount claimed by the latter.

38. The Court will only have to consider, at this juncture, the evidence adduced by the Applicant in support of his claims.

39. Regarding the loss of income caused by the suspension of his newspaper, *L'Ouragan*, the Court notes that the Applicant tendered a document to prove that this Weekly was published every Wednesday and that the unit price was 300 CFA Francs, (Annex XX).

40. The Applicant also adduced evidence regarding the publication of four editions of 5,000 copies (editions 257, 258, 259 and 260) of the Weekly, *L'Ouragan*, at the unit price of 110 CFA Francs each, (Annex

XVI). However, no evidence was produced as to his ability to sell 5,000 copies per week.

41. The Court therefore holds that the amount of 108,000,000 million CFA Francs claimed by the Applicant is unduly inflated, and ruling on the basis of equity, decides to reduce the amount to 20,000,000 CFA Francs.

42.-On the loss of income caused by the reduced number of editions of the weekly, *L'Ouragan* upon its resumption of publication, the Court finds no difficulty in acknowledging the fact that, after his release, the Applicant no longer had sufficient resources to enable him publish his Weekly, *L'Ouragan*, at the same level and volume as was the case before his imprisonment. It however notes that the latter has not produced documentary evidence for the 37,600,000 CFA Francs he is claiming.

43. For these reasons, the Court holds that it is more appropriate to consider the matter in terms of equity and award the Applicant a lump sum of 5,000,000 CFA Francs.

44. In light of the foregoing, the Court deems it reasonable to award the Applicant the total sum of 25,000,000 CFA Francs, in compensation for the loss of income arising from the suspension of his weekly newspaper, *L'Ouragan*, and the reduced number of copies produced after the resumption of publication.

45. On compensation for loss of physical belongings and reimbursement of expenses for the purchase of new equipment, the Court notes that the Applicant did not tender any document in support of his claims and failed to establish the causal link between the wrongful acts committed by the Respondent State and the damage he suffered.

46. As the Court has already underscored in its Judgment in the *Matter of Reverend Christopher Mtikila v United Republic of Tanzania*,³ it does not suffice to show that the Respondent State committed a wrongful act to claim compensation; it is equally necessary to produce evidence of the alleged damages and the prejudice suffered.

47. Since the Applicant has failed to meet that requirement, the Court rules that his claims regarding the loss and acquisition of part of the equipment of *L'Ouragan* are unfounded and therefore dismisses the claims.

48. On the claim for reimbursement of expenditure incurred to obtain visit permits and on the transfer of the Applicant to a more ventilated part of the prison, the Court holds that the said payments were not required by law and the Applicant was therefore not supposed to pay the wardens to obtain visit permits or for the transfer.

49. However, the Court finds no difficulty in recognising that the family of the Applicant incurred transport expenses to visit him in prison. It is

3 *Reverend Christopher R Mtikila v United Republic of Tanzania (Reparations)*, para 31; see also *Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo & The Burkinabé Movement on Human Rights v Burkina Faso (Reparations)*, para 24.

also of the opinion that the amount of 78,000 CFA Francs, claimed by the Applicant is reasonable, and on the basis of equity, decides to award him the said amount.

50. Regarding medical expenses, the Applicant claims 30,000 CFA Francs, even though the receipts in the file show a slightly higher amount. Since the Court cannot rule *ultra petita*, it will limit itself to the amount claimed.

51. In light of the foregoing, the Court is of the opinion that the Applicant should be awarded a total sum of 25,108,000 CFA Francs, in reparation for the material damage, that is, 25,000,000 CFA Francs, for loss of income and 108,000 CFA Francs for medical and travel expenses.

C. Compensation for moral prejudice

52. The Applicant summarises the pain and anguish which he and his family endured as a result of his trial, conviction and imprisonment as follows:

53. He alleges in particular that, in his own case, a campaign was mounted against him to portray him as a “fake journalist” and to insult and discredit him; that he was tried, convicted and imprisoned on the same day without allowing him time to organise his business or to make the necessary arrangements for his family before his imprisonment, that he was found guilty and sentenced to a 12-month term of imprisonment (the maximum sentence in such a case), and to pay the heavy fine of 6,250,000 CFA Francs, for damages, which amount was far beyond his resources; that he therefore had no means of complying with the Court’s judgment and, for that reason, was faced with the threat of extension of his prison term for default; and that, in addition, he had spent twelve months in a crowded, dirty and unsafe prison yard; that he had to share space with paedophiles, psychopaths and drug addicts, most of whom had previously been convicted; and that the living conditions in the prison yard were horrible to the extent that two detainees died in October 2014 as a result of exhaustion and poor ventilation.

54. As regards his wife, the Applicant avers that she was traumatised by his conviction and imprisonment; that she also had to deploy lots of efforts to be able to cater to the needs of his family after the closure of the Weekly, *L’Ouragan*, which was the family’s only source of income; that to make ends meet, she was forced to sell pastries on a daily basis.

55. Regarding his children, the Applicant states that they were equally affected by his conviction and imprisonment; that his eldest son who was undergoing training at military academy in Taiwan at the time of the trial was informed of the sad news of his father’s conviction through the internet because the latter did not have the courage to convey the information to his son; that since he received the news, he started having severe bouts of headache; that his two younger sons, for their part, were being ridiculed by their school mates after the conviction was broadcast by the media; that his youngest son who was only fourteen at the time of the imprisonment, was so affected that he was ultimately dismissed from school for poor academic performance.

56. Relying on the jurisprudence of international courts and considering all the circumstances of the matter, the attack on his professional reputation, the impact on his career (the physical and psychological torture inflicted on his entire family as a result of the case, then his imprisonment and what the Respondent State intended to achieve by subjecting a journalist to such punishment) – the Applicant prays the Court to award reparation proportionate to the moral prejudice suffered in the amount of 17,500,000 CFA Francs.

57. The Respondent State did not dispute the fact that the Applicant suffered moral prejudice during the criminal trial that resulted in his conviction and imprisonment. It however maintains that the magnitude of the damages and the amount of compensation the Applicant is claiming are disproportionate when compared to the prejudice suffered, considering the context and living standards in Burkina Faso. Consequently, it prays the Court to assess the damages based on reality and context, and award the Applicant the sum of 500,000 CFA Francs as compensation.

58.–The Court notes that the Respondent State does not contest the fact that the Applicant suffered moral prejudice. It further observes that such prejudice is often assumed by international courts in cases of human right violations.⁴

59. The Court nevertheless holds that the claim is exaggerated and on the basis of equity, decides to reduce the amount to 10,000,000 CFA.

60. On these grounds,

THE COURT,

(i) Unanimously,

Orders the Respondent State to expunge from the Applicant's judicial records, all the criminal convictions pronounced against him;

(ii) Unanimously,

Orders the Respondent State to revise downwards the amount of fines, damages and costs charged against the Applicant to ensure that it is compliant with the criteria of necessity and proportionality as stated in the Court's judgment on the merits regarding other sanctions;

(iii) Unanimously,

Orders the Respondent State to pay the Applicant the sum of twenty-five million (25,000,000) CFA Francs, (equivalent to US\$ 50,000), as compensation for loss of income;

(iv) Unanimously,

⁴ *Beneficiaries of Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo & Burkinabé Human Rights Movement v Burkina Faso* (Reparation), para 61. See also Inter American Court on Human Rights, *Mapiripán massacre v Colombia*, series C, No 134 (2005), para 146; *Lori Berenson-Meija v Peru*, series C, No. 119 (2004), para 237. European Court of Human Rights: *Lepojic v Serbia*, Application No 13909/05 (2007), para. 84; *Murat Vural v Turkey*, Application No 9540/07 (2014), para 86.

Orders the Respondent State to refund the sum of one hundred and eight thousand (108,000) CFA Francs, (equivalent to US\$ 216), incurred by the Applicant as medical and transport expenses;

(v) Unanimously,

Orders the Respondent State to pay ten million (10,000,000) CFA Francs, (equivalent to US\$ 20,000), to the Applicant as compensation for the moral damage suffered by him and his family;

(vi) Unanimously,

Dismisses the Applicant's claim in respect of loss of goods and purchase of new equipment;

(vii) Unanimously,

Orders the Respondent State to pay all the amounts indicated under sub-paragraphs (iii), (iv) and (v) of this paragraph within six months, effective from this date, failing which it will also be required to pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of the Community of West African States (BCEAO), throughout the period of delayed payment and until the accrued amount is fully paid;

(viii) Unanimously

Orders the Respondent State to publish within six months, effective from the date of this judgment: (a) the summary in French of this judgment as prepared by the Registry of the Court, once in the Official Gazette of Burkina Faso and once in a widely read national Daily; and (b) publish the same summary on an official website of the Respondent State, and maintain the publication for one year;

(ix) Unanimously,

Orders the Respondent State to submit to it within six months from the date of publication of the Judgment, a report on the status of implementation of all the decisions set forth in this Judgment.

Karata Ernest and Others v Tanzania (procedure) (2013) 1 AfCLR 356

Karata Ernest and Others v The United Republic of Tanzania

Order, 27 September 2013. Done in English and French, the English text being authoritative.

Judges: AKUFFO, NGOEPE, NIYUNGEKO, OURGUEGOUZ, TAMBALA, THOMPSON, ORE, GUISSSE and ABA

Recused under Article 22: RAMADHANI

Procedure (change of title of Application (6-10))

1. By an Application filed with the Registry of the Court on 27 January 2012, some former employees of the East African Community, an African regional organization which was dissolved in 1977, brought the United Republic of Tanzania before the African Court on Human and Peoples' Rights for allegedly violating some of their basic rights.
2. The Application was placed on the cause list on 30 January 2012 under the title "*Karata Ernest and Others v the United Republic of Tanzania*", Application No. 001/2012.
3. In a letter, dated 25 October 2012, addressed to the Court, Mr Karata Ernest and six (6) other former employees of the defunct organization stated that they had never filed any Application with the Court nor had they authorized anyone to use their names for that purpose.
4. In like manner, the Respondent filed preliminary observations, dated 29 January 2013, in which it requested the Court to declare the Application, titled "*Karata Ernest and Others v the United Republic of Tanzania*", inadmissible for failing to comply with Rule 40 of the Rules of Court. They maintain that the said Rule had been violated because the Application was signed by persons other than Karata Ernest and others mentioned in the said Application.
5. In their reply to the Respondent's response, dated 9 April 2013, the Applicants expressed surprise at the statements made by Karata Ernest and the other former employees and argued that they had simply withdrawn from the Application without giving genuine reasons. They, however, requested that the title of the Application be changed to "*Frank David Omary and Others v The United Republic of Tanzania*", especially as the Respondent had also sought a change of name to replace "Attorney General" with the "United Republic of Tanzania".

Position of the Court

6. The issue at hand is whether the Court can amend the title of an Application brought before it by substituting the name of a person who was erroneously made a party with the name of a proper party, before proceeding with the case.

7. In the circumstances, the Court distinguishes between the identity of the Applicant and the title of the Application. Rule 40 of the Rules of Court provides that for an Application to be considered, it must “disclose the identity of the Applicant notwithstanding the latter’s request for anonymity”. The Court notes that Rule 40 does set a condition with regard to the identity of Applicants but it does not apply to the title of an Application.

8. Furthermore, the Court notes that the change of the title of the Application would not adversely affect either the procedural or substantive rights of the Respondent.

9. The Court duly notes further that Karata Ernest and six (6) others have stated that they had never filed any Application with the Court nor had they authorized anyone to use their names for that purpose, and, consequently, considers that they are not party to the case.

10. Consequently, the Court deems it necessary to change the initial title of the Application from “*Karata Ernest and Others v The United Republic of Tanzania*” to “*Frank David Omary and Others v The United Republic of Tanzania*” as proposed by the other Applicants.

11. For these reasons, the Court hereby unanimously:

- Takes due note of the fact that Karata Ernest and six Others are not party to this Application;
- Concludes that consideration of Application No 001/2012 by the Court will not be affected by the change of the initial title of the Application;
- Directs that the initial title of the Application, that is, “*Karata Ernest and Others v The United Republic of Tanzania*” be replaced by “*Frank David Omary and Others v The United Republic of Tanzania*”;
- Declares that Application No 001 / 2012 will henceforth be titled “*Frank David Omary and Others v The United Republic of Tanzania*”.

Frank David Omary and Others v Tanzania (admissibility)
(2014) AfCLR 358

Frank David Omary and Others v The United Republic of Tanzania

Judgment, 28 March 2014. Done in English and French, the English text being authoritative.

Judges: AKUFFO, NGOEPE, NIYUNGEKO, OUGUERGOUZ, TAMBALA, THOMPSON, ORE, GUISSÉ, KIOKO and ABA

Recused under Article 22: RAMADHANI

Case dealing with non-payment of pension and severance benefits to former employees after the dissolution of the East African Community. The Court declared the case inadmissible for failure to exhaust local remedies.

Jurisdiction (no need to specify treaty provisions alleged to have been violated, 74)

Admissibility (failure to exhaust local remedies, 127-130)

Separate opinion: OUGUERGOUZ

Jurisdiction (temporal jurisdiction, 21, 22)

I. Subject of the Application

1. The Court was seized with an Application entitled *Karata Ernest and Others v Attorney General*, dated 16 January 2012, and signed by Mr Ahmad Kimaro, on behalf of a group of ex-employees of the East African Community (hereinafter referred to as “the Applicants”), against the United Republic of Tanzania, (hereinafter referred to as “the Respondent”).

A. The Parties

2. The Applicants are all nationals of the Respondent State. On 27 September, 2013, the Court amended the name of the Applicants from Karata Ernest and Others to Frank David Omary and Others.

3. The Respondent is a State Party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) as well as the Protocol. The Respondent has also made the declaration required under Article 34(6) of the Protocol, recognizing the jurisdiction of this Court to receive cases from individuals, and NGOs with observer status before the African Commission on Human and Peoples’ Rights (hereinafter referred to as “the Commission”).

4. At its 27th Ordinary Session, the Court decided to amend the title of the Application, by substituting the United Republic of Tanzania as the Respondent for the Attorney General, who had originally been cited by the Applicants as the Respondent. (See *infra* paragraph 35)

B. Facts of the case as presented by the Applicant

5. According to the Application, on 17 May 1984, following the dissolution of the East African Community (hereinafter referred to as the “EAC”), the Presidents of Tanzania, Uganda and Kenya signed a Mediation Agreement which required, among others, the payment of reparations on the assets and liabilities of the EAC, as well as the pensions and benefits of the ex-employees.

6. The Applicants allege that in 2003, due to the failure of the Respondent to implement these commitments, they seized the High Court of Tanzania, but on 20 September 2005, the case was withdrawn after they concluded an amicable settlement, endorsed by the Court, with the Respondent.

7. The Applicants argue that they repudiated this amicable settlement because it was not fully respected by the Respondent.

8. The Applicants also claim that after being seized of the matter following the repudiation of the amicable settlement, the High Court “found out that there were two groups of Applicants and advised each group to prepare its payroll list, of which at the end they would add their sum to get a single sum, and that was done. To that effect, the lawyers of the two sides prepared a joint affidavit and proceeded to other measures”.

9. The presiding Judge in the High Court named the two groups of the ex-employees, 5,598 in number, as List 3A and List 3A1. The Applicants belong to List 3A1.

10. The Applicants aver that in the High Court, the Respondent challenged the Statement of Claim submitted by the two groups under the pretext that the stated amount had already been paid to them. They claim that their Counsel refuted these assertions by the Respondent, noting that only transport allowances, of the entire 15 items in the Deed of Settlement had been paid. They argue further that the Respondent could not show proof of any other payments made.

11. According to the Applicants, Justice Mwaikugile later recused himself from the case, and Justice Utamwa was appointed to handle the case, and to make a decision on the possibility of issuing the Applicants with a Certificate of Payment, on the payments which they had to receive from the Respondent. The Applicants claim further that in December 2010, Justice Utamwa dismissed the case in a rapidly conducted trial, on the grounds that it was incompetent.

12. Given the tension generated by the case nationally, the Court of Appeal of Tanzania, in accordance with section 4(3) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002, took up the matter and rendered a decision in which it declared that the High Court had been properly seized to issue the Certificate requested, and ordered that the matter be re-examined and disposed of by another Judge of the High Court.

13. According to the Applicants, the case was assigned to Justice Fauz Twaib. They claim that when they appeared before Justice Twaib, their colleagues listed under List 3A adopted a different approach. According to them, their colleagues submitted an amount which was higher and requested the Judge to substitute it for the one which had been taken into account by the Court of Appeal.

14. In his judgement dated 23 May 2011, Justice Fauz Twaib dismissed the Application entirely, on the grounds that there was no outstanding amount to be paid.

15. The Applicants aver further that following this decision, they left the Courtroom in anger but stayed in front of the Court premises. They later sent their representatives to see the Chief Justice of Tanzania to direct them as to the way forward.

16. According to the Applicants, while waiting for the answers, the Respondent sent an elite force of the Tanzania Police to disperse them. Pandemonium ensued since the complainants wanted to leave the Court premises only after the Chief Justice gave them a hearing. At this stage, the special policemen started to beat them severely, by using police batons while spraying them with itching water.

17. The Applicants claim that several persons were injured, amongst them, a man aged 80 and a lady of more than 75 years old, both of whom were ready to testify before this Court.

18. The Applicants allege that in June and July 2011, their colleagues on List 3A applied for leave from the High Court to file an appeal before the Court of Appeal, in order to file their new Application in place of the initial one. This Application for leave was denied on 14 December 2011 on the grounds that it was not submitted within reasonable time and that it contained procedural errors.

C. Alleged violations

19. The Applicants allege that the non-payment of their entire pension and severance benefits by the Respondent, based on the Mediation Agreement of 1984, is a violation of provisions of the Universal Declaration of Human Rights (hereinafter referred to as "the Declaration"), in particular, Article 7 on the right not to be discriminated against, Article 8 on the right to an effective remedy, Article 23 on the right to work and just pay, Article 25 on the right to adequate standard of living and Article 30 on the State duty not to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth in the Declaration.

20. Without mentioning any particular provision, the Applicants also allege that the brutality and humiliation they endured at the hands of the police is also a violation of the Declaration.

21. In its Response dated 6 March 2013, the Respondent denies Applicants' claim that it has violated their rights. The Respondent objects to the Application of the Declaration in this case. With respect to the allegation of police brutality, the Respondent avers that "the Government has not violated any human right of the Applicants nor has it committed any brutal acts to them. The police only discharged their

duty of preserving order and peace without causing any harm to the Applicants...”.

D. Relief sought

22. In their original Application dated 16 January 2012, their submission of 30 March, 2012, as well as their Reply to the Respondent’s Response, the Applicants pray the Court to:

- “Declare that the Respondent violated Articles 7, 8, 23, 25 and 30 of the Declaration, to which the Respondent is a signatory.
- Declare that the Applicants were not paid all their claims by the Respondent.
- Certify to the Applicants payment of severance allowance with effect from 1 October 2009.
- Order that the Rule of Law be reinstated and the Respondent be ordered to pay the amounts approved by the Court of Appeal.
- Call on the Court of Appeal of Tanzania to issue a decision to facilitate these payments.
- Draw the attention of the Respondent on the need to desist from the use of force and humiliation against citizens who only wish to exercise their legitimate rights.
- Pay compensation to the victims of Police brutality;
- Declare the Deed of Settlement null and void”.

23. In its Response dated 6 March, 2013, the Respondent prays the Court to declare that:

- “As a preliminary, it should not have been seized with the matter for want of compliance of admissibility criteria stipulated under rule 40 sub-rule 1-6, as well as Article 6(2) of the Protocol...and Article 56 of the Charter.
- The Application has not invoked the jurisdiction of the Court.
- The Application be dismissed in accordance with rule 38 of the Rules of Court”.

24. The Respondent also prays for the following orders with respect to the merits of the Application:

- “That the Government of Tanzania has not violated articles 7, 8, 23, 25 and 30 of the Universal Declaration of Human Rights, consequently, no compensation/reparation should be awarded to the Applicants.
- That the Applicants were paid all their claims by the Government.
- That the Deed of Settlement was and is still valid.
- That there was no police brutality committed to the Applicants by the Government of Tanzania, consequently, no compensation should be awarded to the Applicants.
- That the cost of this Application be borne by the Applicants.
- Any other relief(s) the Court may deem fit to grant”.

II. Proceedings before the Court

25. The Application, dated 27 January 2012, was accompanied by what the Applicants considered to be evidence of exhaustion of local remedies.

26. By email of 8 February, 2012, the Applicants applied to the Registrar of the Court for legal aid. The Registrar replied by letter dated 10 February 2012, indicating that the Court did not have a legal aid programme and that staff members were not allowed to represent parties.

27. By letter dated 30 April, 2012, the Registry requested the Applicants to show how the Application meets the requirements under Rule 34 of the Rules.

28. By letter dated 11 May, 2012, the Applicants forwarded to the Registry a series of documents, including judgments.

29. By letter dated 28 June, 2012, the Registrar requested additional information with respect to the Application, in particular, evidence of exhaustion of local remedies in relation to the allegation of police brutality. In the same letter, the Registrar also requested that the said information should be submitted to the Registry of the Court within thirty (30) days from the date of receipt of the notification.

30. By letter dated 16 July 2012, the Applicants submitted what they considered to be evidence of exhaustion of local remedies with respect to the allegation of police brutality.

31. By letter dated 10 October, 2012, the Registry notified the Respondent of the Application, pursuant to Rule 35(2)(a) of the Rules. In accordance with Rule 35(4)(a) of the Rules, the Respondent was requested to indicate the names of its representatives within thirty (30) days and pursuant to Rule 37 of the Rules, to respond to the Application within sixty (60) days, from the date of receipt of the notification.

32. By letter dated 10 October, 2012, the Registry informed the Chairperson of the African Union Commission (AUC), pursuant to Rule 35(3) of the Rules, of the receipt of the Application.

33. By letter dated 25 October, 2012, Mr Ernest Karata and six others informed the Court that he has learned that a civil suit in his name was before the African Court, as the Application before this Court is said to be connected to Civil Case No. 95/2003. He stated that as legal representatives in Civil Case No. 95/2003 which was still pending before the High Court at the time, they had not filed any case nor authorized any one to file any case on their behalf, before this Court.

34. By letter dated 13 December, 2012, the Registry notified the Applicants of Mr Karata's letter of 25 October, 2012.

35. By letter dated 17 December, 2012, the Registry informed Counsel for the Applicants that at its 27th Ordinary Session, the Court decided to amend the title of the Respondent from Attorney General to the United Republic of Tanzania, and in view of that decision, the Application will read as Application No 001/2012, *Karata Ernest & Others v The United Republic of Tanzania*.

36. By letter dated 17 December, 2012, the Registry re-forwarded to the Respondent, the Chairperson of the AUC and Counsel for the Applicants, the Application and all annexes thereto.

37. By *Note Verbale* dated 30 January 2013, the Respondent filed preliminary objections to the Application and the list of the names and

addresses of its representatives in respect of the Application, pursuant to Rule 35(4)(a) of the Rules.

38. By letter dated 1 February 2013, the Registry notified the Applicants of the Respondent's Preliminary Objections, and invited the Applicants to file their Reply, if any, within thirty (30) days of receipt of the notification.

39. By letter dated 18 February 2013, the Applicants submitted their comments to the preliminary objections raised by the Respondent.

40. By letter dated 21 February 2013, the Registrar forwarded to the Respondent the Applicants' response to its preliminary objections, and requested the Respondent to file its comments, if any, within thirty (30) days, from the date of receipt of the notification.

41. By *Note Verbale* dated 7 March 2013, the Respondent submitted to the Registry, its Response to the Application, pursuant to Rule 37 of the Rules.

42. By letter dated 12 March 2013, the Registry transmitted the Respondent's Response to the Applicants, and invited the latter to file its Reply within thirty (30) days of receipt of the notification.

43. By letter dated 4 April 2013, the Applicants filed their Reply to the Respondent's Response, including a request for the said Response to be expunged from the proceedings as time barred.

44. By letter dated 9 April 2013, the Registry forwarded the Reply of the Applicants to the Respondent.

45. By letter dated 3 July 2013, the Registrar notified the parties of the close of pleadings.

46. By letter of 2 October, 2013, the Registrar transmitted to the parties, the Court order amending the name of the Applicants to Frank David Omary and Others.

III. Preliminary objections raised by the Respondent

A. Objection to the *ratione materiae* jurisdiction of the Court

47. According to the Respondent, the Applicants based their Application on Articles 7, 8, 23, 25 and 30 of the Declaration. The Respondent submits that, pursuant to Article 3(1) of the Protocol "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 instruments ratified by the States concerned". It avers that these provisions give the Court the jurisdiction to deal with matters concerning the violation of human rights instruments mentioned therein provided these instruments have been ratified by the government of Tanzania.

48. The Respondent submits that a direct and detailed analysis of the Application reveals that it does not concern the interpretation and Application of any human rights instrument ratified by Tanzania.

49. The Respondent argues that the Application therefore does not fall within the provisions of Article 3(1) of the Protocol and Rule 26 of the Rules, and concludes that this Court should declare itself incompetent in terms of its *ratione materiae* jurisdiction.

B. Objection to the admissibility of the Application due to non-compliance with Rule 40 of the Rules of Court

50. According to the Respondent, the Application should be declared inadmissible because it is at variance with conditions of admissibility under Rule 40 of the Rules, read together with Article 56 of the African Charter.

i. The identity of the Applicants – Article 56(1) of the Charter

51. The Respondent raises an objection to the admissibility of the Application on the grounds that the real identity of the Applicants is not known, contrary to Article 56(1) of the Charter.

52. The Respondent submits that the Application before this Court is brought under the name of Karata Ernest and Others v Tanzania, but the same was signed by other persons, not including Karata Ernest himself. The Respondent argues that the Application is based on Suit No 95/2003, bearing the title Karata Ernest and Others v Attorney General, which was pending before the High Court of Tanzania. The Applicants allege that Mr Karata had informed this Court by letter of 25 October 2012 that “as legal representatives in the Civil Case No 93/2005, which was then pending in the High Court of Tanzania, they have never filed any case nor have they authorized anyone to file a case on their behalf or in their name. Further that they informed the Court that they are not party to the Application No 001/2012 currently pending before the Court, and that they have therefore exonerated themselves of any legal liability connected to Application No 001/2012, as it may prejudice their desire to do so when a need arises. That their letter to the Court has been written on behalf of 17,746 Ex EAC employees in Court record and all other Tanzanians who were employees of the defunct East African Community...”.

53. The Respondent submits further that the attempt by the Applicants to amend the name of the Application is not a proper way, as, according to the Respondent, “a defective Application cannot be cured by an amendment”. They submit that “the best way is for the Applicants to withdraw their Application and start afresh if indeed they are serious in pursuing this matter”.

54. The Respondent concludes that “based on the foregoing, we submit that, going by the letter from Karata Ernest and Others, there is currently no case pending in the African Court bearing the same name...”.

ii. Compatibility of the Application with the Constitutive Act of the African Union and the Charter – Article 56(2) of the Charter

55. According to the Respondent, the rights mentioned in support of this Application are only enshrined in the Declaration. It argues that by failing to cite the provisions of the Constitutive Act of the African Union (hereinafter referred to as “the Constitutive Act”) or the Charter, “the Applicants are inviting the Court to deal with an issue which falls outside of its competent jurisdiction”.

iii. Application based exclusively on information disseminated from the mass media – Article 56(4) of the Charter

56. The Respondent argues that regarding the allegations of Police brutality, the Applicants’ claim is based on news disseminated through the mass media. According to the Respondent, no proof of physical violence was adduced.

iv. Exhaustion of local remedies – Article 56(5) of the Charter

57. The Respondent argues that the Applicants have neither exhausted local remedies in relation to their claim for compensation nor have they tried to exhaust local remedies in relation to alleged Police brutality.

58. On claims for compensation, the Respondent avers that after the dismissal of their Application by the High Court in May 2011, the Applicants filed an Application for leave to appeal before the Court of Appeal on 6 June, 2011. According to the Respondent, the Application was struck out for procedural errors and the Applicants later filed another Application, this time for an extension of time by the High Court, to file an appeal. The Respondent claims that this Application was also struck out with cost to the Applicants on 11 October 2012, and that they filed another Application for the extension of time to appeal.

59. Regarding allegations relating to Police brutality, the Respondent argues that the Applicants showed no proof that the presumed victims sued the government in the domestic courts. The Respondent also argues that a letter produced by the Applicants was baseless.

v. Reasonable time – Article 56(6) of the Charter

60. According to the Respondent, the judgment to dismiss the Applicants’ compensation claim was issued in May 2011 and the Applicants seized this Court only in January 2012, eight (8) months after the pronouncement of the judgment. Regarding the alleged Police brutality, the Respondent argues that the facts took place on 13 October 2010, whereas this Court was seized in January 2012, that is, one (1) year and three (3) months after the alleged violence. It adds that even if the Court does not give an indication of what should be reasonable time, the Commission, as well as other regional bodies, recognized a six (6) months period as reasonable time.

61. The Respondent consequently calls on the Court to declare the Application inadmissible both with respect to alleged violations relating to the claim for compensation as well as that of Police brutality.

IV. Position of the Applicants with regard to the preliminary objections raised by the Respondent

A. Arguments against objections raised under Article 56 of the Charter and Rule 40 of the Rules

i. Identity of the Applicants

62. The Applicants on their part submit in their Reply to the Respondent's Response that "the Applicants in the present Application are not claiming to represent all the ex-EAC employees... The Applicants in the present Application are not claiming any mandate from Karata Ernest and his colleagues. So it is not understood why Karata Ernest and his colleagues are pulling out and dissociating themselves from the present Application. The proper case from which they could pull out would be Civil Case No. 93/2003. But this case was extinguished by the Deed of Settlement. For this reason to rename Application No. 001/2012 as Frank David Omary and Others v The Government of the United Republic of Tanzania is quite proper".

ii. Exhaustion of local remedies

63. According to the Applicants, to date, there is no issue pending before the High Court concerning the Civil suit No. 95/2003, that is, the Application deposited by the ex-employees of List 3A, for an extension of the time to appeal. They argue that on 11 October 2012, the said Application was struck out and the Applicants ordered to pay cost. They aver that it was the second time that an Application from the former employees listed on List 3A was struck out by the High Court.

64. On the exhaustion of local remedies relating to Police brutality, the Applicants, without substantiating, simply cite their letter of 16 July 2012 to this Court. In the said letter, the Applicants relate the facts which led to the intervention of the Police, describing the scenes of Police brutality and submitting a list of persons who were injured as a result of this brutality, and the humiliation they suffered.

65. The Applicants claim further that the process at domestic level has been unduly prolonged. They claim that since the signing of the Mediation Agreement in 1984, both Kenya and Uganda have settled the claims of their citizens, but the Respondent has not.

iii. Other admissibility requirements

66. The Applicants do not make any submission with respect to the Respondent's objection to the compatibility of the Application with the Constitutive Act and the Charter (Article 56(2), the Application being exclusively based on information disseminated by the mass media (Article 56(4), and the Application not being filed within reasonable time in accordance with Article 56(6) of the Charter.

V. Applicants request to expunge Respondent's response from the pleadings

67. The Applicants submit that the Response of the Respondent is time barred, having been submitted contrary to the provisions of Rule 37 of the Rules. Rule 37 provides that "The State Party against which an Application has been filed shall respond thereto within sixty (60) days provided that the Court may, if the need arises, grant an extension of time".

68. The Applicants claim that the Respondent's Response was filed on 11 March 2013 instead of 7 March 2013, and that the Respondent did not apply for leave for an extension of time. They therefore call on the Court to expunge this Response from the pleadings.

VI. Analysis by the Court

A. Jurisdiction

i. Court's Jurisdiction *ratione materiae*

69. Respondent submits that the Court lacks jurisdiction to hear this Application as the Applicants have cited only provisions of the Declaration and no provision of the Constitutive Act or the Charter. The Respondent argues further that Article 3(1) of the Protocol limits the jurisdiction of the Court to deal only with human rights instruments "ratified by the States concerned".

70. Article 3(1) of the Protocol confers on the Court the jurisdiction to hear all cases concerning alleged human rights violations. This Article states as follows: "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". It should be noted that Article 3(2) of the Protocol further empowers the Court to decide on its jurisdiction. It provides that "In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide".

71. The issue at stake in this Application is to determine whether or not, the Universal Declaration is a human rights instrument for the protection of human rights to be taken into consideration within the meaning of Article 3(1) of the Protocol.

72. The Court first of all recalls that the Universal Declaration of Human Rights is a resolution adopted by the United Nations General Assembly. The Court notes further that even though the Declaration is one of the prime human rights instruments whose objective is to protect the rights of individuals, it is not ratified by States.

73. The Court recognizes however that although the Declaration is not a treaty that should be ratified by States for it to enter into force, it has attained the status of customary international law and a *grundnorm*.¹ It

1 JE Sánchez-Cordero Grossmann "Promoting human rights as an international policy for world peace" 2 (1) *Mexican Law Review* (2009) 111.

represents the universal recognition that basic rights and fundamental freedoms are inherent to all human beings, inalienable and equally applicable to everyone, and that everyone is born free and equal in dignity and rights.² It was proclaimed as the common standard of achievement for all peoples and all nations, and over the years, has inspired the development of human rights instruments at national, regional and global levels. One such instrument is the Charter. Article 60 of the Charter empowers the Court to “draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, ...”.

74. It is true that Rule 34(4) of the Rules provide that the Application “shall specify the alleged violation”. However, there is no insistence with regard to a formal indication in an Application of the instrument from which the provision of the alleged violation is based. The Court therefore rules that reference by the Applicants to the Declaration to allege a violation has no effect on its jurisdiction as long as the alleged violation is also provided for by a treaty ratified by the State concerned.

75. The Court has the power to exercise its jurisdiction over alleged violations, in relation to the relevant human rights protection instruments ratified by the Respondent.

76. The Court notes that all the rights alleged by the Applicants to have been violated by the Respondent, are guaranteed in the Charter, notably: the right not to be discriminated against (Article 2 and 3), the right to an effective remedy (Article 7), the right to work and fair remuneration (Article 15), the right to life and personal integrity (Article 4); and with respect to the International Covenant on Economic, Social and Cultural Rights (ICESCR) which the Respondent ratified on 11 June 1976, the right to an adequate standard of living is guaranteed under Article 11.

77. The Court therefore rules that it has jurisdiction *ratione materiae* to hear the case and overrules the Respondent’s objection to its jurisdiction.

ii. Court’s Jurisdiction *ratione personae* and *temporis*

78. The parties did not address the Court on these two aspects of its jurisdiction. Rule 39(1) of the Rules however requires the Court to “... conduct preliminary examination of its jurisdiction and the admissibility of the Application in accordance with articles 50 and 56 of the Charter, and Rule 40 of these Rules”.

79. In conformity with Rule 39(1) of its Rules therefore, the Court will proceed to examine its jurisdiction *ratione personae* and *ratione temporis*.

80. With respect to its personal jurisdiction, the Protocol requires that a State against which an action is brought should not only have ratified

2 www.un.org/en/documents/udhr/hr_law.shtml

the Protocol and the other human rights instruments mentioned in Article 3(1) thereof, but should also, with respect to Applications from individuals, have made the declaration required under Article 34(6) of the Protocol, recognising the jurisdiction of this Court to hear cases from individuals. In the instant case, the status of ratification of African Union Instruments indicates that the United Republic of Tanzania became a party to the Protocol on 7 February 2006, and deposited the declaration under Article 34(6) on 29 March 2006. The Court also observes that the Applicants, all nationals of the Respondent State, are individuals. On these bases, the Court holds that it has jurisdiction *ratione personae*.

81. Regarding the *ratione temporis* jurisdiction of the Court, it is important to make a brief summary of the origin of the procedure. On 9 May 2003, the ex-employees of the defunct East African Community seized the High Court of Tanzania to obtain the execution of commitments made by the Tanzanian government within the framework of a Mediation Agreement in relation to the payment of their pension and other benefits. On 20 September 2005, the Applicants withdrew the matter from the High Court after reaching an amicable settlement with the Respondent. On 15 October 2010, the Applicants seized the High Court to compel the Respondent, this time, to honour the amicable agreement reached with the latter. On 27 January 2012, they seized the African Court on the issue of the non-execution of the amicable settlement which had been filed with Tanzanian Courts since October 2010 as stated earlier.

82. The Court notes that according to the Applicants, the non-execution of the agreement was tantamount to a violation of their rights which they were pleading before the Court. The Court is of the view that the alleged violations which are said to have resulted from the non-payment of their benefits and compensation is situated from October 2010, when the High Court was seized of the matter for the first time. The Court also notes that the police brutality alleged by the Applicants is said to have been committed following the judgment of the Court on 23 May 2011.

83. The Court further notes that both the alleged violations which resulted from the non-payment of their compensation benefits and the alleged police brutality took place after the ratification of the Protocol (7 February 2006) and the making of the declaration under Article 34 (6) of the Protocol (9 March 2010) by the Respondent.

84. On these grounds, the Court concludes that it has the *ratione temporis* jurisdiction to hear the matter.

B. Admissibility of the Application

85. The Court recalls that every Application has to meet the requirements under Article 56 of the Charter, read jointly with Article 6(2) of the Protocol. Article 56 of the Charter provides that “[Applications] relating to human and peoples’ rights ...shall be considered if...”, and then goes on to enumerate seven (7) requirements that must be fulfilled for an Application to be admissible. Article 6(2) of the Protocol on its part provides that “The Court shall rule

on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.

86. The Respondent claims that six of the requirements under Article 56 have not been met by the Applicants. It must be stated at this juncture that the seven requirements under Article 56 are cumulative, thus, if one of them is not met, the Application cannot be admissible.

87. The Court will now proceed to analyse the arguments put forward by the Respondent in this regard.

C. Identity of the Applicants

88. Article 56(1) of the Charter provides that Applications shall “Indicate their authors even if the latter request anonymity”. The Respondent submits that the Application before this Court is brought under the name of *Karata Ernest and Others v Tanzania*, and not the Applicants.

89. The Court admits that the Application was filed in the name of Karata Ernest and Others. However, the Court amended the name to Frank David Omary and Others. The fact that Karata Ernest dissociated himself from the Application does not render the identity of the other Applicants void.

90. The Court therefore rules that the Applicants have been properly identified and thus the Application complies with the requirement under Article 56(1) of the Charter.

D. Compatibility of the Application with the Constitutive Act of the African Union and the Charter

91. Article 56(2) of the Charter provides that Applications “Are compatible with the [Constitutive Act of the African Union] or with the present Charter”. According to the Respondent, the Application violates the applicable rules of admissibility because it only cites provisions of the Declaration and does not cite provisions from either the Constitutive Act or the Charter. On this issue, the Court has already stated that its jurisdiction is not adversely affected by the reference made to the Declaration in this Application, and that it will look at the violations alleged by the Applicants to determine its jurisdiction.

92. As indicated earlier, the Respondent has ratified the Charter and other UN human rights instruments, including the ICESCR. To this end, the Court notes that all the provisions of the Declaration alleged to have been violated by the Respondent have corresponding provisions in the Charter.

93. The fact that the provisions of the Charter are not specifically mentioned in an Application does not mean the Application is inadmissible, as long as the rights alleged to have been violated are guaranteed in the Charter or any other human rights instrument ratified by the State concerned.

94. The Court holds therefore that the objection raised on the compatibility of the Application with the Constitutive Act and the Charter is unfounded and is hereby overruled.

E. Objection to the admissibility of the Application on the grounds that it is based exclusively on news disseminated from the mass media

95. Article 56(4) of the Charter requires that Applications “are not based exclusively on news disseminated through the mass media”. The Respondent argues that the Applicants have included pages from newspapers as the only proof of allegations of police brutality, thereby basing their Application exclusively on news disseminated from the mass media. The Court observes that the Applicants did provide excerpts of newspaper clippings to support their allegation of police brutality. It notes that the production of these newspaper excerpts by the Applicants has as its only objective to support the allegations which they made in the Application.

96. It should be added that apart from the newspaper clippings, the Applicants submitted to the Court, the names of persons who they claim were both witnesses and victims of the alleged brutality, some of whom were hospitalized as a result of the alleged brutality, and in their letter of 16 July 2012, to the Court, the Applicants described the scenes of the alleged police brutality which occurred.

97. The Court therefore holds that the Application is not exclusively based on news from the mass media and overrules the objection.

F. Exhaustion of local remedies

98. One of the requirements for admissibility mentioned under Article 56 is exhaustion of local remedies. Article 56(5) requires that Applications relating to human and peoples’ rights shall be considered, if they “...are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged”.

99. In its judgment in *Tanganyika Law Society and The Legal and Human Rights Centre & Rev. Christopher Mtikila v The United Republic of Tanzania*, Consolidated Application 009/2011 and 011/2011, para 82.1, the Court ruled that “remedies envisaged in Article 6(2) of the Protocol and Article 56(5) of the Charter are judicial remedies as they are the ones that meet the criteria of availability, effectiveness and sufficiency that has been elaborated in jurisprudence”. It is for the Court therefore to ascertain if the Applicants have exhausted local remedies or whether they were faced with a procedure that was unduly prolonged.

100. With respect to the current Application, there are two questions this Court is called upon to determine in relation to exhaustion of local remedies. The first is whether or not the Applicants have exhausted local remedies with respect to their claim for compensation. The second is whether or not they have exhausted local remedies with respect to their claim of police brutality. The Court will consider each of them separately.

101. Regarding alleged violations relating to claims for compensation, the Applicants maintain that they have exhausted local remedies and argue that no action concerning them is pending before Tanzanian

Courts. The Respondent argues on the other hand that the Application before this Court is still pending before the domestic Courts of the Respondent State, and therefore the Applicants have not exhausted local remedies.

102. It is important at this stage to recount the judicial actions that have taken place at the domestic level.

103. According to the material submitted to this Court by the parties, on 9 May 2003, one Ernest Karata and six others, on behalf of themselves and ex-employees of the defunct EAC, instituted Civil Case No. 95 of 2003 before the High Court of Tanzania. On 20 September 2005, as a result of out of court negotiations, the parties reached an amicable settlement, and signed a Deed of Settlement.

104. The preamble to the Deed of Settlement provides, among others, that "...and whereas in the course of negotiations it was realized that the number of all former Tanzanian employees of the defunct East African Community were not only the plaintiffs but a total of Thirty One Thousand Eight Hundred Thirty One (31, 831), whom the Government has decided to pay them all according to the terms and conditions of this Deed of Settlement".

105. Paragraphs 2 and 3 of the Deed of Settlement are worth quoting here. Paragraph 2 provides that "...the Plaintiffs agree to withdraw all claims contained in the High Court Civil Case No. 95 of 2003 against the Defendant...". Paragraph 3 provides that "... the Defendant agrees to pay the Plaintiffs, and all former Employees of the defunct East African Community who are not party to this Case, all their aforesaid claims, according to their individual records and such payments shall constitute final settlement of all claims arising from the Tanzanian ex-employees of the defunct East African Community. Be it understood that upon payment of these claims the Defendant shall have no other liabilities of whatsoever nature to the Plaintiffs and any other persons arising from their employment by the Defunct East African Community".

106. The Deed of Settlement was duly filed in the High Court on 21 September, 2005, (before Justice Oriyo), and a Consent Judgment was entered for the plaintiffs (including the Applicants before this Court), in the form of a Decree. In the Decree, the Court made the following orders:

"By consent of the parties, judgment is hereby entered for the Plaintiffs as follows:

1. The Plaintiffs do and hereby do withdraw the claims and all the claims contained therein against the defendant.
2. The defendant do pay to the 7 plaintiffs, the other beneficiaries on Court record and to all other persons who were on the staff of the former East African Community and its institutions and Corporations on 30 June 1977, all claims as stated in page 3 of the Deed of Settlement to be made on the basis of the plaintiff's and other said payees' employment record".

107. It is alleged that when the Respondent began to pay the ex-employees, based on what "the Government considered to be their lawful entitlements in accordance with the Deed of Settlement, and therefore the orders of the Court", a dispute arose between the parties,

as 5,598 of the 31,831 ex-employees, including the Applicants before this Court. Those ex-employees “felt that the payments made to them did not fully reflect what they were entitled to under the Deed of Settlement”. The parties confronted each other in the High Court on several occasions.

108. On 15 October 2010, the 5,598 ex-employees filed an Application before the High Court as they claim they were not satisfied in the manner the Deed of Settlement was executed by the Respondent, claiming that some of the 15 claims in the Deed were not settled by the Respondent. The 5,598 claimants, who include the Applicants before this Court, returned to the High Court and applied for a Certificate of Payment, for the execution of the Deed. The matter was heard by Justice Mwaikugile, but before he could deliver ruling, he recused himself.

109. It is important to state here that by the time the matter went before Justice Mwaikugile, the claimants were already divided into two groups, due to internal differences. In paragraph 7 of their Reply to the Respondent’s Response dated 4 April, 2013, the Applicants provide this Court with the cause of the division, stating that “while Karata Ernest and 6 others represented all the ex-EAC employees in Civil Case No. 95/2003, they did not have the mandate of such employees to negotiate a deed of settlement and withdraw Civil Case No. 95/2003, this means that the Deed of Settlement was signed without the consent of all ex-EAC employees. That is what caused the division of the complainants into two groups”.

110. The Applicants argue that there was a difference in the relief sought by the two groups. In view of this, Justice Mwaikugile, decided to name the two groups as payroll List 3A, comprising 2,681 ex-employees, with a total claim of 416,166,090,304.30 Tanzanian Shillings (TZSH), and payroll List 3A1 comprising 2,917 ex-employees, with a total claim of 2,178,558,653,941TZSH. According to the Applicants, “while claimants of List 3A were claiming underpayment, List 3A1 were claiming their basic entitlements, what was paid by the Government was only one item, i.e. transportation”.

111. Following the recusal of Justice Mwaikugile, the case was assigned to Justice Utamwa of the same Court. Justice Utamwa heard the matter and on 9 November 2010, struck it out as being incompetent.

112. In the Applicants’ Application dated 16 January 2012, they submit that “the decision [of Justice Utamwa] was not well received by the Applicants. The heat, anger, mistrust and frustration it generated was plainly reflected in the public statements to the media”.

113. Acting under section 4(3) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002, the Court of Appeal called for the records of the High Court on the case, “in order to satisfy itself as to the correctness, legality or propriety of the findings or orders of the learned High Court Judge or as to the regularity of the proceedings”. The Court of Appeal considered the case as Civil Revision No. 10 of 2010.

114. After hearing counsel for Respondent and Plaintiffs, the Court of Appeal “quashed that part of the High Court ruling striking out the

Application and ordered the substantive Application to be heard on merit as soon as possible but by another Judge... All said and done, we find and hold that the High Court had been properly moved to issue a Certificate under s.16 of the Act. The learned Judge therefore, erred in law in failing to exercise his jurisdiction to hear and determine the Application on merit. That is why we did set aside his order striking out the Application for being incompetent and we restore it and ordered that it be heard and determined forthwith by another Judge". It is important to state here that the Court of Appeal did not examine the merits of the case.

115. After the Court of Appeal Ruling, the case was assigned to Justice Fauz Twaib of the High Court. In his ruling of 23 May 2011, Justice Twaib stated that "... where there is proof that the full payment according to the Court's order has been made, no certificate should be issued... The rationale for this is clear: issuing a certificate for amounts not currently due would not only be academic...but may confuse matters and even result in wrongful payments being made...". The learned Judge went on to state that "from the foregoing, and on the basis of the material made available to me in this Application, there is no entitlement that remains unpaid by the Respondent...If anything, there was an overpayment to those whose house allowance was wrongly included in their Annual Pensionable Emoluments...". He concluded by stating that "since my findings are that there is no shortfall, the Applicants cannot get what they are seeking. This Court cannot issue the certificate sought. Therefore, I hereby dismiss this Application in its entirety".

116. According to the Respondent, after the ruling of Justice Twaib of 23 May 2011, the Applicants applied for leave of the High Court on 6 June 2011 to appeal to the Court of Appeal, and the Application was struck out on the basis of a defective affidavit. The Applicants again applied to the High Court for leave for extension of time to file an appeal, and the same was also struck out with cost, on 11 October, 2012. The Respondent submits further that, on 25 October 2012, the Applicants filed another Application for extension of time to file their appeal to the Court of Appeal, and this was scheduled for mention on 19 March, 2013.

117. On 27 November, 2013, the Court wrote to the parties requesting them to provide information on the status of the case at domestic level. The Applicant informed the Court by letter of 12 December that it has provided to the Court all relevant information relating to the Application. The Respondent on its part informed the Court by letter of 30 December, 2013, that it was still tracing the information requested.

118. The Applicants maintain that "there are no cases pending at the High Court of the Tanzania relating to miscellaneous Civil Case No. 95.2003". They claim that the Application filed by members of List 3A have been struck out twice, the last time being on 11 October, 2012.

119. The Applicants argue further that when they appeared before Justice Twaib, members of List 3A "came before the Judge with a fresh payroll with a bigger sum asking him to substitute it for the one that had passed through the bench of appeal court judges. The Judge told them

that he was not there to rule on a new thing other than what was in the pact received from the Supreme Court ... In his ruling, the Honourable Judge dismissed this fresh Application...” They argue that “the ruling of Justice Fauz shows clearly that he only dismissed the new payroll list delivered to him by Applicants of List 3A to be substituted with the one in the pact presented to him by the Court of Appeal bench to be determine forthwith. Since he did not dismiss what was in the pact from the Appeal Court, the Government ought to pay our terminal benefits as the ruling of Supreme Court directed in page 15...”

120. The Applicants aver that they have written three letters to the Court of Appeal seeking the issuance of a certificate of payment, and the Court of Appeal responded that they should be patient. This Court does not attach any weight to these letters.

121. The Court notes that the Applicants before this Court are part of a group of former employees of the defunct East African Community who were involved in Suit No. 95/2003 against the Respondent. The Deed of Settlement which was filed in the High Court on 21 September, 2005 clearly states that “the defendant do pay to the 7 plaintiffs, the other beneficiaries on Court record and to all other persons who were on the staff of the former East African Community and its institutions and Corporations on 30th June 1977...”.

122. There is nothing before this Court to suggest that the Applicants have dissociated themselves from the Suit. The Applicants brought this Application before this Court as Karata Ernest and others v the Attorney General of Tanzania, the same title of Suit No 95/2003 which Respondent claims is still pending before Tanzanian Courts. It is only when Mr Karata Ernest dissociated himself from the case before this Court that Applicants sought to change the title to Frank David Omary and Others.

123. They have appeared before the Courts in Tanzania under one suit – Suit No 95/2005 since 2005. The division of the claimants at the domestic level into two groups does not mean that the claimants in the two lists were not part of the same case. The cause of action remained the same, the parties remained the same and the reliefs sought were identical.

124. The Applicants acknowledged in paragraph 7 of their Reply to the Respondent’s Response that the division was as a result of internal bickering. For reasons of proper administration of justice the Court classified the two groups as List 3A and List 3A1, but within one case. For all intents and purposes, this Court holds that the Applicants are, and continue to be, part of Suit No 95/2003.

125. This Court observes that the Applicants do not show proof of an end of the action before domestic courts. Even if this Court were to accept their arguments that they are a separate group and have a different claim from the other claimants in Suit 95/2003, there is no indication that they have exhausted local remedies. They argue that although they appeared together before Justice Twaib, the latter’s ruling of 23 May 2011, “only dismissed the new payroll list delivered to him by Applicants on List 3A...”, suggesting that the Judge did not rule on the claim by claimants on List 3A1.

126. Even if this assertion is true, the Court is of the view that while employees listed as List 3A have applied for leave to appeal to the Court of Appeal, ex-employees listed as List 3A1, who are Applicants before this Court, have not demonstrated what action they have taken or attempted to take to either have the High Court rule on their own claim or appeal to the Court of Appeal. In fact, Applicants do not seem inclined to approach the Court of Appeal. On page 5, paragraph 1 of their Reply to the Respondent's Response, they state clearly that "the present Applicants did not find it useful to revert to the Court of Appeal which had previously ruled on the matter. Moreover, the Applicants found it fit to resort to the African Union through this Honourable Court which, they believe is in the best position to see that justice is not only done but also seen to be done". They add that "in another surprising turn of events, Karata Ernest have recently filed yet another Chamber Application (No. 165/2012) purporting to prolong the life span of Civil Suit No. 95/2003. What is even more intriguing is the fact that the Affidavit filed in support of Chamber Summons No. 165/2012 bears the reference to Civil Case No. 95/2003".

127. The above statement moves this Court to draw two conclusions: if the Applicants are part of Suit No 95/2003, the same is still pending before domestic Courts and as such local remedies have not been exhausted; if the Applicants are not part of Suit No 95/2003 pending at the domestic Court, they have not taken their matter to the Court of Appeal, after the ruling of the learned Justice Twaib, on 23 May 2011. Their submission that they do not find it useful to revert to the Court of Appeal on the grounds that the Court had previously ruled on the matter is wrong because the Court of Appeal did not rule on the merits of the matter.

128. The Court of Appeal simply "quashed that part of the High Court ruling striking out the Application and ordered the substantive Application to be heard on merit as soon as possible but by another Judge ... All said and done, we find and hold that the High Court had been properly moved to issue a Certificate under s.16 of the Act. The learned Judge therefore, erred in law in failing to exercise his jurisdiction to hear and determine the Application on merit. That is why we did set aside his order striking out the Application for being incompetent and we restore it and ordered that it be heard and determined forthwith by another Judge".

129. It is clear from the above quotation that the Court of Appeal did not examine the merits of the case.

130. This Court therefore concludes that, either way, be it as part of Suit N. 95/2003 or separately, the Applicants have not complied with the requirement under Article 56(5) with respect to claims for compensation.

131. On the question of undue prolongation of the process, the Applicants allege that the process has been unduly prolonged at the domestic level. They claim in their Reply to the Respondent's Response that the Mediation Agreement for the payment of the defunct EAC ex-employees was signed in 1984, and both Kenya and Uganda had since paid their citizens.

132. The Respondent did not address this point in its Response of 7 March, 2013. However, the Court takes the view from the pleadings that the matter commenced in the High Court in 2003 and was finalised in 2005 by the conclusion of a consent judgment between the parties. In the opinion of the Court, the merits of the case was determined in 2005, and what took the claimants back to Court was the execution of the Deed of Settlement.

133. From the pleadings before this Court, it is clear that since 2003 when the case began in the domestic Courts, and especially after the signing of the Deed of Settlement in 2005, the delay in the process has been occasioned by internal bickering among the claimants. Their Reply to the Respondent's Response, paragraph 18 supports this conclusion. They submit that "... in fact, for reasons explained below...we would come to the conclusion that bearers of payroll 3A, under the umbrella Ernest Karata and six others are subject to factor of undue prolong delay, and one would wonder whether our honourable Government had no hand on this".

134. There is no indication that proceedings at any stage of the case have been unduly prolonged in the domestic Courts, and the Applicants did not adduce any evidence to prove collusion between the Respondent and the claimants of List 3A to 'prolong the procedure'. When the Court of Appeal realised the tension the case had generated, it invoked its power under the Appellate Jurisdiction Act to intervene, and when the case was referred back to the High Court, Justice Twaib disposed of it within two weeks, and the Applicants themselves were surprised at the speed with which he disposed of the matter.

135. The Court therefore rules that the local procedure in respect this case has not been unduly prolonged by the Respondent.

136. On the allegation of police brutality, the Respondent submits that "there is no evidence to show whether these alleged victims or Applicants have pursued any available local remedy against the Government regarding allegations of police brutality which they have complained about. Their letter to court dated 16th July, 2012...does not point towards this direction".

137. The Applicants did not demonstrate any measures they took, or attempted to take to exhaust local remedies. In their Reply to the Respondent's Response, they cite their submission of 16 July 2012 to justify their exhaustion of local remedies. The said submission simply described the incidents that took place on that day, and nothing is said about any process initiated in Court. The Court therefore holds that the Applicants have not exhausted local remedies with respect to the allegations of police brutality.

138. On both counts therefore, that is, the claim for compensation as well as allegation of police brutality, the Court holds that the Applicants have not exhausted local remedies.

G. Objection to the admissibility of the Application on the grounds of unreasonable delay in filing the Application

139. Article 56(6) of the Charter requires that Application “Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter”.

140. Having concluded that the Applicants have not exhausted local remedies, in accordance with Article 56(5) of the Charter, this Court does not find it necessary to pronounce itself on condition of reasonable delay laid down under Article 56(6).

H. Applicants’ request to expunge the Respondent’s Response from the pleadings

141. On the Applicants request to expunge the Respondents Response from the pleadings, the Court notes that the Respondent’s Response was received at the Registry of the Court on 11 March, 2013, four (4) days after the deadline set by the Court. The Court however, notes that the Response is dated 7 March 2013 and only arrived the Registry four days later by courier. For this reason, although received four days later than the time set, the Court considers the Response as properly filed.

142. The Court, having concluded that the Application is inadmissible on the grounds that Applicants have not exhausted local remedies, decides that this matter will not be considered on its merits.

V. On Costs

143. The Respondent prays this Court to order the Applicants to pay its cost.

144. The Court notes that Rule 30 of the Rules of Court provides that “unless otherwise decided by the Court, each party shall bear its own costs”. Taking into account all the circumstances of this case, the Court is of the view that each party shall bear its cost.

A. On these grounds,

The Court:

1. On its jurisdiction, by majority of nine (9) to one (1), Justice Ougergouz dissenting:
 - i. Overrules the Respondent’s objection to its jurisdiction;
 - ii. Declares that it has jurisdiction to hear the Application;
2. Unanimously, declines the Applicants’ request to expunge from the pleadings, the Respondent’s Response to the Application on the grounds that it was filed out of time.
3. On the admissibility of the Application, unanimously:
 - i. Overrules the Respondent’s objection to the admissibility of the Application based on the identity of the Applicants;

- ii. Overrules the Respondent's objection to the admissibility of the Application based on the incompatibility of the Application with the Constitutive Act of the African Union and the Charter;
 - iii. Overrules the Respondent's objection to the admissibility of the Application on the grounds that the Application is based exclusively on information disseminated from the mass media;
 - iv. Sustains the Respondent's objection to the admissibility of the Application due to Applicants' failure to exhaust local remedies with respect to alleged violations relating to claims for compensation;
 - v. Sustains the Respondent's objection to the admissibility of the Application due to failure to exhaust local remedies with respect to the alleged police brutality;
4. Declares this Application inadmissible.
 5. In accordance with Rule 30 of the Rules of Court, each party shall bear its own cost.

Separate opinion: OUGUERGOUZ

1. Though I am also in favour of rejecting the Application filed by Mr Frank David Omary and others against the United Republic of Tanzania, I am of the view that the Court ought to have declared that it does not have jurisdiction *ratione temporis* to deal with the alleged violations of human rights drawn from the non-payment of the totality of their pension and severance benefits and that consequently, it ought to have considered the admissibility of the Application only with regard to the alleged violations of the rights of the Applicants in relation to the police brutalities which are said to have taken place after the reading of the judgment of the High Court of Tanzania on 23 May 2011. The only preliminary issue that will be dealt with here will therefore be the temporal jurisdiction of the Court.
2. The Respondent State deposited its instruments of ratification of the Charter and of the Protocol on 9 March 1984 and 10 February 2006, respectively; it deposited the optional declaration of compulsory jurisdiction of the Court on 9 March 2010. It is therefore this latter date which is critical in determining the jurisdiction of the Court to hear cases of violation under the Charter or any other relevant human rights instrument ratified by the Respondent State.
3. Consequently, if the Court is seized of an individual Application against the Respondent State, which alleges the violation of a right founded on facts which occurred before 9 March 2010, it does not in principle have jurisdiction to deal with such an allegation.
4. The jurisdiction *ratione temporis* of the Court has to be assessed exclusively in relation to the facts which led to the alleged violation; the subsequent failure of the appeals filed in the domestic courts of the Respondent State in order to redress the violation cannot bring this violation under the ambit of the temporal jurisdiction of the Court.

5. This was underscored as follows by the Grand Chamber of the European Court of Human Rights in a judgment delivered on 8 March 2006:

“An Applicant who considers that a State has violated his rights guaranteed under the Convention is usually expected to have resort first to the means of redress available to him under domestic law. If domestic remedies prove unsuccessful and the Applicant subsequently applies to the Court, a possible violation of his rights under the Convention will not be caused by the refusal to remedy the interference, but by the interference itself, it being understood that this may be in the form of a court judgment.”¹

6. To establish the temporal jurisdiction of the Court in this matter, it is therefore necessary to look back in time to identify what is the Respondent State’s act which led to the alleged violation of its international obligations under the Charter or another legal instrument to which it is a party.

7. When, as in the instant case, the facts in question took place for some before and for others after the critical date (i.e. 9 March 2010), it is important to determine whether the alleged violation stems from a fact which occurred prior to this date or one which took place after this date. On that score, it is important to bear in mind the traditional distinction between the acts of State having an “*instantaneous character*”² and those having a “*continuous character*”.³

8. In considering its temporal jurisdiction, the Court should take into account not only the complaints of the Applicants but also the scope of the rights guaranteed by an international instrument, the violation of which has been alleged.

9. In the instant case, the Applicants alleged that the non-payment of the totality of their pension and severance benefits by the Respondent State constitutes a violation of Articles 7, 8, 23, 25 and 30 of the Universal Declaration of Human Rights.

10. The first four provisions guarantee, respectively, the right to equality and non-discrimination, the right to an effective remedy by the national

1 Paragraph 78 of the Judgment in the case concerning *Blecic v Croatia*, Application No 59532/00.

2 The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue”. Paragraph I of Article 14 (“Extension in time of the breach of an international obligation) of the “Draft articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission on 9 August 2001”, *Yearbook of the International Law Commission, 2001*. Volume II (Part Two). *Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, UN Doc. NCN.4/SER.N200 I/ Add. I (Part 2), p 27.

3 The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation. Paragraph 2 of the same Article 14. The Court may also consider facts which occurred before the entry into force of the optional declaration with regard to a Respondent State which is of the view that they are at the origin of a continuous situation which extended beyond that date (see for example the considerations of the Court on this issue in paragraphs 62 to 83 of its judgment on the admissibility of Application No. 013/2011, *Beneficiaries of late N Robert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Iboudou & The Burkinabe Movement on Human and Peoples’ Rights v Burkina Faso*).

competent tribunals, the right to work and to satisfactory working conditions and the right to an adequate standard of living. For its part, Article 30 does not provide the individual with a right as such; it indeed reads as follows: "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein". This provision enshrines the classical prohibition of abuse of rights.⁴

11. Irrespective of the importance of the rights alleged by the Applicants to have been violated by the Respondent State, because of the failure to pay the totality of their pension and severance benefits, the Court can deal with their alleged violation only if the latter falls within the ambit of its jurisdiction *ratione temporis*. It is therefore important to determine precisely the date of occurrence of the act that led to the alleged violation consisting, in the instant case, in the non-payment of the totality of the pension and severance benefits by the Respondent State.

12. In the instant case, several dates may be taken into consideration to determine the origin of this instigating act.

13. On 20 September 2005, a *Deed of Settlement* was agreed upon between the Applicants and their co-Applicants at the time, on the one hand, and the Respondent State on the other. On 21 September 2005, the said deed was registered at the High Court of Tanzania in Dares Salaam.

14. In terms of Article 3 of this agreement, the Respondent State promised to pay the amount owed the Applicants and to do this between 20 September 2005 and 28 October 2005. In terms of Article 2 of this agreement, it also promised to consider any other request for compensation within six (6) months, as from 28 October 2005.

15. In their Application, the Applicants stated that: "the Respondents on 21/9/2005 started to pay the Applicants only one item (passage). (...) Doing this shows that by paying only one item in the total of 15 the defendants con ravened the out of Court settlement' ' (see their letter of 16 January 2012)."

16. On 15 October 2010, the Applicants were of the view that the amount paid by the Respondent State was insufficient, and once again seized the High Court of Tanzania.

17. On 23 May 2011, the High Court of Tanzania dismissed the Applicants' Application for the issuance of a *Certificate of payment* by this Court. On page 17 of his Ruling, Judge Fauz Twaib endorsed the

4 Other international legal instruments provide for such a ban, as for example, the International Covenant on Civil and Political Rights (Article 5), the International Covenant on Economic, Social and Cultural Rights (Article 5), the American Convention on Human Rights (Article 29 (a)), the European Convention on Human Rights (Article 17) and the Charter of Fundamental Rights of the European Union (Article 54); for a discussion of this issue, see Sebastien van Drooghenbroeck, "L'article 17 de la Convention européenne des droits de l'homme est-il indispensable?" *Revue trimestrielle des droits de l'homme*, 2001, pp 541-566. The above provisions to some extent echo the phrase uttered by Louis Antoine de Saint-Just during the French Revolution: "NO freedom for the enemies of freedom".

interpretation of the *Deed of Settlement* made by Judge Orlyo in 2008 and 2009; it was the latter judge who registered the *Deed of settlement* through a decision dated 21 September 2005. Judge Twai referred in particular to the following paragraphs of the two decisions taken by Judge Orlyo.

18. In his decision of 19 September 2008, Judge Orlyo noted that:

“Looked at from an objective angle, by Clause 2, the (Defendant) undertakes to pay all the (Plaintiffs) claims as enumerated at page 3 thereof. But the undertaking by the (Defendant) to pay is qualified and restricted. Whereas *the claim in the plaint* and at page 3 of the Settlement Deed are general, it was agreed by the parties that their payments are to be made on the basis of the individual record of each employee (...)” (emphasis added).

19. In his second decision dated 30 January 2009, he noted that: “There is no dispute on the content of paragraph 8 (...) and on the rights of the Applicants stated therein. However, the contents of paragraph 8 are not to be taken in isolation of the rest of the paragraphs of the Deed of Settlement. Further, and of cardinal importance, is that the contents of paragraph 8 and the whole Deed of Settlement are subject to the relevant laws”.

20. These two decisions are a clear indication that by 19 September 2008, there was already a complaint and therefore a dispute as to the payment of pension and severance benefits by the Respondent State. This presupposes that by that date, the Respondent State had already violated its obligation towards the Applicants as provided for in the *Deed of settlement* of 20 September 2005. The dispute therefore took place well before the seizure of the High Court of Tanzania by the Applicants on 15 October 2010.

21. Based on the foregoing, one can therefore safely conclude that the act which instigated the alleged violation of certain provisions of the Universal Declaration of Human Rights occurred prior to the entry into force of the optional declaration with regard to the Respondent State and that, consequently, the Court has no jurisdiction *ratione temporis* to examine this allegation.

22. Thus, the Court ought to have declared that it lacked jurisdiction with regard to the alleged violations of the rights of the Applicants relating to the non payment of the totality of their pension and severance benefits; it should have continued with the consideration of the admissibility of the Application but only with respect to the alleged violation of the rights of the Applicants resulting from the police brutalities which are said to have taken place on 23 May 2011, and to declare it not admissible, as it did. due to the failure to exhaust local remedies.

Frank David Omary and Others v Tanzania (review) (2016) 1 AfCLR 383

Frank David Omary and Others v The United Republic of Tanzania

Judgment, 3 June 2016. Done in English and French, the English text being authoritative.

Judges: THOMPSON, NIYUNGEKO, OUGUERGOUZ, TAMBALA, ORE, GUISSÉ, KIOKO, BEN ACHOUR, BOSSA and MATUSSE

Recused under Article 22: RAMADHANI

The Applicants brought this Application seeking a review of the Court's decision dismissing their case for being inadmissible. The Applicants premised their Application on the discovery of new evidence. The Court dismissed the Application holding that the fresh allegations by the Applicants did not constitute new evidence within the meaning envisaged under the Rules of the Court.

Admissibility (requirements for admissibility are cumulative, 52)

Review of judgment (evidence already considered, 41, 46, new evidence would not have influenced decision, 49, 51)

Separate opinion: OUGUERGOUZ

Review of judgment (difference between fact and evidence, 7, 8, 11, 12; conditions for admissibility 13, 20; need for caution on review 23, 24)

I. Subject of the Application

1. Messers Frank David Omary and Others (hereinafter referred to as the "Applicants") filed before the Court, through their Counsel, Chabruma and Co Chambers, an Application for Review of the Judgment of the Court (hereinafter referred as "the initial Judgment") rendered on 28 March 2014 in the Matter between them and the United Republic of Tanzania (hereinafter referred as "the Respondent"), pursuant to Article 28(3) of the Protocol and Rule 61 (4) of its Rules.

2. For ease of reference, the Applicants, former employees of the East African Community (hereinafter referred as "EAC"), had seized the Court by an Application dated 17 January 2012, brought against the Respondent. They alleged, among other things, that the non-payment of the entirety of their pension and terminal allowance owed by the Tanzanian Government by virtue of the Mediation Agreement of 1984, constitutes a violation of the Universal Declaration of Human Rights, especially Article 7 on the right to non-discrimination, Article 8 on the right to effective remedy, Article 23 on the right to work and to a fair

remuneration, Article 25 on the right to adequate standard of living and Article 30 on the obligation of States to refrain from engaging in any activity or perform any act aimed at the destruction of the rights and liberties set forth in the Declaration. They further alleged that the brutality and humiliation they suffered at the hands of the police also constitute a violation of the Declaration.

3. In its decision of 28 March, 2014, the Court held that the Application is inadmissible. The relevant portions of that decision are as follows:

- “3) On the admissibility of the Application, unanimously...:
- iv. Sustains the Respondent’s objection to the admissibility of the Application due to Applicants’ failure to exhaust local remedies with respect to alleged violations relating to claims for compensation;
- v. Sustains the Respondent’s objection to the admissibility of the Application due to failure to exhaust local remedies with respect to the alleged police brutality;
- 4) Declares this Application inadmissible.”

II. Procedure

4. On 30 June 2014, the Court received an Application filed by Frank David Omary and Others against the Respondent.

5. By letter dated 18 September 2014, the Registry, pursuant to Rule 35(3) of the Rules of Court, transmitted the Application for review to the Respondent and, by another letter dated 12 November 2014, requested the latter to submit its response within 30 days of receipt of the letter.

6. By e-mail dated 12 December 2014, the Respondent transmitted to the Registry its Response. On 13 December 2014, the Registry, having found that the brief was not attached to the e-mail, accordingly notified the Respondent by e-mail dated 15 December 2014. The Respondent transmitted its Response by e-mail dated 17 December 2014.

7. By *Note Verbale* dated 29 December 2014, the Respondent again transmitted to the Registry its Response dated 12 December 2014.

8. By letter dated 6 January 2015, the Registry acknowledged receipt of the brief to the Respondent, notified the latter that the Annexes mentioned in the covering letter were not attached, and gave it seven (7) days within which to transmit the said Annexes. By *Note Verbale* of 9 January 2015, the Respondent transmitted the missing Annexes.

9. By letter dated 6 January, 2015, the Registry forwarded to the Applicants, a copy of the Response of the Respondent and requested them to submit their observations within thirty (30) days of receipt of the letter.

10. By letter dated 30 January 2015, received at the Registry on 2 February 2015, Counsel for the Applicants transmitted Reply, to which the Respondent also reacted in a rejoinder dated 9 March 2015, received at the Registry on 18 March 2015.

11. On 29 May 2015, the Court declared the written procedure closed and the Parties were notified accordingly on 8 June 2015.

III. Positions of the Parties

A. The Applicants' submissions

12. In their Application for Review, the Applicants alleged that: “the Court’s finding that the Applicants have not complied with Article 56 (5) of the African Charter by failing to produce evidence of exhaustion of local remedies needs to be reviewed because the evidence produced was not given the weight it deserves”.

13. According to the Applicants, to determine whether local remedies have been exhausted, the Court should take into account the events that gave rise to the Applications addressed to it in respect of payment of terminal entitlements and damages arising from police brutality, which events allegedly took place, respectively, after the 2005 Deed of Settlement and at the time of implementation of the Deed on 23 May 2011.

14. They further explained all the efforts they allegedly deployed to exhaust the local remedies before Tanzanian Courts and to bring their concerns to the attention of the judicial and political authorities.

15. The Applicants also affirmed that they are not concerned by the matters pending before the local courts.

16. Furthermore, reverting to the request for damages sequel to police brutality, the Applicants claimed that this Court was the ideal forum for the matter to be heard; for fear that they would not otherwise have a fair trial.

17. The Applicants submit finally that they have discovered new evidence to request for a review of the initial judgment, in conformity with the Rules of Court. They provide as annexures to their Application a number of documents as part of the new evidence, in particular:

- i. Letter from the former employees of the EAC to the Chief Justice in the Court of Appeal of Tanzania.

According to the Applicants, the said letter was addressed to the Chief Justice of the Tanzania to see whether their request will be granted.

- ii. Response from the Office of the Chief Justice.

According to the Applicants, that letter was allegedly a reply of the Chief Justice of Tanzania to their email dated 5 October 2011, a response which they found unsatisfactory.

- iii. Newspaper Article (HABARI LEO) of 16 March 2011.

The Applicants produced this Newspaper Article which, according to them, highlights the personal involvement of the President to the Republic, who instructed the Government to proceed with settling their terminal entitlements. The Applicants regard the non-implementation of the said instructions as undue prolongation of the procedure.

- iv. Tanzania Daima Newspaper (Toleo No. 983), Monday 13 August 2007 edition.

The Applicants similarly produced this Newspaper to evoke the payments which were allegedly made fraudulently to unentitled persons, thus endangering the funds meant for them.

- v. EAC Mediation Agreement 1984.

The Applicants maintained that the copy of this Agreement is a complete document contrary to the copy filed during the initial procedure.

- vi. Tanzania Legal and Human Rights Centre Reports 2010, 2011 and 2012.

To corroborate the fact that the procedure in the suit between them and the Respondent has been unduly prolonged, the Applicants submitted to the Court the Reports of the Tanzania Legal and Human Rights Centre for 2010, 2011 and 2012, which allegedly mentioned and commented that the procedure in the local Courts as being prolonged.

- vii. Letter dated 11 May 2012, as evidence of the exhaustion of local remedies.

As regards new evidence, the Applicants produced a letter dated 11 May 2012, which, according to them, constitutes proof that the local remedies have been exhausted.

- viii. Report on undue prolongation as prophesied by V. Umbritch.

As the title indicates, this report produced by the Applicants is, in their view, a prediction allegedly made by Dr. V. Umbritch on the undue prolongation of the procedure in respect of the settlement of the terminal entitlements of the former employees of the EAC.

- ix. Letter from Crown Agent dated 25 February 1987 addressed to the former Minister of Finance, Economic Affairs and Planning, Mr Cleopa D. Msuya signed by the Fund Manager, Mr Collyer.

The Applicants also produced this document to justify, as they said, "giving details of the distribution of EAC funds on 20 January 1987".

18. For the foregoing reasons, the Applicants pray the Court to review the Judgement of 28 March 2014.

B. The Respondent's submission

For its part, in its Response to the Application, the Respondent maintained that the decisions of the African Court are final and not subject to appeal, except where key new evidence has been discovered which was not within the knowledge of the Applicants at the time the judgement was delivered.

20. According to the Respondent, the letters dated 5 October 2011 and 1 November 2011, the Newspaper edition of 16 March 2011, the letter of 11 May 2012, the Newspaper edition of 13 August 2007, the EAC Mediation Agreement and the 2010-2012 Reports of the Legal and Human Rights Centre produced by the Applicants do not constitute new evidence in support of exhaustion of local remedies, given the fact that an appeal procedure involving these documents was still pending under Case No. 73/2004.

21. The Respondent further maintained that the allegations that the Applicants had not been afforded the right to a fair trial were erroneous given the fact that the Tanzanian judicial system is independent and the Applicants had reached an amicable settlement in all freedom and in the presence of a lawyer.

22. For the foregoing reasons, the Respondent prays the Court to:

- i. Dismiss the Applicant's Application on the basis of Rule 36 of the Rules of Court;

- ii. Uphold its initial decision as rendered in the Matter referenced 001/2012;
- iii. Award costs to the Respondent or grant any other relief(s) that the Court may deem fit to grant.

IV. Objection raised by the Applicants to the Respondent's response

23. In their Reply, the Applicants raised the issue of inadmissibility of the Respondent's Response on the grounds that it was submitted out of time, that is, over three months after the expiry of the time limit, without explanation.

24. To buttress their Application, the Applicants invoked Rule 70(1) of the Rules of Court and the letter dated 12 November 2014, addressed by the Registry to the Counsel for the Respondent.

V. The Respondents response to the objection raised by the Applicants

25. In response, the Respondent maintained that the Applicants' allegation according to which the brief had been filed out of time, was groundless for the following reasons:

- i. The letter from the African Court dated 18 September 2014, did not stipulate a time limit for the Respondent to file its Response;
- ii. The Respondent grounded its argument on Rule 37 of the Rules of Court which allows it sixty (60) days within which to file its Response. The Respondent affirmed having received on 17 November 2014, a letter from the Registrar of the Court dated 12 November 2014, notifying it that it had thirty (30) days from the date of receipt of the letter, to react;
- iii. The Respondent transmitted its Response to the Court by email dated 12 December 2014, that is, prior to the expiry of the time limit set by the Registrar, but omitted to attach the Response;
- iv. By email dated 13 December 2014, the Registry acknowledged receipt thereof and, by another email dated 15 December 2014, notified the Respondent that its Response had not been attached. The Respondent took notice of the aforesaid email on 17 December 2014 and, on the same day, forwarded the Response, together with its Annexures.

26. The Respondent maintained, for the above reasons, that it had complied with all the guidelines issued by the Registry and, therefore, prayed the Court to dismiss the preliminary objection and, in that case, grant it leave to file its Response all the same.

VI. Considerations of the Court on the preliminary objection

27. As regards the Respondent's Response which the Applicants request to be expunged from the current procedure, the Court first notes that the said Response was forwarded to it by email on 17 December 2014, following the two emails which the Registrar addressed to the Respondent on 18 September and 20 November 2014, respectively.

28. The Court notes that the letter dated 18 September 2014, did not provide for any time limit for the submission of the response, whereas the letter dated 12 November 2014, filled that gap by setting 30 days' time limit for the Respondent to submit its Response. It should be noted that a copy of the same letter was forwarded to the Applicants for information.

29. The Court notes that the Respondent received the Registry's letter on 17 November 2014, and as such had up to 17 December 2014 to submit its Response. The Court finds in this regard that the Respondent has submitted its Response within the prescribed time limit.

30. Moreover, the Court holds that, in the instant case, the fact that it forwarded to the Applicants a letter dated 6 January 2015, transmitting the Respondent's Response does not mean that the Respondent submitted its Response out of time.

31. For these reasons, the Court holds that the Respondent's Response was validly submitted and consequently dismisses the preliminary objection grounded on non-compliance with the time limit.

VII. Considerations of the Court on admissibility of the Application for Review

32. Pursuant to Article 28 of the Protocol, the Court may review its decision. According to this Article, "2. The judgement of the Court decided by majority shall be final and not subject to appeal. 3. Without prejudice to sub-Article 2 above, the Court may review its decision in the light of new evidence under conditions to be set out in the Rules of Procedure"

33. Rule 67 (1) of the Rules of Court states that "...pursuant to Article 28 (3) of the Protocol, a party may apply to the Court to review its judgement in the event of the discovery of evidence which was not within the knowledge of the party at the time the judgement was delivered. Such Application shall be filed within six (6) months after that party acquired knowledge of the evidence so discovered".

34. Rule 67 (3) of the same Rules of Court provides that "...the Court shall rule on the admissibility of such Application and its decision shall take the form of a judgement".

35. The Court will now examine the requirements concerning time limit and the discovery of new evidence.

36. With respect to the discovery of new evidence, the Applicants affirmed on page 3, paragraph h of their Application that: "We have come across such evidence ..." and produced the following documents as listed in paragraph 18 of this Judgment, including:

- i. Letter dated 5 October 2011, from the former employees of the EAC to the Chief Justice of Tanzania;
- ii. Reply letter from the Office of the Chief Justice dated 1 November 2011;
- iii. Newspaper (HABARI LEO) report of the 13 August 2007 Speech of the President of the United Republic of Tanzania, His Excellency Jakaya Mrisho Kikwete;

- iv. Tanzania Daima Newspaper (Toleo No. 983) Monday 13 August 2007 edition;
- v. EAC Mediation Agreement 1984;
- vi. Tanzania Legal and Human Rights Centre Reports 2010, 2011 and 2012;
- vii. Letter dated 11 May 2012 as evidence of the exhaustion of local remedies;
- viii. A report concerning undue prolongation as prophesied by V UMBRITCH;
- ix. Letter from the Crown Agent dated 25 February 1987 addressed to the former Minister of Finance, Economic Affairs and Planning, Mr Cleopa D. Msuya signed by the Fund Manager, Mr Collyer.

37. The Court recalls that in its initial Judgment, review of which is being sought, the Application had been declared inadmissible on the grounds that local remedies had not been exhausted. In that judgement, the Court also held that “.... the matter has not been unduly prolonged by the Respondent...” (paragraph 135 of the initial Judgment).

38. In the circumstances, the Court will limit itself to the pieces of evidence that the Applicants produced as new evidence of exhaustion of local remedies and of undue prolongation of the time limit to decide whether the said evidence effectively impact on the findings which it made on 28 March 2014.

39. The Court notes, on this score, that the Newspaper Article of 16 March 2011, the letter of 11 May 2012, the Tanzania Legal and Human Rights Centre 2010, 2011 and 2012 Reports and, lastly the statement of Dr V Umbritch, as pieces of evidence deserve attention.

40. As regards the letter of 11 May 2012, the Court notes that, that letter was produced by the Applicants in the initial procedure in response to the Registry’s letter dated 30 April 2012, requesting them “to produce evidence that the Application has met the conditions set forth in Rule 34 of the Rules of Court”. The Court notes that in the said letter of 30 April 2012, the Applicants wanted to show, in their own words, “how our Application meets the requirements under Rule 34 of the Rules of Court”. They also explained “the evidence of exhaustion of local remedies including judgments and all possible annexures to assist efficiency of handling the case”.

41. The Court deduces from the aforesaid that the evidence in question does not constitute new evidence, given the fact that the same had been amply analysed by the Court in its Ruling of 28 March 2014, especially in paragraphs 27 and 28 thereof.

42. As regards the Newspaper Article of 16 March 2011, the Reports of the Tanzania Legal and Human Rights Centre of 2010, 2011 and 2012, and the statement of Mr V Umbritch, the Court notes that the Applicants have produced these pieces of evidence as new proof of undue prolongation of local remedies.

43. The Court finds that the evidence relating to the Tanzania Legal and Human Rights Centre Reports of 2010, 2011 and 2012 dwelt on the question of payment of the pensions of a group of ex-employees of the EAC. The Reports also dwelt on the slow pace of the procedure, the

politicisation of the matter and the human rights violations observed, especially the rights of older women.

44. As regards the evidence on undue prolongation of local remedies as predicted by Dr V Umbricht, the Court notes that that entailed an account of a discussion between Dr V Umbricht, who was at the time the liquidator of the EAC and President Nyerere, on 7 May 1984 at Msasani.

45. It therefore follows from the foregoing analysis, that the aforesaid evidence contains a number of depositions filed by the Applicants and attached to the Brief dated 27 January 2012, as Annexures 12 and 4.1, respectively, received at the Registry on 30 January 2012, and were subsequently submitted for consideration by the Court at the previous procedure, leading to the Judgment of 28 March 2014.

46. The Court deduces from the aforesaid that the documents in question do not constitute new evidence and must therefore be dismissed.

47. As regards the Newspaper Article of 16 March 2011, the Court notes that that evidence was being brought before it by the Applicant for the first time.

48. The Court notes that the author of that Article reported the directives issued by the President of the United Republic of Tanzania, Mr KIKWETE, to the Minister of Finance for payment of the former employees of the East African Community and for adoption of appropriate measures to ensure prompt settlement of the case.

49. The Court notes that, although produced for the first time before it, nothing in that Article is of the nature to exert influence on its initial decision. For that reason, the undue prolongation of the remedies will be determined on the basis of the remedies actually exercised or attempted before the local courts, rather than in light of statements and reports.

50. Moreover, the Court finds it quite surprising that the Applicants claim to have acquired knowledge of a Newspaper Article so vital to their cause only after the Court had rendered its decision of 28 March, 2014, whereas the said Article has been in the public domain since 11 March 2011, date of its publication.

51. Be that as it may, the Court holds the view that the Newspaper Article of 16 March 2011, does not constitute new evidence within the meaning of Rule 67(1) of its Rules in the sense that it could not have led to a change in the decision taken by the Court in its Judgment of 28 March 2014.

52. The Court recalls that the requirements for admissibility for an Application for Review are cumulative; the absence of any one of them is sufficient to engender the inadmissibility of the Application. In the Matter of *El Salvador/Honduras v Nicaragua*,¹ the International Court

¹ International Court of Justice, Matter of the Land, Island and Maritime Frontier Dispute (*El Salvador/Honduras v Nicaragua (intervening)*), Judgement of 18 December 2003, para 20.

of Justice observed in this regard, that “an Application for revision is admissible only if each of the conditions laid down is satisfied. If any one of them is not met, the Application must be dismissed.”

53. The Court therefore does not deem it necessary to consider the requirement in respect to time limit.

54. Consequently, the Application must be declared inadmissible.

55. For these reasons,

The Court,

Unanimously,

- i) Rules that the Application for Review dated 28 June 2014, does not meet the requirement regarding new evidence.
- ii) Declares the Application inadmissible, pursuant to Rule 67(1) of its Rules.

Separate opinion: OUGUERGOUZ

1. Although I subscribe to the conclusions of the Court regarding the inadmissibility of the Application for Review of its Judgment of 28 March 2014, filed by Messrs Frank David Omary and Others on 28 June 2014, I believe that the Court should have spelt out more clearly the conditions that must be met for an Application for Review to be admissible under the Protocol and the Rules. In this regard, it was incumbent on the Court to clearly pronounce itself on certain ambiguities on this issue, in the Protocol and in the Rules, and to close the gaps in these two instruments by specifying the other essential conditions which an Application for revision must meet to be declared admissible.

I. The ambiguities in the Protocol and in the Rules

2. I would point out, in this respect, that the English and French versions of Article 28, paragraph 3, of the Protocol do not tally. This is certainly the reason why one of the three conditions set forth in this paragraph is not identical with that which is provided for in Rule 67, paragraph 1, of the Rules.

3. The French version of Article 28, paragraph 3, of the Protocol indeed allows the Court to revise its judgment in light of new evidence “which was not within its knowledge at the time the decision was delivered”;¹ the English version of this paragraph does not, for its part, contain such a condition.²

1 “La Cour peut [...] réviser son arrêt, en cas de survenance de preuves dont elle n’avait pas connaissance au moment de sa décision et dans les conditions déterminées dans le Règlement intérieur”.

2 “[...] the Court may review its decision in the light of new evidence under conditions to be set out in the Rules of Procedure”.

4. As regards Rule 67, paragraph 1, of the Rules, both the French and English versions provide that it is the “party” seeking the revision that must be unaware of the new evidence at the time the judgment was delivered;³ it does not mention lack of knowledge of the evidence on the part of the “Court” before the delivery of its judgment.

5. In this respect, it is important to note that the instruments governing the functioning of other international courts and dealing with revision matters⁴ require that both the Court and the party seeking a revision must have been within the aforesaid lack of knowledge; this is the case under Article 61(1) of the Statute of the International Court of Justice,⁵ Article 25 of the Protocol establishing the Court of Justice of the Economic Community of West African States,⁶ and Article 80(1) of the Rules of the European Court of Human Rights.⁷ This is equally the case under Article 48(1) of the Protocol on the Statute of the African Court of Justice and Human Rights⁸ adopted on 1 July 2008 and which is expected to replace the Protocol establishing the existing Court.⁹

- 3 The French version of Article 28(3) of the Protocol also provides that the Court may review its decision “en cas de survenance de preuves”, whereas the English version of the same clause provides that the Court may review its decision “in the light of new evidence”; the two linguistic versions of Rule 67, paragraph 1, of the Rules, for their part, refers to the “discovery” (“découverte”) of such an evidence. The aforesaid terminological disparities do not in my view have particular legal consequences in regard to consideration of the admissibility of review Applications.
- 4 The American Human Rights Convention like the Statute and Rules of the Inter-American Court of Human Rights do not contain provisions on the revision of judgments; these aforementioned three instruments only make reference to the issue of interpretation of judgments. See, however, the Application for revision of the judgment in the matter of *Genie Lacayo v Nicaragua* filed by the Inter-American Commission but declared inadmissible by the Court in its Order of 13 September 1997, *Case of Genie-Lacayo v Nicaragua* (Application for Judicial Review of the Judgment on Merits, Reparations and Costs), Order of the Court.
- 5 “An Application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence”.
- 6 “An Application for revision of a decision may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the decision was given, unknown to the Court and also to the party claiming revision, provided always that such ignorance was not due to negligence”.
- 7 “A party may, in the event of the discovery of a fact which might by its nature have a decisive influence and which, when a judgment was delivered, was unknown to the Court and could not reasonably have been known to that party, request the Court, within a period of six months after that party acquired knowledge of the fact, to revise that judgment.” The European Human Rights Convention, for its part, does not contain any provision on revision of the judgments of the Court; however, see the jurisprudence of the European Court in this regard, *infra*, footnote 15.
- 8 Paragraph 1 of this Article indeed reads as follows: “An Application for revision of a judgment may be made to the Court only when it is based upon discovery of a new fact of such nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, provided that such ignorance was not due to negligence”.
- 9 This Protocol will enter into force upon ratification by fifteen (15) States; as at 1 April 2016, the Protocol had been signed by thirty (30) States and ratified by only five (5) States.

6. Furthermore, the foregoing four instruments make reference to the discovery of a “fact” and not of an “evidence”, which is substantially different.

7. A fact may indeed be defined as “an event which occurred or took place”¹⁰ and evidence may be defined as the “demonstration of the existence of a fact”.¹¹ Although there are close links between “fact” and “evidence”, these are two distinct concepts.

8. International jurisprudence however seems to recognize that an evidence may constitute a fact, discovery of which could provide grounds for a revision of a judgment.

9. The Permanent Court of International Justice made a restrictive pronouncement on this issue; according to the latter, a newly produced document may not constitute a new “fact”.¹² The International Court of Justice, for its part, did not come out clear on this issue in the three Judgments it rendered on Applications for Revision;¹³ it does not however exclude that a probative document could be regarded as a “fact”.¹⁴

10. The European¹⁵ and Inter-American courts,¹⁶ for their part, also admit that a document could constitute a “fact”, discovery of which is likely to provide grounds for revision of their judgments.

10 Jean Salmon (dir.), *Dictionnaire de Droit international public*, Bruxelles, Bruylant, 2001, p 493.

11 Jules Basdevant, *Dictionnaire de la terminologie du droit international*, Sirey, Paris, 1960, p 474; evidence may also be defined as follows: “A - Demonstration of the existence of a fact or B - Element used to make such demonstration”, Jean Salmon (ed), *Dictionnaire de Droit international public*, op. cit., p 874.

12 “As concerns new facts, there are none in the present case. It is true that, according to a communication received by the Court from the Conference of Ambassadors, the Conference was unacquainted with the documents sent by the Serb-Croat-Slovene State in support of its claim for revision until June 1923. But in the opinion of the Court fresh documents do not in themselves amount to fresh facts. No new fact, properly so-called, has been alleged”, Permanent Court of International Justice, Question of the Monastery of Saint-Naoum (Albanian Frontier), Advisory Opinion of 4 September 1924, series B, No 9, p 22.

13 Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), (Tunisia v Libyan Arab Jamahiriya), Judgment ICJ Report 1985, p 192; Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v Yugoslavia), Preliminary objections (Yugoslavia v Bosnia-Herzegovina), Judgment, ICJ Report 2003, p 7; Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening) (*El Salvador v Honduras*), Judgment, ICJ Report 2003, p 392.

14 Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf, pp 203-204, paras 19-21, and p 213, paras 38-39. See also the dissenting opinion of Judge Paolillo appended to the Judgment rendered on 18 December 2003 with regard to the Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute, pp 421-423, paras 29-34.

15 See the three Judgments rendered by the European Court on revision. Case of *Pardo v France* (Revision), Application 13416/87, Judgment of 10 July 1996, p 9, paras 19, 20 and 24; the Court decided that as the documents (a letter and a document in the appeal file) have a decisive influence, they could be regarded as

11. If it stems from this brief jurisprudential overview that an “evidence” can constitute a “fact”, the conclusion cannot however be made that a “fact” necessarily forms part of an “evidence”. The concept of “fact” is indeed wider than that of “evidence”. As has been rightly emphasised, “whether in the context of revision or in another context, the concept of “fact” has never been reduced to physical evidence or documents”.¹⁷

12. The distinction between “evidence” and “fact” is not therefore a matter of pure semantics since it may have important legal implications for the admissibility of an Application for Revision grounded in Article 28(3) of the Protocol. It is consequently desirable that the Court should, one day, provide the necessary clarifications on this issue and not limit the opening of a revision procedure solely to the discovery of “evidence”.

13. In the instant case, the Court made a ruling on the admissibility of the Application for Revision brought before it (paragraphs 32-52 of the Judgment) without clearly identifying the three conditions prescribed by the Protocol and the Rules, namely that the Application must: 1) be based on the discovery of new evidence, 2) which was not within knowledge of the Court “and/or” of the party seeking the revision at the time the judgment was delivered, and 3) must be filed within six months from the time when the evidence discovered came within the knowledge of the said party.

14. Still more fundamental, the Court did not even indicate that the aforementioned three conditions, though necessary, are not sufficient grounds for a revision of its judgments. I would therefore now address

“facts” within the meaning of its Rules, and hence declared admissible the Application for Revision filed by the European Commission; see also the Judgment of 28 January 2000 rendered in the Case of *McGinley and Egan v United Kingdom* (Revision), Applications 21825/93 and 23414/94, and which the Court held that the letters could constitute “facts” (para 31), but dismissed the Application for Revision on the grounds that the said facts “could reasonably be known” to the Applicants before the initial judgment was rendered (para 36). See lastly the Judgment of 30 July 1998 rendered in the Case of *Gustafsson v Sweden* (Revision), Application 15573/89; the Court did not however make a ruling on the notion of “fact” and dismissed the Application on the sole ground that the new elements did not have decisive influence on the initial judgment.

16 “The Application for judicial review must be based on important facts or situations that were unknown at the time the judgment was delivered. The judgment may therefore be impugned for exceptional reasons, such as those involving documents the existence of which was unknown at the time the judgment was delivered; documentary or testimonial evidence or confessions in a judgment that have acquired the effect of a final judgment and is later found to be false; when there has been prevarication, bribery, violence, or fraud, and facts subsequently proven to be false, such as a person having been declared missing and found to be alive”, Case of *Genie-Lacayo v Nicaragua* (Application for Judicial Review of the Judgment on Merits, Reparations and Costs), Court Order of 13 September 1997, op. cit., p 5, para 12.

17 Dissenting Opinion of Judge Vojin Dimitrijevič attached to the Judgment on the Application for Revision of the Judgment of 11 July 1996 in the Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, p 54, para 6; see also the dissenting opinion of Judge Vladlen S Vereshchetin (*ibid*, p 40, para 10) and the separate opinion of Judge Ahmed Mahiou (*ibid* p 70, para 2).

the lacuna in the Protocol and in the Rules which, in my opinion, the Court is supposed to fill through interpretation.

II. The lacuna of the Protocol and the Rules

15. Evidence discovered after the delivery of a judgment and unknown to the Court and to the party which invokes the said evidence, and invoked within six months after it was discovered, cannot indeed be sufficient grounds for a revision of a judgment. The party which invokes the discovery must not also demonstrate lack of diligence in the matter; in other words, that party must not have been negligent or faultily unaware of the new evidence before the delivery of the judgment, revision of which is being sought. It is also necessary, above all, that the evidence discovered should be of such nature as would exert decisive influence on the judgment delivered. These are the two key conditions set forth under the Statute of the International Court of Justice, the Protocol establishing the Court of Justice of the Economic Community of West African States, the Rules of the European Court of Human Rights and the Protocol establishing the Statute of the African Court of Justice and Human Rights (see *supra*, paragraph 5).

16. The Court should therefore have used the powers inherent in its judicial function and the principle that “the court knows the law” (*jura novit curia*), to rule on the basis of the general principles of procedural law as enshrined in the aforementioned four instruments.

17. It is in light of the aforesaid principles of procedural law that the Court should have interpreted Article 28(3) of the Protocol and 67(1) of the Rules, unless the said principles are being deliberately set aside in order to throw the revision remedy wide open, the effect of which would however be to distort the revision institution.

18. Before pronouncing on the admissibility of the Application for Revision, the Court should therefore have clearly spelt out all the conditions for admissibility of such an Application regardless of whether or not such conditions had been expressly prescribed by the Protocol and the Rules.

19. A perusal of the grounds for the Judgment (paragraphs 32-52 of the Judgment) gives the impression that the conditions providing the grounds for revision of a judgment are two in number: “the requirements concerning time limit and the discovery of new evidence” (paragraph 35).

20. However, the said conditions are, in my view, five in number: 1) The Application must be grounded on the “discovery” of an “evidence”, 2) The evidence, discovery of which has been invoked, must be of such nature as can exert decisive influence on the initial judgment, 3) Such evidence must not have been within the knowledge of the Court and of the party which invokes it, prior to the delivery of the said judgment, 4) The party invoking such evidence must not have been negligent in being unaware of the evidence in question, 5) The Application for Revision must have been brought “within six months from the time the evidence discovered came within the knowledge of the party concerned”.

21. It would then have been enough for the Court to indicate, as it did in paragraph 51 of the Judgment, that the afore-listed conditions are cumulative and that in case any of them has not been met, the Application for Revision must be dismissed; and then determine whether the said conditions have actually been met in the instant case.

22. The Court however proceeded directly to consider the requirement concerning “the discovery of new evidence” without indicating what that consideration will entail (paragraphs 35-51). In so doing, the Court hardly evoked the condition, albeit fundamental, regarding the decisive influence that the new evidence must exert on the judgment for which revision is being sought (paragraph 49), and the no less fundamental condition that the Applicants must not be negligent in not being within the knowledge of the evidence in question before the delivery of the judgment (paragraph 50). The Court did not draw any conclusion with respect to this latter condition and then reverted (paragraph 51) to its finding as expressed in paragraph 49, apparently making the said finding the ground for its decision. A more systematic approach would, without doubt, have provided greater clarity to the Court’s reasoning in the present judgment.

23. The recourse to revision of a judgment of the Court, by its very nature and purport, should be exercised and be accepted exceptionally in a way to avoid undermining the principle of the authority of a matter already judged (*res judicata*) embodied in the decisions of the Court and any other judicial organ.¹⁸ It is indeed necessary not to endanger legal certainty by encouraging the parties not satisfied with a judgment of the Court to request a revision of such a judgment.

24. For an Application for Revision not to be transformed into an ordinary appeal procedure not prescribed by the Protocol, such Application must conform to strict conditions which must equally be strictly interpreted by the Court. For the purpose of ensuring the proper use of the revision remedy, it is absolutely necessary that potential litigants before the Court be cognizant of the real meaning of the texts governing this extraordinary remedy.

25. Predictability of procedural standards is surely a guarantee for legal certainty, and for such standards to be predictable, they must be clear and intelligible. Pending a possible amendment of the Rules governing the question of revision in particular,¹⁹ such clarification must be made through the judicial rulings of the Court: indeed, the judgments,

¹⁸ This has been emphasized by the Inter-American Court of Human Rights in the following terms: “The legal motives envisaged as reasons for the remedy of revision are restrictive in nature, inasmuch as the remedy is always directed against orders that have acquired the effect of *res judicata*, that is, against judgments of a decisive nature or interlocutory judgments that are passed and put an end to the proceeding”, *Case of Genie-Lacayo v Nicaragua* (Application for Judicial Review of the Judgment on Merits, Reparations and Costs), *op. cit.*, p 5, para 11; see also, European Court of Human Rights, Application No 13416/87, *Matter of Pardo v France* (Revision), judgment of 10 July 1996, p 9, para 21.

¹⁹ For reasons of legal certainty, it will also be desirable to introduce a time limit within which every Application for Revision must be submitted; see for example Article 25(4) of the Protocol establishing the Court of Justice of the Economic Community of West African States, which provides for a deadline of five years; see also

advisory opinions and orders undoubtedly possess pedagogical virtues, the importance of which must not be underestimated especially in these initial years of the Court's existence. Consequently, the Court should have seized the new opportunity²⁰ offered by the present judgment to clearly lay down the conditions for admissibility of an Application for Revision, by making use of the rather wide power of interpretation implicitly conferred on it by Articles 60 and 61 of the African Charter, relating to "Applicable principles".²¹

Article 61(5) of the Statute of the International Court of Justice or Article 48(5) of the Protocol on the Statute of the African Court of Justice and Human Rights both of which provide that no Application for Revision may be submitted after the expiry of a ten years deadline effective from the date of delivery of the judgment, revision of which is being sought.

20 See in this respect the Judgment rendered by the Court on 28 March 2014 regarding the interpretation and review of its Judgment of 21 June 2013 in the matter *Urban Mkandawire v Republic of Malawi*, as well as paras 9 to 16 of my separate opinion attached to that judgment.

21 The Protocol on the Statute of the African Court of Justice and Human Rights and the Protocol establishing the Court of Justice of the Economic Community of West African States belong without any doubt to the category of African instruments mentioned in Article 60; the Statute of the International Court of Justice, which forms an integral part of the United Nations Charter, is for its part clearly one of these "general international conventions laying down rules expressly recognized by Member States of the African Union", referred to in Article 61.

Peter Joseph Chacha v Tanzania (admissibility) (2014) 1 AfCLR 398

Peter Joseph Chacha v The United Republic of Tanzania

Ruling, 28 March 2014. Done in English and French, the English text being authoritative.

Judges: AKUFFO, NGOEPE, NIYUNGEKO, OUGUERGOUZ, TAMBALA, THOMPSON, ORE, GUISSÉ, KIOKO and ABA

Recused under Article 22: RAMADHANI

The case concerned the alleged unlawful arrest, detention and imprisonment of the complainant. The Court declared the Application inadmissible due to non-exhaustion of local remedies.

Jurisdiction (complaint need not expressly state Charter provisions, 118)

Admissibility (failure to exhaust local remedies, 152)

Separate opinion: AKUFFO, THOMPSON and KIOKO

Admissibility (exhaustion of local remedies; remedies inaccessible, 25-30)

Rationale for rule on exhaustion (domestic remedies, 66-71)

Separate opinion: NGOEPE

Evidence (expert witness, 4)

Separate opinion: OUGUERGOUZ

Admissibility (exhaustion of local remedies; remedies inaccessible, 30, 52, 69; conduct of judicial authorities, burden of proof, 70, 73)

I. The Parties

1. The Applicant, Peter Joseph Chacha is a citizen of the United Republic of Tanzania (“hereinafter referred to as the Respondent”), who at the time of filing his Application was in remand at Arusha Central Prison with the Remand Number 3502/2007.

2. The Applicant filed his Application against two Respondents; the First Respondent being the Attorney General of the United Republic of Tanzania, the Principal Legal Adviser to the Government of the United Republic of Tanzania and the Second Respondent being the Minister of Home Affairs of the United Republic of Tanzania. It is assumed that

the two Respondents are being sued on behalf of the Government of Tanzania therefore the Respondent is the United Republic of Tanzania.

II. Nature of the Application

3. The Applicant filed the Application on the basis of Criminal Cases Nos. 915/2007, 931/2007, 933/2007, 1027/2007, 1029/2007, 883/2008, 712/2009 and 716/2009 that were on-going against him in the District Court of Arusha (“hereinafter referred to as the Criminal Cases”) alleging that he was unlawfully arrested, interrogated, detained, charged and imprisoned contrary to Sections 13(1)(a) and (b), 3(a), (b) and (c), 32(1), (2) and (3), 33, 38(1), (2) and (3), 50(1) and 52(1), (2) and (3) of the Criminal Procedure Act, Chapter 20 of the Laws of Tanzania, Revised Edition 2002 (“hereinafter referred to as the Criminal Procedure Act”). The Applicant alleges that his arrest, detention, charging and imprisonment in connection with the Criminal Cases were unlawful and therefore violated his right under Article 15(1) and (2)(a) of the Constitution of the United Republic of Tanzania, to freedom, as well as the guarantee that such freedom shall only be deprived under circumstances, and in accordance, with procedures prescribed by law. The Applicant also alleges that the seizure of his property, allegedly in connection with the Criminal Cases, is in contravention of his right to property as set out in Article 24(1) and (2) of the Constitution of the United Republic of Tanzania, and therefore unlawful.

4. The Applicant also alleges that the Police of the United Republic of Tanzania contravened the procedure for the search and seizure of property as set out in the Criminal Procedure Act in relation to his property. The Applicant alleges the violation of his right to own property, of the protection of his property held in accordance with the law, and the right not to be unlawfully deprived of his property, as provided for in Articles 24(1) and (2) of the Constitution of the United Republic of Tanzania.

III. Procedure

5. The Application was received at the Registry on 30 September 2011. Annexed to the Application was a list of property that the Applicant alleges was illegally seized by the Police.

6. By a letter dated 4 October 2011, the Registrar acknowledged receipt of the Application and advised the Applicant to ensure compliance with Rule 34 of the Rules.

7. By a letter dated 20 February 2012, the Applicant responded to the Registrar’s letter of 13 February 2012, alleging that despite his efforts, through correspondence to various Ministries and the Commission on Human Rights and Good Governance, to have his complaints addressed, nothing has happened, resulting in an inordinate delay in accessing local remedies to resolve the matters that are the basis of his Application. He stated that he has also brought an action, Criminal Application Number 16 of 2011 filed at the High Court of Tanzania at Arusha on 19 May 2011 under certificate of urgency alleging violation of his constitutional rights. He stated that the case has not been heard due to the lack of *coram* of three Judges as required by the Basic Rights

and Duties Enforcement Act. He stated that such a delay in determining this petition is unduly prolonged and is contrary to Article 7 of the African Charter on Human and Peoples' Rights ("hereinafter referred to as the Charter").

8. By a letter dated 27 February 2012 the Registrar acknowledged receipt of the Applicant's letter dated 20 February 2012 and advised him that his Application has been registered as Application Number 003/2012 *Peter Joseph Chacha v The United Republic of Tanzania*.

9. By a letter dated 1 March 2012, the Applicant informed the Registrar that he would like a request for reparation pursuant to Rule 34(5) of the Rules to be included in his Application.

10. By a letter dated 25 April 2012, the Registrar requested the Applicant to provide it with copies of the letters he intends to adduce as evidence and any other evidence that would demonstrate exhaustion of local remedies, including Court judgments, and to do so within thirty (30) days of receipt of the letter.

11. In response to the request by the Registrar, by a letter dated 25 May 2012 and received at the Registry on 30 May 2012, the Applicant submitted copies of the following:

- i. Letter dated 19 February 2008 to the Minister of Home Affairs and copied to the Commission on Human Rights and Good Governance. In this letter the Applicant wrote to the Minister of Home Affairs regarding the misconduct of the Officer Commanding the Criminal Investigations Division (OCCID) in Arusha District, Ramadhani Mungi. The Applicant alleged that Mr Mungi abused his office and illegally seized his vehicle, audio and video equipment and equipment for running a radio station, on the pretext that this equipment was stolen. The Applicant attached a list of the equipment to the letter. The Applicant also stated that Mr Mungi falsely charged him with one count of murder and four counts of armed robbery in Criminal Cases Nos. 915/2007, 931/2007, 933/2007, 1027/2007 and 1029/2007, respectively. It is on the basis of Mr Mungi's unlawful actions that he wrote to the Minister for Home Affairs reporting the misconduct of Mr Mungi and the violation of his constitutional rights to have his liberty, person and property protected and for due process to be followed whenever Police are investigating and charging one with an offence and in the respect of his constitutional rights.
- ii. Letter dated 22 December 2008 to the Minister of Justice and Constitutional Affairs requesting the Minister's assistance in resolving his complaints. The Applicant attached the copies of the letters he had written to various Ministries and institutions in this regard.
- iii. Letter dated 18 September 2009 to the Minister for Home Affairs referring to the Ministry's acknowledgement of receipt by its letter dated 27 February 2008, of the Applicant's letter dated 19 February 2008 and advising the Applicants that the complaints he has filed against OCCID Ramadhani Mungi are under study. In the letter of 18 September 2009, the Applicant informs the Minister that since he has not received a response from the Ministry regarding his complaints, he is proceeding to seek the intervention of the Courts. He also urges the Minister to refer to the Criminal Record Office for Arusha and Arumeru Districts of 2007 which he states do not contain any reports of crimes he allegedly committed or any reports related to his property. The

Applicant states that the officer he has complained against is abusing his office to keep him in remand and to unlawfully hold his property.

- iv. Letter dated 8 February 2010 to the Attorney General's Chambers, Public Prosecutions Division. In this letter, the Applicant recalls that the Criminal Cases No 915/2007, 931/2007, 933/2007, 1027/2007, 1029/2007 and later, 883/2008 against him have been pending since 2007. He states that the cases against him were filed despite there not being any First Report and credible evidence, therefore the prosecutions are false. He stated that, in addition, the State opened two new prosecutions against him in Criminal Cases No 712/2009 and 716/2009 despite his absence in Court. The Applicant indicated that he had decided to file an Application at the High Court of Tanzania at Arusha based on Section 90(1)(c)(4) of the Criminal Procedure Act so that the Director of Public Prosecutions can explain why the Applicant has been charged with the Criminal Cases despite the lack of the First Report and evidence to support the charges, and for the charges against him to be withdrawn. A list of his allegedly unlawfully seized property was attached to this letter.
- v. A copy of an Order dated 16 October 2010 striking out Criminal Application No. 6 of 2010 originating from the Criminal Cases. This is the Application the Applicant filed at the High Court of Tanzania at Arusha and in respect of which he had advised the Director of Public Prosecutions he would file, vide his letter dated 8 February 2010. This Application was found incompetent since, the section under which it was brought, Section 90(1)(c)(4) of the CPA, had by then, been repealed.
- vi. A copy of the Attorney General's Notice of Preliminary Objection, Reply to the Applicant's petition and Counter Affidavit in respect of Criminal Application No. 16 of 2011 at the High Court of Tanzania at Arusha.

12. In his letter dated 25 May 2012 to the Registrar, the Applicant maintained that his claim in the Applications before the High Court at Arusha and before the African Court is against the Attorney General as principal legal advisor to the Government of the United Republic of Tanzania, as the person responsible for acts done by officers and agents in his office and in his personal capacity. The Applicant also alleges that the Minister for Home Affairs is 'responsible for abuse of office'. By a letter dated 6 June 2012, the Registrar acknowledged receipt of this letter and the additional letters he provided as requested, and advised him that the Charter and the Protocol only envisage Applications against States thus the registration of his Application against the United Republic of Tanzania.

13. By a letter dated 27 June 2012, the Registrar notified the Respondent of the Application.

14. By a letter also dated 27 June 2012, the Registrar notified the Chairperson of the African Union Commission and through him, the States Parties to the Protocol and the Executive Council of the African Union, of the Application. The letter also advised that should any State Party to the Protocol wish to intervene in the proceedings, it should do so as soon as possible, and before the closure of written proceedings.

15. By a letter dated 27 June 2012, the Registrar, at the direction of the Court, wrote to the Pan African Lawyers' Union (PALU) to enquire whether it can consider assisting the Applicant in the matter.

16. By a letter dated 16 July 2012 and received at the Registry on 17 July 2012, PALU wrote to the Registrar indicating its willingness to assist the Applicant in the matter. In the said letter, PALU requested copies of the Application and other filings or documents related thereto. They also requested assistance in securing authorisation towards arranging a meeting with the Applicant.

17. By a *Note Verbale* dated 30 July 2012, the Respondent communicated the names and addresses of its representatives in respect of the Application.

18. By a letter dated 1 August 2012, the Registrar sent a copy of the Application and all other documents filed by the Applicant thus far, to PALU.

19. By a letter dated 1 August 2012, the Registrar informed the Respondent that, PALU will be representing the Applicant in the matter. Also by a letter dated 1 August 2012, the Registrar forwarded to PALU, the names and address of the Respondent's representatives in the Application.

20. By a *Note Verbale* dated 31 August 2012 and received at the Registry by electronic mail on the same date and in hard copy on 3 September 2012, the Respondent forwarded its Response to the Application.

21. By a letter dated 4 September 2012, the Registrar forwarded to the Applicant, the Respondent's response to the Application and advised him that he has thirty (30) days running from 3 September 2012, the date when the Response was received at the Registry, to reply to the Response.

22. At its 26th Ordinary Session, the Court decided that PALU be formally served with the Respondent's Response and be granted thirty (30) days from 14 September 2012 to reply to the Respondent's Response and that this communication be copied to the Applicant and the Respondent.

23. By a letter dated 28 September 2012, the Registrar served the Respondent's Response to the Application to PALU and advised that PALU has thirty (30) days from 14 September 2012 to reply to the Response. This letter was copied to the Applicant and the Respondent.

24. By a letter dated 3 October 2012, the Registrar advised the Applicant of the Court's decision taken at its 26th Ordinary Session, that, where Parties have appointed representatives, all correspondence on the Application will be addressed to these representatives with a copy to the Parties and in the Applicant's case, since PALU is representing him, the relevant correspondence will be addressed to PALU with a copy to him for information.

25. On 18 October 2012, the Registry received a letter dated 17 October 2012, from PALU, requesting for an extension of time by thirty (30) days for it to file a Reply to the Respondent's Response to the Application. By a letter dated 18 October 2012, the Registrar served PALU's request for extension of time to the Respondent.

26. By a *Note Verbale* dated 8 October 2012 and received at the Registry on 9 November 2012, the Respondent acknowledged receipt of PALU's request of 17 October 2012 for an extension of time to file a Reply to the Response and indicated that it has no objection to the request and further, that the Officer In Charge of Arusha Prison has been ordered to facilitate the consultation meeting between the Applicant and PALU.

27. A letter from the Respondent dated 7 November 2012 and received at the Registry on 7 December 2012 informed the Registrar that the Respondent had no objection to PALU's request of 17 October 2012 for extension of time to file the Reply to the Response. In the meantime, by an Order dated 5 December 2012, the Court granted PALU's request for an extension of time to file the Reply and required PALU to file the response within fifteen (15) days from 6 December 2012. The Registry sent the Order to PALU by electronic mail on 12 December 2012 then served PALU with the Order by a letter dated 13 December 2012.

28. On 16 May 2013, PALU filed the Applicant's Rejoinder to the Response, dated 15 May 2013. By a letter dated 17 May 2013, the Registrar served the Rejoinder on the Respondent.

29. On 13 June 2013, the Registry received a *Note Verbale* from the Respondent dated 12 June 2013 in which the Respondent stated that the Applicant's Rejoinder was filed out of time and contrary to the Order of the Court of 5 December 2012 since it had been filed after the fifteen (15) days granted for the same commencing 6 December 2012 and without any support from the Rules. The Respondent pleaded for the Rejoinder to be dismissed or that it would counter the Rejoinder accordingly.

30. By a letter dated 24 June 2013, the Respondent was informed that at its 29th Ordinary Session, the Court decided that the Applicant's Rejoinder had been properly filed and that the Respondent was further requested to respond thereto within thirty (30) days, if it so wished

31. By a letter dated 23 July 2013, the Registrar notified the Parties of the hearing of the Application on 26 and 27 September 2013 and provided them with the issues that they would be expected to make submissions on, as well as Guidelines for Persons Appearing at the Hearing on 24 to 27 September 2013. The Parties were also required to indicate the number of witnesses they intended to call as well as the time they will require for their evidence in chief.

32. On 2 August 2013, the Registry received the Respondent's Response to the Applicant's Rejoinder. This Response was dated 25 July 2013.

33. By a letter to the Parties dated 12 August 2013, the Registrar requested that they indicate their availability for the hearing by 31 August 2013.

34. By a letter dated 22 August 2013, the Respondent advised the Registry that it will send the list of witnesses it intends to call in due course and also tendered the correct names of its representatives.

35. By separate letters dated 3 September 2013, the Parties were reminded to send their lists of witnesses and/or experts by 9 September 2013.

36. Counsel for the Applicant, PALU sent the Applicant's list of witnesses by a letter dated 9 September 2013 and the Respondent sent its list of witnesses by a letter dated 10 September 2013.

37. By two notices dated 18 and 19 September 2013, the Registrar notified the parties of the hearing of the Application on 25 to 27 September 2013.

38. By a letter dated 19 September 2013, the Respondent informed the Registrar that it, being guided by the letter of the Registrar of 23 July 2013, had set aside 26 and 27 September 2013 for the hearing. The Respondent proposed that the scheduled hearing be only on the preliminary objections and that the hearing on the merits be set down for March 2014. By a letter dated 20 September 2013 and copied to the Applicant, the Registrar replied to this letter clarifying that despite the guidance provided by the letter dated 23 July 2013 and its attachments notifying the parties of the hearing being for 24- 27 and 26 to 27 September 2013, respectively, the prevailing interpretation was that the hearing was for 24-27 September 2013 and that in any event, there would be no problem posed regarding the Respondent's witnesses' attendance at the hearing since their testimony was scheduled for 26 and 27 September 2013.

39. On 23 September 2013, the Applicant informed the Registrar of the substitution of his expert witness with another expert witness.

40. Also on 23 September 2013, the Respondent informed the Court of the death of Mr Dixon N Ntimbwa who was the Lead Counsel for the Respondent in preparing the defence to the Application. By a letter of the same date, the Registrar acknowledged receipt of the Respondent's letter and by copy thereto, forwarded it to PALU. This letter informed the parties that, in view of this, the Court had decided that the matter be adjourned until further notice.

41. On 24 September 2013, the Applicant's representative sent an electronic mail acknowledging receipt of the letter of the Registry dated 23 September 2013 regarding the death of Mr Ntimbwa and that the hearing has been postponed until further notice.

42. By a notice dated 11 October 2013, the Registrar informed the Parties that the hearing was set down for 2 to 4 December 2013.

43. By separate letters dated 17 October 2013, the Registrar requested the Parties to confirm whether they will maintain the same list of witnesses and to indicate the issues in respect of which each witnesses' testimony will cover, bearing in mind the issues that the Court had directed, through the Registrar's letter dated 23 July 2013, it wishes to hear testimony on.

44. By a letter dated 5 November, PALU informed the Registry that it wished to maintain the Applicant and Professor Leonard P Shaidi as witnesses. The Applicant would render testimony in relation to the facts and circumstances surrounding his arrest, interrogation, detention and search and seizure of his property and Professor Leonard P Shaidi

would be on hand to testify and assist the Court to understand the obtaining criminal law and procedure of the Respondent State, which should apply or should have been applicable to the Applicant.

45. By a letter dated 18 November 2013, the Respondent submitted a new list of witnesses. The Respondent also sought directions from the Court on the whether the Court issues summons only to witnesses, experts or other persons it intends to hear or also to witnesses that the Parties intend to call. The Respondent also sought directions on the appropriate time to challenge the competence of the Applicant's expert witness, the criteria for qualification of an expert witness, the grounds for disqualification of an expert witness and the procedure provided by the Court to obtain the credentials and Curriculum Vitae of the Applicant's expert witness. The Respondent also sought the leave of the Court to produce relevant documents in respect of the Criminal Cases that the Applicant is basing the Application on.

46. By a letter dated 26 November 2013, the Registrar responded to the Respondent's letter of 18 November 2013 on the issues raised by the Respondent and also attaching the programme for the hearing. This letter was copied to the Applicant.

47. By a letter dated 26 November 2013, the Respondent submitted a list of its representatives during the hearing.

48. A public hearing was held, at the seat of the Court in Arusha, Tanzania, on 2, 3 and 4 December 2013, during which oral arguments were heard on both the preliminary objections and the merits. The appearances were as follows:

For the Applicant:

- Mr Donald Deya, Advocate
- Mr Rashid Rashid, Advocate
- Mr Selemani Kinyunyuu, Advocate

For the Respondent:

- Ms Sarah D. Mwaipopo
Acting Director-Principal State Attorney Division of Constitutional Affairs and Human Rights Attorney General's Chambers
- Mr Edson Mweyunge
Assistant Director-Principal State Attorney Division of Contracts and Treaties Attorney General's Chambers
- Mr Michael Luena
Principal State Attorney, Division of Litigation and Arbitration Attorney General's Chambers
- Ms Nkasori Sarakikya Principal State Attorney
Division of Constitutional Affairs and Human Rights Attorney General's Chambers
- Mr Mark Mulwambo
Senior State Attorney, Division of Constitutional Affairs and Human Rights Attorney General's Chambers
- Ms Eliainenyi Njiro
State Attorney Attorney General's Chambers

49. The Court also heard the following witnesses:

For the Applicant:

- The Applicant, Mr Peter Joseph Chacha

For the Respondent:

- Mr Ramadhani Athumani Mungi, currently the Regional Police Commander in Iringa, who was the Officer Commanding the Criminal Investigation Department (OCCID) in Arusha at the time the events forming the basis of the Applicant's complaints allegedly occurred.
- Mr Salvus Viatory Makweli, currently a Police Officer in Muleba District, and Assistant Superintendent of Police, who was an Inspector of Police in Arusha at the time the events forming the basis of the Applicant's complaints allegedly occurred, and who was in charge of the search conducted in the Applicant's house on 12 September 2007.
- Mr John Mathias Maro, currently the (OCCID) in Shinyanga District and Assistant Superintendent of Police, who was an officer on the Criminal Investigation Department in Arusha of the rank of Assistant Inspector at the time the events forming the basis of the Application occurred.
- Mr Leonard Paul, currently an Assistant Commissioner of Police and the Regional Police Commander of Geita Region, who had the rank of Superintendent of Police in Arusha and was a Regional Criminal Officer at the time the events forming the basis of the Application occurred.
- Mr Wilson Mushida an Assistant Superintendent of Prisons at the Central Prison of Arusha who, at the time the events forming the basis of the Applicant's complaints allegedly occurred, was an Assistant Inspector of Prisons working at the Reception Department of the Central Prison of Arusha.

50. At the hearing, following oral submissions by the Parties, the Court ruled, by a majority of six to four, that it would not hear the Applicant's expert witness. In respect of the Parties' witnesses, questions were also put by Members of the Court to which replies were given orally. In respect of the Parties' representatives, their submissions and replies to questions from Judges were given orally and in writing.

51. By separate letters dated 12 December 2013 the Registrar forwarded to the Parties copies of the verbatim record of the public hearings and informed them that their comments on the same, if any, had to be sent within thirty (30) days. None of the Parties sent any observations on the verbatim record.

IV. Historical and factual background to the Application

52. On 12 September 2007, the Applicant's wife, Nakuhoja Moses Miyombo, who was expectant at the time, was detained by the Police in connection with an alleged robbery which had occurred in Arusha on the same day. The Applicant alleges that his properties were also seized by the Police on the same date, without a certificate of seizure or a search warrant. All these happened in his absence. On his return to Arusha on 26 October 2007, the Applicant went to the Police Station to find out why his wife was being held by the Police and why his property had been seized. He was then detained by the Police from that day until 8 November 2007 when he was, for the first time, brought

before Court. Thereafter he remained in custody pending trial until his release on 3 May 2013.

53. The Applicant was charged with several counts of conspiracy, robbery, murder, armed robbery, rape and kidnapping as follows:

- i. Criminal Case No 915/2007 dated 8 November 2007 wherein the Applicant was jointly charged with Akida Mohamed, with conspiracy to commit an offence and stealing. This case eventually became Criminal Case No. 712/2009.
- ii. Criminal Case No 931/2007 dated 30 November 2007 wherein the Applicant was charged jointly with Hamisi Jumanne and Rajabu Hamisi, with armed robbery. On 19 February 2008, he was charged alone in Criminal case No. 931/2007, with armed robbery.
- iii. Criminal Case No 933/2007 dated 8 November 2007 wherein the Applicant was charged with murder. This Case eventually became Criminal Case No. 3 of 2009 dated 7 February 2009.
- iv. Criminal Case No 1027/2007 dated 16 April 2008 and the charge was armed robbery. This case was withdrawn and eventually the case became Criminal Case No.883/2008 dated 2 December 2008 wherein the Applicant was charged with armed robbery and rape.
- v. Criminal Case No 1029/2007 which eventually became Criminal Case No. 712/2009 dated 21 December 2009 wherein the Applicant was charged with armed robbery. The original charge sheet indicated that the alleged incident of armed robbery occurred on 12 September 2009 yet the Applicant was already in custody at the time the alleged offence occurred. In the course of the hearing of this case, the Applicant alerted the Magistrate's Court to the Prosecution's substitution of the charge on 13 November 2012, to reflect the alleged incident of armed robbery as having occurred on 12 September 2007.
- vi. Criminal Case No 716/2009 dated 23 December 2009 wherein the Applicant was charged with armed robbery, kidnapping with intent to do harm and rape, though he was not present in Court.

54. The Applicant's wife was charged with robbery and possession of stolen items under Criminal Case No 799 of 2007. She was in remand from 12 September 2007 until her release on 25 October 2007.

55. There being no progress in the prosecutions against him, the Applicant corresponded severally with the Ministry of Home Affairs, the Ministry of Justice and Constitutional Affairs, the Attorney General's Chambers', Public Prosecution Division and the Commission on Human Rights and Good Governance, seeking their intervention in ensuring the prosecutions against him either proceeded or were withdrawn for lack of evidence and that his seized property be restored to him.

56. Having received no resolution of the issues he raised with the said authorities and institutions, the Applicant informed the Director of the Attorney General's Chambers' Public Prosecution Division and the Minister of Home Affairs that he would move to the High Court to have these issues resolved.

57. In 2007, the Applicant filed Miscellaneous Criminal Application No. 7 of 2007, Originating from Criminal Case No 933 of 2007, in the High Court of Tanzania at Arusha, under Section 357(a) of the Criminal Procedure Act, against the Attorney General of the Respondent. He

sought orders for restitution of his property seized on 12 September 2007 while he was in Dar es Salaam, Tanzania and for any order the Court deemed fit to grant. At the hearing of the Applicant's Application, the Respondent therein contended that the High Court lacked jurisdiction to order the restitution of the Applicant's property as the right Court to issue such an order was the District Court where the Applicant was facing prosecution on a murder charge. The Applicant argued that there was no connection between the murder charge he was facing and the property that the Police had seized. The High Court stated that as the High Court had jurisdiction over murder cases, it followed that the High Court had jurisdiction to order restitution of property in murder cases. However, in the instant case, because there was no connection between the property seized by the Police and the murder charge which the Applicant was facing, the High Court's jurisdiction to order the restitution of the property was ousted and the only avenue open to him was to approach the District Court where he was charged, to seek orders for restitution of his property. The Court also stated that though the Applicant could have applied for prerogative orders from the High Court, being the only court vested with jurisdiction to issue such orders, such orders could only be granted if they would in no way prejudice the interests of justice in respect of the murder charge the Applicant faced. In this regard therefore, the High Court stated that since the murder charge the Applicant was facing in Criminal Case No 933 of 2007 was pending, the Applicant's Application to the High Court was premature and that it had to be stayed until final determination of the pending murder charge unless the seized properties had no connection with the charge he faced.

58. In addition, by the time the High Court heard the Application, the charges in the rest of the Criminal Cases had been filed against the Applicant and the fact that there were additional criminal charges filed against him was a reason for the High Court to decline jurisdiction, and to refer the Applicant back to the District Court as the proper forum for adjudicating whether the property in dispute had a connection with the Criminal Cases the Applicant was facing. The High Court stated that, indeed, the Applicant's property had been seized and that the authorities were required to keep it in safe custody pending determination of the Criminal Cases the Applicant was facing. For these reasons, on 14 December 2010, the High Court of Tanzania at Arusha dismissed the Application for the release of property, as being premature.

59. In the High Court of Tanzania at Arusha, in 2009, the Applicant filed Miscellaneous Criminal Application No. 54 of 2009 originating from Criminal Case No. 933 of 2007 under Section 91 of the Criminal Procedure Act for the charges preferred against him to be discharged. On 11 August 2010, the Application was struck out as it did not specify the subsection of Section 91 of the Criminal Procedure Act under which it was made and that the Applicant's prayers were stated in the affidavit in support of the Application rather than in the Chamber Summons.

60. Again, in 2010, the Applicant filed, in the High Court of Tanzania at Arusha, Miscellaneous Criminal Application No. 6 of 2010 in accordance with Section 90(1)(c)(4) of the Criminal Procedure Act

requesting a discontinuance of the Criminal Cases under Section 90(1)(c) of the Criminal Procedure Act as the actions that the Police had taken were contrary to Sections 32, 33, 50(1), 51(1) and 52(1), (2) and (3) thereof. The Application was against the Attorney General of the Respondent. On 16 November 2010, the Application was struck out for being incompetent as it was filed under a repealed section of the law, that is Section 90(1)(c)(4) of the Criminal Procedure Act, which was repealed by Section 31 of the National Prosecution Act No 27 of 2008 which had come into effect on 9 June 2008.

61. The Applicant also filed, in 2010, in the High Court of Tanzania at Arusha, Miscellaneous Civil Application No. 47 of 2010, originating from the Criminal Cases, against the Respondent. The Application was on the basis of Articles 13(1), 15(1), (2)(a) and 30(3) of the Constitution of the United Republic of Tanzania guaranteeing equality before the law and the right not to be arbitrarily deprived of one's freedom. On 14 December 2010, the High Court struck out the Application as it was not properly made since it had been filed by way of Chamber Summons and supporting affidavit. According to the High Court, the matter should have been brought in accordance with Section 5 of the Basic Rights and Duties Enforcement Act, which sets out the appropriate procedure, namely, that the case be filed by way of a Petition and Originating Summons. In addition, such an Application must be determined by a three-Judge Bench and not a single Judge, as was in the instant case.

62. On 8 December 2010, the Applicant filed, in the High Court of Tanzania at Arusha, Miscellaneous Criminal Application No 78 of 2010, originating from the Criminal Cases, against the Attorney General of the Respondent, as First Respondent, and the Police Officer in Charge of Arusha, as Second Respondent, on the basis of Articles 13(1), 15(1), (2) (a) and 30(3) of the Constitution of the United Republic of Tanzania. These provisions guarantee equality before the law and the right not to be arbitrarily deprived of one's freedom. In the Application, the Applicant alleged violation of his right to freedom and to live as a free person. The Applicant alleged that the Second Respondent had arrested, detained and interrogated him in respect of what would be the Criminal Cases, contrary to the provisions of the Criminal Procedure Act and that therefore the actions of the Second Respondent in that regard were vitiated by these irregularities. The Applicant sought a decree under Part III of Chapter One of the Constitution of the United Republic of Tanzania to this effect. On 18 May 2011, the High Court issued an order that the Application was withdrawn at the Applicant's instance.

63. On 29 December 2010, the Applicant filed, in the High Court of Tanzania in Arusha, Miscellaneous Criminal Application No. 80 of 2010, alleging violation of his basic rights and freedoms guaranteed under Part III of Chapter One of the Constitution of the United Republic of Tanzania, specifically of Articles 24(1), (2) and 30(3) thereof on the right to own property. The Application was against the Attorney General of the Respondent and the Police Officer in Charge of Arusha. The Applicant prayed the Court to order the Respondents in that Application to restore his properties and any other relief it deemed fit. On 18 May

2011, the High Court issued an Order that the Application was withdrawn at the instance of the Applicant.

64. On 19 May 2011 the Applicant filed, in the High Court of Tanzania at Arusha, Miscellaneous Criminal Application No 16 of 2011, originating from the Criminal Cases, against the Attorney General of the Respondent on the basis of Articles 13(1), 15(1) and 15(2)(a) and 30(3) of the Constitution of the United Republic of Tanzania. He alleged that the provisions and laws governing his rights under Section 13(1)(a), (b), 13(3)(a), (b) and (c), 32(1), (2) and (3), 33, 50(1), 52(1) and 52(2) of the Criminal Procedure Act and Articles 14(1) and 15(1), and 15(2)(a) of the Constitution of the United Republic of Tanzania were violated by the Police. He sought a decree under Part III of Chapter One of the Constitution. The Respondent in the matter filed the response on 5 October 2011. The Applicant repeatedly urged the empanelling of the three - Judge Bench of the High Court to hear this Application. On 29 June 2011, the Applicant wrote to the Judge in Charge of the High Court of Tanzania at Arusha, requesting that the three - Judge Bench be constituted to hear the Application. He wrote again in this regard on 14 November 2011 to the District Registrar of the High Court at Arusha. On 26 March 2012, this Application was withdrawn in the absence of the Applicant. The Order, which was filed by the Respondent as an annexure to its Response to the Application, shows that the Applicant was not in Court yet the text of the record shows, that the Application was withdrawn at his instance. At the hearing before us, the Respondent sought to introduce another record indicating that the Applicant was present during that hearing. In its written submissions, the Respondent sought to explain this discrepancy. The Respondent requested the Court to accept its document and then conduct a further enquiry as to the veracity of the second document it presented during the hearing. The Applicant objected to the introduction of the Respondent's document. The Court sustained the Applicant's objection and expressed its disapproval of the Respondent's conduct.

65. Some of the Criminal Cases against the Applicant were discharged under Section 91(1), 98(a) and 225(5) of the Criminal Procedure Act. The Applicant was acquitted in Criminal Case No. 915 of 2007, Criminal Case No. 933 of 2009 and Criminal Case No. 712 of 2009. The Respondent has lodged a notice of intention to appeal in Criminal Case No. 712 of 2009. There were also two other cases against the Applicant that were dismissed under Section 225(5) of the Criminal Procedure Act, being Criminal Case No. 1027 of 2007 and Criminal Case No. 716 of 2009. Criminal Case No. 883 of 2008 was withdrawn under Section 91(1) of the Criminal Procedure Act and Criminal Case No 1029 of 2007 was withdrawn under Section 98(a) of the Criminal Procedure Act.

V. The Applicant's Prayers

66. In his Application dated 30 September 2011:

1. The Applicant seeks a declaration that the Respondent deprived him of his right to freedom and to live as a free person.
2. The Applicant asks that his property be restored and he be adequately compensated for damage and loss.

3. The Applicant seeks reparation.
4. The Applicant seeks any order the Court may deem fit to grant.

67. In the reply dated 15 May 2013 filed by the Applicant's representatives, PALU, to the Respondent's Response the prayers are that:

"The Applicant states that he seeks the following reliefs from this Honourable Court: -

- a. A declaration that the Respondent was in violation of Articles 3, 5, 6, 7(1), 14 and 26 of the African Charter on Human and Peoples' Rights;
- b. An order for reparations and compensation including for being deprived of his property; and
- c. Any other Order the Court deems fit to make."

VI. The Respondent's Prayers

68. In the Reply to the Application dated 30 August 2012:

"The Respondent prays the Court to give/grant the following orders with respect to the admissibility of the Application:

- i. That the Application should be dismissed as it has not met the admissibility requirements under Rule 40 of the Rules of Court, Article 56 of the Charter and Article 6(2) of the Protocol
- ii. That the Application be dismissed in accordance with Rule 38 of the Rules of Court
- iii. That the Application has not invoked the jurisdiction of the Court
- iv. That the costs of the Application be borne by the Applicant

With respect to the merits of the Application, the prayers are:

- v. That the Government of the United Republic of Tanzania has not violated the Applicant's right to own property
- vi. That the Government of the United Republic of Tanzania has not violated the Applicant's right to personal freedom
- vii. That the investigation of all the cases facing the Applicant in the municipal courts was in accordance with the law
- viii. That the costs of the Application be borne by the Applicant"

69. In the Reply to the Applicant's Reply to the Respondent's Response to the Application dated 23 July 2013,

"The Respondent prays that the Court grant the following orders:

- a. That the Respondent has not violated the new Articles 3, 5, 6, 7(1), 14 and 26 of the African Charter cited by the Applicant in their Rejoinder.
- b. That the Applicant is not entitled to the reliefs, reparations and compensation claimed as none of his rights have been infringed by the Respondent.
- c. That the investigation and subsequent prosecution of all cases facing the Applicant in the Municipal Courts was/is being done in accordance with the laws.
- d. That the Applicant has not invoked the jurisdiction of the Court as per Rule 26(1)(a) of the Rules of Court and Article 3(1) of the Protocol Establishing the Court.

- e. That the Applicant has not met the requirements of Article 40 of the Rules of the Court, Article 56 of the Charter and Article 6(2) of the Protocol.
- f. That the Application be dismissed in accordance with Rule 38 of the Rules of Court.
- g. That the costs of this Application be borne by the Applicant.
- h. That this Application has no merit.
- i. Any other orders or relief(s) the Court may deem fit.”

VII. Respondent’s objection to tendering of evidence by the Applicant’s expert witness

70. By a letter dated 23 September 2013 and confirmed by a letter dated 5 November 2013, the Applicant notified the Registrar of Court (which letters were served on the Respondent) that he intended to call Professor Leonard P Shaidi, a Professor of Law at the University of Dar es Salaam School of Law to “testify and assist the Honourable Court to understand the obtaining criminal law and procedure of the Respondent State, which should apply or should have been applicable to the Applicant.”

71. During the public hearing, the Respondent objected to the calling of the expert witness. The Parties made submissions on this issue.

VIII. The Position of the Respondent

72. The Respondent stated that expert witnesses should only be allowed if they are called by the Court, and that the Court does not need an expert opinion on the Criminal Procedure applicable in Tanzania as these are common statutes that can be easily interpreted. The Respondent stated that, furthermore, Counsel for both Parties are Officers of the Court who ought to assist the Court to come to a just decision without resorting to experts.

73. The Respondent maintained that the interpretation of statutes is the preserve of Courts and not of experts. The Respondent cited the decision of the Court of Appeal of Tanzania, in the Case of *Director of Public Prosecutions v Shida Manyama and Selemani Mabuba*, App No. 81 of 2012 (Unreported), wherein the Court (per Rutakangwa, JA) quoted the opinion of *the Supreme Court of India in Alamgir v State of Delhi (2003)* ISCC 21: “We think it would be extremely hazardous to condemn the appellant merely on the strength of opinion evidence of a handwriting expert. It is now settled law that expert opinion must always be received with great caution”.

74. In the same case, the Court of Appeal of Tanzania also quoted the decision of the Indian Supreme Court in the case of *Romesh Chandra Aggarwal v Regency Hospital Ltd (2009)* 9 SCC 709 which set out three requirements for the admission of an expert witness as follows:

- i. An expert witness must be within a recognized field of expertise;
- ii. Evidence must be based on reliable principles;
- iii. The expert witness must be qualified in the discipline.

75. The Respondent argued that the expert witness the Applicant intended to call does not meet these three requirements as he was not an expert in any field of law, let alone criminal procedure, with renowned writings that have given substantial contribution to the knowledge of criminal law in Tanzania.

76. On this basis, the Respondent called on the Court to exercise caution and disqualify the witness as an expert.

IX. The Position of the Applicant

77. The Applicant opposed the Respondent's preliminary objection on three grounds.

78. The first ground is that the Respondent's objection to the expert witness is not in good faith as it has been done very late in the proceedings, despite the Respondent being aware as far back as 23 September 2013 that the Applicant intended to call the expert witness.

79. The Respondent, in support of the objection, cited Rule 53(2) and Article 19(1) of the Rules of Procedure and the Statute of the Inter-American Court of Human Rights, respectively, which provide for disqualification of experts on the basis that they have a direct interest in the matter. The Applicant maintained that the Respondent did not put forward any evidence to show what, if any, relationship exists between the expert and the matter currently before the Court. Unlike the Inter-American Court of Human Rights, this Court's Rules of Procedure do not contain any explicit provisions on disqualifications of experts. In view of this *lacuna*, the Applicant urged the Court, as a human rights court to adopt a liberal and victim-centred approach to this issue towards ensuring that truth and justice is achieved.

80. The second ground argued by the Applicant was that the expert witness was competent and credible. He is a Professor of Law at the Faculty of Law of the University of Dar es Salaam with relevant scholarly research and professional expertise. The Applicant also called on the Court to apply Rule 45(1) of the Rules which empowers the Court to call for "any evidence which in its opinion may provide clarification of the facts of a case or which in its view is likely to assist it in carrying out its task" to admit the oral evidence of the expert as well as the particulars of his qualification including his Curriculum Vitae.

81. The third ground on which the Applicant based his argument, was that the testimony of the expert was intended to be limited in scope to issues of domestic law which would assist the Court in reaching a fair and just decision on the same. This would therefore not be prejudicial to the Respondent. In addition, according to the Applicant, the Court may order that the expert testimony be limited to specific areas of competence. This would be in line with the approach adopted by various international courts and tribunals such as in the case of *Prosecutor v Bagasora et al*, ICTR Case Number 98/41T, Decision of 20 September 2004.

82. On these grounds, the Applicant pleaded for the admission of Professor Leonard P Shaidi as an expert witness in this case.

X. The Court's Ruling on the objection to the expert witness

83. Pursuant to Rule 46(5) of the Rules, which provides that the "Court shall rule on any challenge arising from an objection to a witness or an expert", the Court begins by ruling on the objection raised by the Respondent State regarding the admissibility of the testimony of the expert witness proposed by the Applicant.

84. Firstly, the Court notes that the Rules do not contain any special provision, and no conditions or time limits have been laid down, for objecting to a witness or an expert.

85. Under such circumstances as far as the present case is concerned the Respondent was entitled to raise an objection at any stage of the proceedings

86. As a consequence, the Respondent State in this case had the possibility to challenge the Applicant's expert witness prior to his testimony.

87. The Court notes that the appointment of an expert, falls squarely within the discretion of the Court. Indeed, under Rule 45(1) of the Rules, the Court may, "of its own accord, or at the request of a party, or the representatives of the Commission, where applicable, obtain any evidence which in its opinion may provide clarification of the facts of a case. The Court may, *inter alia*, decide to hear as a witness or an expert or in any other capacity any person whose evidence, assertions or statements it deems likely to assist it in carrying out its task".

88. Therefore the main qualities the Court expects of an expert in this case would include sufficient knowledge of the subject matter, independence and impartiality towards the Parties in carrying out his or her duties.

89. The Court declares that, in this matter, it does not consider to be relevant the procedural criminal law of the Respondent State, which is not the applicable law in this matter.

90. In the view of the Court, since the expert was called by one party and the other objected, in circumstances where the Court had not felt the need for an expert of its own accord, and was under no obligation to accept the expert witness, then the Court decided to dispense with the expert.

A. The Respondent's preliminary objections

91. The Respondent raises preliminary objections on both admissibility and jurisdiction.

i. Preliminary objection on jurisdiction

92. The Respondent raises a preliminary objection regarding the Court's jurisdiction *ratione materiae*.

93. The Respondent contends that the subject matter of the Application does not relate to the Application and interpretation of the Charter, the Protocol or any other relevant human rights instrument ratified by the

Respondent as required by Article 3(1) of the Protocol and Rule 26 of the Rules, rather, that the Application is based on the Constitution of the Respondent as well as national legislation, specifically, the Criminal Procedure Act, on which the Court cannot adjudicate. The Respondent contends that, should the Court adjudicate on the matter, it will usurp the powers of municipal courts.

ii. Preliminary objection on admissibility

94. In the alternative, the Respondent is challenging the admissibility of the Application on the grounds that it is not compatible with the Charter of the Organisation of African Unity, now the Constitutive Act of the African Union, or the Charter as required by Rule 40(2) of the Rules.

95. The Respondent contends that the Applicant has not identified the provisions of the Charter and the Charter of the Organisation of African Unity that are alleged to have been violated and that he has only alleged violation of the Constitution of the United Republic of Tanzania and national legislation.

iii. Non-exhaustion of local remedies

96. The Respondent states that “Criminal Sessions Case No. 3 of 2009, Criminal Case No 716 of 2009 and Criminal Case No. 712 of 2009 instituted in the Resident Magistrate’s Court of Arusha which form the basis of this Application, are being handled by the national adjudication machinery. The Applicant’s cases are ongoing and are yet to be finalised”.

97. The Respondent maintains that the Applicant has filed several petitions in the High Court of Tanzania at Arusha alleging violations of his right to personal freedom and to property. Miscellaneous Criminal Application No 7 of 2007 was dismissed for being premature and the Applicant did not appeal this decision. Miscellaneous Civil Application No 47 of 2010 was struck out for being improperly filed. The Applicant did not either reinstitute the matter under the correct procedure or appeal against the Court’s decision to strike out the petition. The Applicant withdrew Miscellaneous Criminal Application No 78 of 2010 and Miscellaneous Civil Application No. 80 of 2010 on 18 May 2011 and has not reinstated them. The Respondent also alleges that the Applicant withdrew Criminal Application No 16 of 2011 on 26 March 2012 and has not reinstated it.

98. The Respondent alleges that it is after the dismissals and striking out of his petitions as well as his withdrawal of some of them that the Applicant decided to file the Application to the African Court. The Respondent states that the subject matter of the Application before this Court is the same as that of Applicant’s petitions to the High Court of Tanzania at Arusha, which he has withdrawn. That, it should therefore be inferred that if the Applicant felt that he had no cause of action at the municipal level, he cannot assert that this Court is the appropriate forum to address his grievances.

99. The Respondent contends that the criminal cases instituted against the Applicant are pending before the national courts and even after they

are concluded, there are appeals procedures which the Applicant must exhaust; therefore, the Court should not consider the Application.

iv. The Application has not been filed within a reasonable time from the time local remedies were exhausted

100. Alternatively and without prejudice to the contention of inadmissibility of the Application for non-exhaustion of local remedies, the Respondent argues that the Application has not been filed within a reasonable time from the period when local remedies were exhausted vis-à-vis Applicant's petitions to the High Court. Two of the petitions were dismissed and struck out nine months and sixteen days, respectively, before the Application was filed with the Court; also, the Applicant withdrew two petitions four months and twelve days and three months, respectively before filing the Application, The Respondent submits that the 'reasonable period' specified in the Charter for filing Applications after exhaustion of local remedies should be set at six months and considering this, the Applicant filed his Application too late.

101. In the Reply to the Applicant's Reply referred to earlier, filed by PALU, the Respondent reiterated that the Applicant filed his Reply to the Respondent's Response out of time without requesting for an extension of time from the Court; therefore the Applicant's Reply should be considered as not having been filed, in accordance with the Court's Practice Direction Number 41.

v. The Applicants' response to the preliminary objections

a. Preliminary objection on jurisdiction

102. The Applicant maintains that the Application complies with Rule 34 of the Rules and has specified the Charter rights that have been violated.

103. The Applicant states that, the fact that the Criminal Cases against him are pending does not preclude the Applicant from enforcing his constitutional rights and his Charter rights through filing an Application with the Court.

104. In the Reply filed by the Applicant's representative, PALU, to the Respondent's Response to the Application, it is contended that the Court has jurisdiction to deal with the matter since there have been violations of the Applicant's fundamental rights as provided for in the Constitution of the United Republic of Tanzania and the Charter, to which the Respondent is a State Party as well as to the Protocol and, furthermore, having made the declaration required under Article 34(6) thereto.

105. PALU reiterated the Applicant's pleadings and that there have been violations of his rights as guaranteed under the Constitution of the United Republic of Tanzania and also as enshrined in Articles 3, 5, 6, 7(1), 14 and 26 of the Charter.

b. Preliminary objection on admissibility

106. The Applicant states that Criminal Cases No 712/2009, 716/2009 and 933/2007 (now Session No.3/2009) were instituted in the Arusha District Court in violation of the procedures of the Criminal Procedure Act and that Criminal Case Number 716/2009 is not at the hearing stage as alleged by the Respondent. Further, the Applicant states, that the Respondent has not responded to the Applicant's allegations in respect of Criminal Cases No 915/2007, 931/2007, 1027/2007, 1029/2007 and 883 of 2008 with which the Applicant has been charged and in connection with which the Applicant's property has been seized, contrary to Section 38 of the Criminal Procedure Act and Article 24(1) and (2) of the Constitution of the United Republic of Tanzania.

107. It is further argued that the Applicant has been charged in the Criminal Cases unprocedurally, contrary to Section 38(1) and (2) of the Criminal Procedure Act; therefore, the charges against him are incurably defective and in violation of his human rights and which violation cannot be determined by the Resident Magistrate's Court of Arusha.

108. The Applicant maintains that he was not arrested on 12 September 2007 but on 26 October 2007 and that Session No 3/2009 is pending trial at the High Court at Arusha for almost three years.

109. The Applicant states that the High Court at Arusha determined that Miscellaneous Criminal Application No 7 of 2007 was premature; therefore it was unnecessary to appeal this decision. This Application to the High Court was for the Police to produce a document acknowledging seizure of the Applicant's property following the failure of the Regional Crime Officer to produce the said document.

110. The Applicant maintains that he did not withdraw Miscellaneous Criminal Application No 16 of 2011; rather, he wrote requesting for the *coram* of three Judges to be constituted to hear the case. Thereafter, the High Court at Arusha withdrew the case in the absence of the Applicant. These circumstances constitute the exhaustion of local remedies.

111. The Applicant contends that the local remedies which the Respondent alleges he has not exhausted have been unavailable, inordinate and unduly prolonged.

c. The Court's Ruling on the preliminary objection on jurisdiction

112. The Respondent's contention that the Court lacks jurisdiction *ratione materiae* since the Application is based only on the provisions of the Constitution of the United Republic of Tanzania and the Criminal Procedure Act upon whose adjudication is the sole preserve of the national courts of the Respondent cannot be upheld. This would be tantamount to stating that the Court has no jurisdiction to examine the compatibility of national legislation, including Constitutions, with the Charter; that is, as long as national Constitutions and national legislation form the basis of an Application, the Court would not have jurisdiction.

113. The Court rejected the above contention in Application 009/2011 *Tanganyika Law Society and The Legal and Human Rights Centre v the United Republic of Tanzania* and Application 011/2011 *Reverend Christopher Mtikila v the United Republic of Tanzania* (Consolidated Applications). In that matter, the Court considered the provisions of the Constitution of the United Republic of Tanzania, and found them to be incompatible with the provisions of the Charter. This is because where only national law or constitution has been cited and relied upon in an Application, the Court will look for corresponding articles in the Charter or any other human rights instrument, and base its decision thereon.

114. As long as the rights allegedly violated are protected by the Charter or any other human rights instrument ratified by the State concerned, the Court will have jurisdiction over the matter. In the instant case, the Applicant alleges violation of his right to equal protection of the law and equality before the law, the right to the respect of the dignity inherent in a human being and to the recognition of his legal status, the right to liberty and security of the person and not to be arbitrarily arrested or detained, the right to a fair trial, the right to property and the right to the independence of the Courts and the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the Charter.

115. The rights alleged to have been violated are protected under the Charter. The Court therefore finds that it has jurisdiction *ratione materiae* over the Application.

116. Article 56 of the Charter also comes into consideration in this regard. Article 56 of the Charter provides that: "Communications relating to human and peoples' rights referred to in Article 55 received by the Commission, shall be considered if they: ...

2. Are compatible with the Charter of the Organization of African Unity or with the present Charter ..."

117. The introductory sentence of Article 56, speaks of "Communications relating to Human and Peoples' Rights." None of these provisions require that the communication should state that it is based on the Charter; rather, the communication must merely relate to "human and peoples' rights", and be compatible with the Charter.

118. In line with jurisprudence on this matter, the Court's position is that the substance of the complaint must relate to rights guaranteed by the Charter or any other human rights instrument ratified by the State concerned, without necessarily requiring that the specific rights alleged to have been violated be specified in the Application.

119. The African Commission on Human and Peoples' Rights has taken a similar position, as stated in Communication 333/06 *Southern African Human Rights NGO Network and Others v Tanzania*.¹ In that Communication, the Commission stated that "one of its primary considerations under Article 56(2) is whether there has been *prima*

1 Twenty Eighth Activity Report November 2009 – May 2010.

facie violation of human rights guaranteed by the African Charter. Furthermore ... the Commission is only concerned with whether there is preliminary proof that a violation occurred. Therefore, in principle, it is not mandatory for the Complainant to mention specific provisions of the African Charter that have been violated.”²

120. The jurisprudence of the European Court of Human Rights on what qualifies as a complaint is defined as the purpose or legal basis of the claim. The complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on.³

121. In the *Hilaire v Trinidad and Tobago Case*,⁴ the Inter-American Court of Human Rights specified that “Article 32(c) of the Commission’s Rules of Procedure, in effect when the complaint was lodged before it, expressly allows for the possibility that no specific reference [need be] made to the Article(s) alleged to have been violated” in order for a complaint to be processed before it.”

122. Failure to cite any specific Articles of the Charter or any other human rights instrument ratified by the Respondent is no reason to oust the jurisdiction of the Court.

123. The Court finds that the Applicant’s Application stated facts which revealed a *prima facie* violation of his rights; furthermore, the Court finds that the Application relates to human and peoples’ rights protected under the Charter, therefore, the requirements of Article 3(1) of the Protocol and Article 56(2) of the Charter have been met.

124. Regarding the Respondent’s objection to the Application on the grounds of the incompatibility of the Application with the Charter of the Organisation of African Unity, now the Constitutive Act of the African Union, the Court finds that this argument does not stand. The Constitutive Act of the African Union provides that one of the objectives of the African Union shall be to promote and protect human and peoples’ rights in accordance with the Charter and other relevant human rights instruments. Therefore the present Application is in line with the objectives of the African Union as it requires the Court, as an organ of the African Union, to consider whether or not human and peoples’ rights are being protected by the Respondent, a Member State of the Union, in line with the Charter.

d. The Court’s jurisdiction *ratione personae*

125. The Applicant, Peter Joseph Chacha, is a national of the United Republic of Tanzania. He brings his Application in his personal capacity, as a national of the Republic which has made a declaration in terms of Article 34(6) of the Protocol, accepting to be cited before this Court by an individual. The Respondent ratified the Protocol on 10 February 2006 and made the declaration required under Article 34(6)

2 Para 51.

3 *Guerra and Others v Italy*, para 44; *Scoppola v Italy* (No 2) [GC], para 54; and *Previti v Italy* (Dec), para 293.

4 Inter-American Court of Human Rights, Judgment of 1 September 2001, para 42.

thereof on 29 March 2010. The Court therefore has jurisdiction *ratione personae* over the Application.

e. The Court's jurisdiction *ratione temporis*

126. The rights alleged to be violated are protected by the Charter. By the time of the alleged violation, the Respondent had already ratified the Charter, having done so on 9 March 1984, and was therefore bound by it. The Charter was operational in respect of the Respondent, and there was therefore already a duty on it as at the time of the alleged violation to protect those rights. The Respondent ratified the Protocol on 10 February 2006 and the alleged violations occurred thereafter. The Respondent made the declaration required under Article 34(6) of the Protocol on 29 March 2010. Though the Respondent made the declaration after the alleged violations occurred, the alleged violations of the Applicant's following rights continued: The right to equal protection of the law and equality before the law, the right to the respect of the dignity inherent in a human being and to the recognition of his legal status, the right to liberty and security of the person and not to be arbitrarily arrested or detained, the right to a fair trial, the right to property. The Court therefore finds that it has jurisdiction *ratione temporis* over the Application.

vi. The Court's Ruling on the preliminary objection on admissibility

a. Compatibility of the rights alleged to have been violated with the Charter of the Organisation of African Unity, now the Constitutive Act of the African Union and the African Charter on Human and Peoples' Rights

127. The Respondent contends that the Application should be declared inadmissible as it is not in compliance with Article 56 of the Charter and Rule 34(4) of the Rules since the Application does not indicate which articles of the Charter the Respondent is alleged to have violated.

128. This preliminary objection based on the inadmissibility of the Application due to incompatibility of the rights alleged to have been violated with the Charter of the Organisation of African Unity, now the Constitutive Act of the African Union, and the Charter is interlinked with the preliminary objection on the lack of the Court's jurisdiction *ratione materiae*. As the Court has already addressed the issue of incompatibility of the Application with the Constitutive Act of the African Union and the Charter when dealing with the issue of its jurisdiction *ratione materiae*, it does not find it necessary to address this issue again.

b. Non-exhaustion of local remedies

129. The Applicant's Application before this Court is connected with the Miscellaneous Criminal and Civil Applications that he filed in connection with the Criminal Cases that he was charged. In these Miscellaneous Applications, the Applicant prayed the restitution of his property and the

withdrawal of the allegedly unlawful charges that he faced following his alleged unlawful detention and interrogation.

130. All the Miscellaneous Applications were filed at the High Court of Tanzania at Arusha.

131. Miscellaneous Criminal Application No 7 of 2007 Originating from Criminal Case No 933 of 2007 was struck out for being premature. In that Application, the High Court, held that because there was no connection between the property seized by the Police and the murder charge that the Applicant was then facing, the Court's jurisdiction to order the restitution of the property was ousted and the only avenue open to him was to approach the District Court before which he was charged, to seek orders for restitution of his property. The learned High Court Judge added that since the murder charge he was facing in Criminal Case No 933 of 2007 was pending, the Applicant's Application to the High Court was premature and that it would have to be stayed until final determination of the pending murder charge, unless the seized properties had no connection with the charges he faced. Furthermore, the High Court also declined jurisdiction in the Application on the ground that there were additional criminal charges against the Applicant in the District Court. The Application was therefore not heard on merits and the High Court referred the Applicant back to the District Court, as it considered it the proper forum for adjudicating whether the property in dispute had a connection with the Criminal Cases the Applicant was facing. The Applicant did not resort to the District Court to seek restitution of his property, nor did he appeal the decision of the High Court.

132. The Applicant filed Miscellaneous Criminal Application No. 54 of 2009 originating from Criminal Case No 933 of 2007, under Section 91 of the Criminal Procedure Act for the charges preferred against him to be discharged. On 11 August 2010, the Application was struck off as it did not specify the subsection of Section 91 of the Criminal Procedure Act under which it was made and that the Applicant's prayers were stated in the Affidavit in support of the Application rather than in the Chamber Summons.

133. The Applicant also filed Miscellaneous Criminal Application No 6 of 2010, citing Section 90(1)(c)(4) of the Criminal Procedure Act, for a discontinuance of Criminal Cases Nos 915/2007, 931 of 2007, 1027/2007, 1029 of 2007, 883 of 2008, 712 of 2009 and 716 of 2009 in the District Court of Arusha on the grounds that the actions that the Police had taken were contrary to Sections 32, 33, 50(1), 51(1) and 52(1), (2) and (3) of the Criminal Procedure Act. On 16 November 2010, the Application was struck out for being incompetent as it was filed under a repealed section of the law, that is, Section 90(1)(c)(4) of the Criminal Procedure Act which had been previously repealed by Section 31 of the National Prosecution Act No 27 of 2008 which came into effect on 9 June 2008.

134. The Applicant then filed, Miscellaneous Civil Application No. 47 of 2010. The Application originated from the Criminal Cases Nos 915/2007, 931 of 2007, 1027/2007, 1029 of 2007, 883 of 2008, 712 of 2009 and 716 of 2009 in the District Court of Arusha. The Application was

grounded on Articles 13(1), 15(1), (2)(a) and 30(3) of the Constitution of the United Republic of Tanzania guaranteeing equality before the law and dealing with the right not to be arbitrarily deprived of one's freedom. On 14 December 2010, this Application was struck out for the reason that it had not been properly made since the Applicant brought it by way of Chamber Summons and Supporting Affidavit, whereas Section 5 of the Basic Rights and Duties Enforcement Act, which governs the procedure for filing and determining Applications under Part III of Chapter One of the Constitution, required that such Application be brought by way of a Petition and Originating Summons. In addition, according to the High Court, the aforesaid Act required that such an Application be determined by a three – Judge Bench and not a single Judge.

135. The Applicant filed against the Attorney General of the Respondent and the Police Officer in Charge of Arusha Miscellaneous Criminal Application No.78 of 2010, in the High Court of Tanzania at Arusha, originating from the Criminal Cases, on the basis of Articles 13(1), 15(1), (2)(a) and 30(3) of the Constitution of the United Republic of Tanzania. In support of the Application, he alleged violation of his right to freedom and to live as a free person since the Second Respondent in that Application had arrested, detained and interrogated him contrary to the provisions of the Criminal Procedure Act and that therefore, the Criminal Cases against him were vitiated by these illegalities. The Applicant sought a decree under Part III of Chapter One of the Constitution of the United Republic of Tanzania to this effect. On 18 May 2011, the High Court issued an order that the Application was withdrawn at the Applicant's instance. There is no record of the reasons for the withdrawal of the Application.

136. The Applicant filed Miscellaneous Criminal Application No. 80 of 2010, originating from the Criminal Cases, in the High Court of Tanzania in Arusha, alleging violation of his basic rights and freedoms guaranteed under Part III of Chapter One of the Constitution of the United Republic of Tanzania, specifically of Articles 24(1), (2) and 30(3) thereof on the right to own property. The Application was against the Attorney General of the Respondent and the Police Officer in Charge of Arusha. The Applicant prayed the Court to order the Respondents in that Application to restore his properties and any other relief it wished to grant. On 18 May 2011, the High Court issued an Order that the Application was withdrawn at the instance of the Applicant. There is no record of the reasons for the withdrawal of the Application.

137. Finally, the Applicant filed against the Attorney General of the Respondent, Miscellaneous Criminal Application No. 16 of 2011, Originating from the Criminal Cases on the basis of Articles 13(1), 15(1) and 15(2)(a) and 30(3) of the Constitution of the United Republic of Tanzania. In that Application, the Applicant alleged that the provisions and laws concerning his rights under Section 13(1)(a), (b), 13(3)(a), (b) and (c), 32(1), (2) and (3), 33, 50(1), 52(1) and 52(2) of the Criminal Procedure Act and Articles 14(1) and 15(1), and 15(2)(a) of the Constitution of the United Republic of Tanzania were violated by the Police. He therefore sought a decree under Part III of Chapter One of the Constitution of the United Republic of Tanzania. The Respondent

therein filed its response on 5 October 2011. The Applicant repeatedly urged for the empanelling of a three - Judge Bench of the High Court to hear this Application. On 29 June 2011, the Applicant wrote to the Registrar of the High Court of Tanzania at Arusha requesting that the three - Judge Bench be constituted to hear the Application. He wrote again in this regard on 14 November 2011. On 26 March 2012, the Application was recorded at the High Court as withdrawn, even though the same record indicates that the Applicant was absent from Court.

138. The Application filed in this Court is almost identical with the numerous Miscellaneous Criminal and Civil Applications which the Applicant filed in the High Court in Arusha, in connection with the Criminal Cases. In the Miscellaneous Applications, the Applicant sought restitution of property which the Police seized from his house during his absence. In that regard, he also sought relief against violation of his basic right to own property and not to be unlawfully deprived of such property. Further, he sought withdrawal or dismissal of the Criminal Cases. These are basically the same claims and reliefs he is seeking from this Court.

139. The Court observes that some of the Applications were dismissed by the High Court. For instance, Miscellaneous Criminal Application No 7 of 2007, in which the Applicant claims the restitution of his property which was allegedly seized by the Police unlawfully, was struck out for being premature. Miscellaneous Civil Application No. 54 of 2009 which sought the discharge or dismissal of criminal charges brought against the Applicant, was struck out by the High Court on the ground of procedural irregularity. Again, Miscellaneous Criminal Application No 6 of 2010 in which the Applicant sought the discontinuance of certain criminal cases commenced against him, was struck out for incompetence as it was brought under a repealed statute.

140. Then, in Miscellaneous Criminal Application No. 78 of 2010, in which the Applicant contended that he was unlawfully arrested, detained and interrogated and sought a decree to that effect under Part III of Chapter One of the Respondent's Constitution, was withdrawn by the Applicant. Similarly, Miscellaneous Criminal Application No 80 of 2010, in which the Applicant claimed violation of his basic rights and freedoms guaranteed in Part III of Chapter One of the Constitution of the Respondent and claimed restoration of his property allegedly seized by the Police unlawfully, was withdrawn by the Applicant. The withdrawal of the two Applications by the Applicant has not been disputed by the Applicant. He disputes the withdrawal of another Application, Miscellaneous Criminal Application No 16 of 2011. The view of the Court is, therefore, that the Applicant withdrew these Applications freely and voluntarily.

141. Now, according to the law and practice in Tanzania, an Applicant who is dissatisfied with a dismissal or a striking out of an Application has the liberty to appeal to the Supreme Court of Appeal of the United Republic of Tanzania. There is no evidence that even in instances where he could have done so, the Applicant seized the Supreme Court of Appeal. Again, an Application which is withdrawn can be reinstated in the High Court. According to the Application before this Court, the Applicant neither appealed to the Supreme Court of Appeal the cases

which were struck out, nor reinstated in the High Court some of the Applications which were withdrawn. In these circumstances, the Court finds any claim that the Applicant has exhausted local remedies in respect of the Applications which were dismissed, struck out or withdrawn, to be incorrect.

142. Exhaustion of local remedies by an Applicant is not a matter of choice. It is a legal requirement in international law. Therefore this Court in the matter of Application No 003/2011 *Urban Mkandawire v Republic of Malawi* affirmed the importance of this requirement; it dismissed the Application on the basis that the Applicant in that matter had not exhausted local judicial remedies.

143. In Communication 263/02 *Kenyan Section of the International Commission of Jurists, Law Society of Kenya and Kituo Cha Sheria v Kenya* the African Commission on Human and Peoples' Rights stated that:

"The African Commission is of the view that it is incumbent on the Complainants to take all necessary steps to exhaust, or at least attempt the exhaustion of local remedies. It is not enough for the Complainants to cast aspersion on the ability of the domestic remedies of the State due to isolated incidences."⁵

144. The Commission reiterated this position in Communication 299/05 *Anuak Justice Council v Ethiopia* in which it stated that:

"Apart from casting aspersions on the effectiveness of local remedies, the Complainant has not provided concrete evidence or demonstrated sufficiently that these apprehensions are founded and may constituted [sic] a barrier to it attempting local remedies. In the view of this Commission, the Complainant is simply casting doubts about the effectiveness of the domestic remedies. This Commission is of the view that it is incumbent on every complainant to take all necessary steps to exhaust, or at least attempt the exhaustion of, local remedies".⁶

145. In relation to the instant case, the Applicant stated that though he was aware of the existence of the Supreme Court of Appeal of the United Republic of Tanzania, he did not approach that Court as he was frustrated. The Supreme Court of Appeal of the United Republic of Tanzania was not given a chance to address the issues at hand, a situation that this Court will not countenance by admitting the Application.

c. Whether local remedies are unduly prolonged

146. In reply to the Respondent's response, the Applicant claims that the local remedies in the national courts were unduly prolonged and that he is therefore covered by the exception to the requirement to exhaust local remedies under Article 56(5) of the Charter which makes it mandatory for Applicants to exhaust local remedies first before filing their Applications in this Court, "unless it is obvious that this procedure is unduly prolonged".

5 Eighteenth Activity Report: July 2004 to December 2004 para 41.

6 Twentieth Activity Report: Jan 2006 – Jun 2006 para 58.

147. To fully address the issue of undue prolongation of domestic remedies, it would be necessary to monitor the progress of the Miscellaneous Criminal and Civil Applications through the national courts of the Respondent. Between 2007 and 2011, the Applicant was able to file a total of seven Applications in the High Court at Arusha, as follows:

- i. Miscellaneous Criminal Application No. 7 of 2007: It commenced after 26 October 2007 the day when he got detained. The Application was dismissed on 14 December 2010. It was in the High Court for approximately two (2) years and two (2) months.
- ii. Miscellaneous Criminal Application No. 54 of 2009: It commenced in 2009 and ended on 11 August 2010 when it was struck out. The Application was in Court for about one (1) year and seven (7) months.
- iii. Miscellaneous Criminal Application No. 6 of 2010: It commenced in 2010. It ended on 16 November 2010. It was in the Court for about eleven (11) months, before it was struck out.
- iv. Miscellaneous Civil Application No. 47 of 2010: It commenced in 2010 and ended on 14 December 2010, when it was struck out. It was in the High Court for a total of about one (1) year.
- v. Miscellaneous Criminal Application No. 78 of 2010: It commenced in 2010 and ended on 18 May 2011, when it was withdrawn. The Application remained in the High Court for about one (1) year and five (5) months.
- vi. Miscellaneous Criminal Application No. 80 of 2010: It was commenced on 29 December 2010. It ended with a withdrawal on 18 May 2011. The Application was in the High court for less than six (6) months.
- vii. Miscellaneous Criminal Application No. 16 of 2011: The matter was commenced on 19 May 2011. The Application was withdrawn on 26 March 2012. It was in the High Court of a total of less than nine (9) months.

148. The Court observes that the majority of the Applications were pending in the High Court for periods of between less than six months and one year (about four Applications). The duration of the other three was two years and two months, in the case of Miscellaneous Criminal Application No. 7 of 2007 followed by Miscellaneous Criminal Application No. 54 of 2009 which lasted one year and seven months and lastly Miscellaneous Criminal Application No. 78 of 2010 which remained in Court for one year and five months. It must be borne in mind that in the year 2010 alone, the Applicant filed four out of the seven Applications and that had some effect on the progress of the cases. The total time that all the Applications, dealt with separately, took to conclude, was five (5) years. Given the number of Applications the Applicant filed, being seven (7) in total, and the average duration each took to conclude, which did not exceed two (2) years and two (2) months, it is the opinion of the Court, that the proceedings were not unduly prolonged. It is therefore the view of this Court that the exception to the requirement of exhausting of local remedies does not apply in the present case.

149. On the material before this Court, Miscellaneous Criminal Application No. 16 of 2011 required the empanelling of a High Court Bench of three Judges to hear the matter. There is evidence that on two occasions, on 29 June 2011 and 14 November 2011, the Applicant

wrote to the Registrar of the High Court at Arusha to put in place the required three-Judge Bench to consider the Application, but he received no response. The records at the Court show that the Application was withdrawn by the Applicant, which fact he disputes. He denies that he withdrew the request and contends that the failure by the Court to constitute a panel of three Judges to hear his Application amounts to exhaustion of local remedies.

150. The Tanzania Court of Appeal Rules, 2009 provide at Rule 1(3) that:

“(3) In all proceedings pending whether in the Court or High Court or other judicial body, preparatory or incidental to, or consequential upon any proceeding in court, tribunal or other judicial body at the time of the coming into force of these rules, the provisions of these rules shall thereafter apply, but without prejudice to the validity of anything previously done;

Provided that:-

- (a) if and so far as it is impracticable in any such proceedings to apply the provisions of these rules, the practice and procedure heretofore obtaining shall be followed;
- (b) in any case of difficulty or doubt, the Chief Justice may issue practice notes or directions as to the procedure to be adopted.”

Rule 14(10) of the same Rules provides that:

“(10) Any person aggrieved by any order or a decision made by the Registrar or Deputy Registrar under this rule may, within fourteen days, of the making of such order, require the matter to be referred to a Judge in Chambers for his decision. An Application under this sub rule may be made informally at the time when the decision is given or in writing within 14 days after the decision.”

151. In terms of Rule 1(3), the Court of Appeal Rules, 2009, apply in the High Court. In this regard therefore, following the failure of the Registrar of the High Court at Arusha to empanel the three-Judge Bench, the Applicant ought to have applied to a Judge in Chambers for a decision in that regard in accordance with Rule 14(10) of those Rules.

152. The Applicant has not stated anywhere that his attempt to access the special Court in the High Court was intended to give him access to the Supreme Court of Appeal. Both in his oral and written pleadings the Applicant does not express the desire to access the Supreme Court of Appeal. When asked, during cross-examination, why he did not make an attempt to access that Court, he stated that he did not do so because he thought that the result would be the same. There is no reason for this Court to say that the Supreme Court of Appeal of the United Republic of Tanzania does not constitute an effective remedy; consequently, the Applicant has failed to exhaust a local remedy which was at his disposal.

153. It is the conclusion of this Court that the Applicant did not exhaust local remedies before submitting his Application before this Court.

d. That the Application has not been filed within a reasonable time

154. The Respondent contended that, in the alternative, the Application is not admissible since it has not been filed within a reasonable time.

155. Since the Court has ruled that the Application is not admissible for non-exhaustion of local remedies, the issue of whether or not it was filed within a reasonable time is moot and merits no further consideration, save to restate the position of this Court in the matter of Application 009/2011 *Tanganyika Law Society and The Legal and Human Rights Centre v the United Republic of Tanzania* and Application 011/2011 *Reverend Christopher Mtikila v the United Republic of Tanzania* (Consolidated Applications). In that matter, this Court stated that there was no fixed period within which to seize it; each case would be decided according to its own facts and circumstances.

156. For the reasons stated above the Court finds that the Application is not admissible.

vii. The Merits

157. As the Court has found that the Application is not admissible, it is not necessary to deal with the merits of the case.

viii. Costs

158. The Respondent prayed that the Court orders the Applicant to bear the costs of the Application. The Court notes that Rule 30 of the Rules of Court states that “[U]nless otherwise decided by the Court, each party shall bear its own costs.” Taking into account all the circumstances of this case, the Court is of the view that there is no reason to depart from the provisions of this Rule.

159. For these reasons:

By a majority of six votes to four, the Court holds:

1. That the preliminary objection on the lack of jurisdiction *ratione materiae* of the Court as required by Article 3(1) of the Protocol is overruled.
2. That the preliminary objection on the inadmissibility of the Application for incompatibility with the Charter of the Organisation of African Unity and the Charter as required by Article 6(2) of the Protocol read together with Article 56(2) of the Charter and Rule 40(2) of the Rules is overruled.
3. That the preliminary objection on the inadmissibility of the Application for non-exhaustion of local remedies as required by Article 6(2) of the Protocol read together with Article 56(5) of the Charter and Rule 40(5) of the Rules is allowed.
4. That the Application is therefore declared inadmissible.
5. In accordance with Rule 30 of the Rules of Court, each Party shall bear its own costs.

Separate opinion: AKUFFO, THOMPSON and KIOKO

I. Introduction

1. The background details of this matter have been sufficiently set out in the majority opinion herein. Therefore, in this Dissenting Opinion, we will only narrate such details as we deem necessary for providing a clear grounding for the position we have taken. Whilst agreeing with the conclusions made by the majority of the Court, in respect of the other issues raised in the Respondent's Preliminary objection, we, the undersigned, part company with them on their conclusions on the issue of whether or not the Applicant's Application herein is admissible on grounds of exhaustion of local remedies.

2. In our respectful view, the circumstances of this case clearly place the Application within the exception to the requirement to exhaust local remedies, created by Rule 34(4) of the Rules of Court. Therefore, the Court ought to have found the Application admissible. The said provision reads as follows: "The Application shall specify the...evidence of exhaustion of local remedies or of the inordinate delay of such remedies...."

II. Admissibility of the Application

3. As is patently clear from the facts of this matter, as set out in the majority opinion, after his incarceration by the Respondent, the Applicant made several attempts to cause his complaint, which forms the basis of this Application, to be addressed administratively and by the Courts of the Respondent State. These attempts were made against the background of a plethora of ever-changing criminal charges, which the Respondent repeatedly withdrew and preferred. At all material times, the Applicant questioned the legality of his incarceration and seizure of his property, for various reasons, including the unlawfulness of the seizure and his arrest, as well as the uncertainty of what charges he was being required to answer.

4. It is worth listing, at this juncture, the various criminal cases that were mounted against the Applicant in the District Court of Arusha, even though they have been set out in detail in the majority opinion.

The Charges:

- i. Criminal Case No. 915/2007 dated 8 November 2007 and wherein, he was jointly charged with Akida Mohamed, with conspiracy to commit an offence and stealing.
- ii. Criminal Case No. 931/2007 dated 30 November 2007 wherein the Applicant was charged jointly with Hamisi Jumanne and Rajabu Hamisi, with armed robbery. On 19 February 2008, he was charged alone in Criminal Case No. 941 of 2007 with committing the offence of armed robbery. There is nothing on the record to show that the charge against Mr Hamisi in the earlier charge was withdrawn.
- iii. In Criminal Case No. 933/2007, dated 8 November 2007, the charge was murder. This case eventually became Criminal Case No. 3 of 2009 dated 7 February 2009.
- iv. Criminal Case No. 1027/2007 was dated 16 April 2008 and the charge was armed robbery. This case was withdrawn and eventually the case

- was re instituted as Criminal Case No. 883/2008 dated 2 December 2008 wherein the Applicant was charged with armed robbery and rape.
- v. The Applicant was also charged in Criminal Case No. 1029/2007. Though both of the Parties refer to this Case, there is no record of when the Applicant was charged in this regard and what charges were preferred.
 - vi. In Criminal Case No . 712/2009 dated 21 December 2009 wherein the Applicant was charged with armed robbery, the alleged incident of armed robbery occurred on 12 September 2009 at which date the Applicant was already in remand. During the hearing of the case at the Magistrate's Court, the Applicant raised an objection to the Prosecution's substitution of the charge on 13 November 2012, to reflect the alleged incident of armed robbery as having occurred on 12 September 2007.
 - vii. Criminal Case No . 716/2009 dated 23 December 2009 which charged the Applicant with armed robbery, kidnapping with intent to do harm and rape.

III. The Applications

5. In 2007, the Applicant, filed Miscellaneous Criminal Application No. 7 of 2007, originating from Criminal Case No. 933 of 2007, under Section 357(a) of the Criminal Procedure Act, in the High Court of Tanzania at Arusha, seeking orders against the Attorney General of the Respondent, for restitution of his properties that were seized by the Police on 12 September 2007, allegedly in connection with the murder charge he was facing. There is no record of when this Application was filed. The High Court, in that Application, held that because there was no connection between the property seized by the Police and the murder charge that the Applicant was then facing, the Court's jurisdiction to order the restitution of the property was ousted and the only avenue open to him was to approach the District Court before which he was charged, to seek orders for restitution of his property. The learned High Court Judge added that, since the murder charge he was facing in Criminal Case No. 933 of 2007 was pending, the Applicant's Application to the High Court was premature and that it would have to be stayed until final determination of the pending murder charge, unless the seized properties had no connection with the charges he faced. Furthermore, the High Court declined jurisdiction in the Application on the ground that there were additional criminal charges pending against the Applicant in the District Court. The Application was, therefore, not heard on merits and the Applicant was "referred" back to the District Court as being the proper forum for determining whether the seized property had a connection with the Criminal Cases the Applicant was facing. The Application was dismissed on 14 December 2010. Even though the record does not show when this Application was filed, it would appear that it took at least three years for it to be determined.

6. In the High Court of Tanzania at Arusha, in 2009, the Applicant filed Miscellaneous Criminal Application No. 54 of 2009 originating from Criminal Case No. 933 of 2007 under Section 91 of the Criminal Procedure Act for the charges preferred against him to be discharged. On 11 August 2010, the Application was struck out on the grounds that it did not specify the subsection of Section 91 of the Criminal Procedure

Act under which it was made and that the Applicant's prayers were stated in the affidavit in support of the Application rather than in the Chamber Summons.

7. In 2010, the Applicant, filed, against the Attorney General, of the Respondent Miscellaneous Criminal Application No 6 of 2010 in the High Court of Tanzania at Arusha, citing Section 90(1)(c)(4) of the Criminal Procedure Act, for discontinuance of the Criminal Cases on the grounds that the actions that the Police had taken against him were contrary to Sections 32, 33, 50(1), 51(1) and 52(1), (2) and (3) of the Criminal Procedure Act. On 16 November 2010, the Application was struck out for being incompetent as it was filed under Section 90(1)(c)(4) of the Criminal Procedure Act, which had been previously repealed by Section 31 of the National Prosecution Act No.2 of 2008 which came into effect on 9 June 2008.

8. The Applicant also filed, on 19 August 2010, in the High Court of Tanzania at Arusha, Miscellaneous Civil Application No. 47 of 2010, against the Respondent. That Application originated from the Criminal Cases Nos. 915/2007, 931 of 2007, 1027/2007, 1029 of 2007, 883 of 2008, 712 of 2009 and 716 of 2009 in the District Court of Arusha ("hereinafter referred to as the Criminal Cases"). The Application was grounded on Articles 13(1), 15(1), (2)(a) and 30(3) of the Constitution of the United Republic of Tanzania guaranteeing equality before the law and dealing with the right not to be arbitrarily deprived of one's freedom. On 14 December 2010, that Application was struck out for the reason that it had not been properly made since the Applicant brought it by way of Chamber Summons and Supporting Affidavit, whereas Section 5 of the Basic Rights and Duties Enforcement Act (which governs the procedure for filing and determining Applications grounded on Part III of Chapter One of the Constitution under which the above mentioned provisions fall) , required that such Application be brought by way of a Petition and Originating Summons. In addition, according to the High Court, the aforesaid Act required that such an Application be determined by a three Judge Bench and not a single Judge.

9. On 8 December 2010, the Applicant filed against the Attorney General of the Respondent and the Police Officer in Charge of Arusha, Miscellaneous Criminal Application No. 78 of 2010, in the High Court of Tanzania at Arusha, originating from the Criminal Cases, to enforce his rights under Articles 13(1), 15(1), (2)(a) and 30(3) of the Constitution. In support of the Application, he alleged violation of his right to freedom and to live as a free person. According to the Applicant, the Second Respondent in that Application had arrested, detained and interrogated him contrary to the provisions of the Criminal Procedure Act and therefore, the Criminal Cases against him were vitiated by these illegalities. The Applicant consequently, sought a decree, in enforcement of Part III of Chapter One of the Constitution of the United Republic of Tanzania, to this effect. On 18 May 2011, the High Court issued an order to the effect that the Application was withdrawn at the Applicant's instance. It should be noted that, neither the Order nor the record do not indicate the basis for the withdrawal of the Application and merely indicates its withdrawal.

10. On 29 December 2010, the Applicant filed in the High Court of Tanzania in Arusha, Miscellaneous Criminal Application No. 80 of 2010, originating from the Criminal Cases, alleging violation of his basic rights and freedoms guaranteed under Part III of Chapter 1 of the Constitution of the United Republic of Tanzania, specifically of Articles 24(1), (2) and 30(3) thereof on the right to own property. The Application was against the Attorney General of the Respondent and the Police Officer in Charge of Arusha. The Applicant prayed the High Court to order the Respondents in that Application to restore his properties and any other relief it deemed fit to grant. On 18 May 2011, the High Court issued an Order that the Application was withdrawn at the instance of the Applicant. On 8 December 2010, the Applicant filed against the Attorney General of the Respondent and the Police Officer in Charge of Arusha, Miscellaneous Criminal Application No. 78 of 2010, in the High Court of Tanzania at Arusha, originating from the Criminal Cases, to enforce his rights under Articles 13(1), 15(1), (2)(a) and 30(3) of the Constitution. In support of the Application, he alleged violation of his right to freedom and to live as a free person. According to the Applicant, the Second Respondent in that Application had arrested, detained and interrogated him contrary to the provisions of the Criminal Procedure Act and therefore, the Criminal Cases against him were vitiated by these illegalities. The Applicant consequently, sought a decree, in enforcement of Part III of Chapter One of the Constitution of the United Republic of Tanzania, to this effect. On 18 May 2011, the High Court issued an order to the effect that the Application was withdrawn at the Applicant's instance. It should be noted that, neither the Order nor the record do not indicate the basis for the withdrawal of the Application and merely indicates its withdrawal.

11. On 19 May 2011, the Applicant, in the High Court of Tanzania at Arusha, filed against the Attorney General of the Respondent Miscellaneous Criminal Application No. 16 of 2011, originating from the Criminal Cases on the basis of Articles 13(1), 15(1) and 15(2)(a) and 30(3) of the Constitution of the United Republic of Tanzania. In that Application, the Applicant alleged that the provisions and laws concerning his rights under Section 13(1)(a), (b), 13(3)(a), (b) and (c), 32(1), (2) and (3), 33, 50(1), 52(1) and 52(2) of the Criminal Procedure Act and Articles 14(1) and 15(1), and 15(2)(a) of the Constitution of the United Republic of Tanzania were violated by the Police. He, therefore, sought a decree under Part III of Chapter One of the Constitution of the United Republic of Tanzania. The Respondent therein filed its response on 5 October 2011. The Applicant sought to cause the empanelling of a three-Judge Bench of the High Court to hear this Application (as hinted by the High Court Judge when striking out Miscellaneous Application No. 47 of 2010). On 29 June 2011, the Applicant wrote to the Registrar of the High Court of Tanzania at Arusha requesting that the three- Judge bench be constituted to hear the Application. He wrote again in this regard on 14 November 2011; it is apparent that there was no formal reaction to this request. On 26 March 2012, the Application was recorded at the High Court as withdrawn, even though the same record indicates that the Applicant was absent from Court. It is in our view, quite baffling that an Application which was required to be heard by a three Judge Bench was withdrawn on the order of a single Judge.

If the Application was to have been withdrawn, it should have been done before the three-Judge Bench.

12. From all the foregoing it is quite evident that the Applicant made several Applications to have his complaints determined, all of which proved futile. On closer examination, it is clear that he was caught in a vicious cycle of attempting to find resolution to his complaints and finding himself thwarted at practically every turn by procedural technicalities that effectively had nothing to do with the substance of his complaints. Hence, his complaints were either found premature, not properly made or incompetent. The complaints were also treated as intrinsically tied to ever-changing and hardly moving criminal charges the Applicant was facing, in that the Courts concluded that they could not grant him the orders he sought to enforce his basic rights until the criminal charges against him were prosecuted to finality, whereas his complaints were essentially against the very legality of his continuing incarceration. The Courts never adverted to the crucial question of whether his detention, the criminal proceedings preferred against him and the seizure of his property allegedly in connection with these criminal charges, were in accordance with the laid down due process, yet this was the gist of his complaints and Applications.

13. In all the Miscellaneous Criminal and Civil Applications he filed, the Applicant sought to have his human rights respected within the multiple criminal proceedings he was facing, both procedurally and substantively, but because of the approach of undue regard to circular technicalities that the courts chose to take, this became impossible and delayed final determination of his complaints. A patent example of this unfortunate approach is the decision of 14 December 2010 in Miscellaneous Criminal Application No. 7 of 2007, wherein the High Court found that, although there was no connection between the Applicant's seized property and the murder charge he was facing, nonetheless it could not order the release of his property as the criminal charges against him were still pending at the District Court, in which it was being alleged that the Applicant's property was connected to the Criminal Cases.

14. The statement made before this Court by Counsel for the Respondent, during the public hearing of this matter, is quite illustrative of the conundrum posed to the Applicant by the approach the Respondents officials chose to take in the domestic courts:

"With regards to the question posed ... on whether the Applicant had a right to appeal before the finalisation of any criminal proceedings; we pray to submit that the right to appeal is available to anyone after the matter is finally heard by the Court and not at a stage where it is still being heard by the Court. However one can do so after the finalization of the proceedings if he or she believes there are reasonable grounds for doing so. Similarly at any stage of the proceedings~ if one feels their right has been violated or threatened he or she can file a constitutional petition before the High Court for the enforcement of his basic rights and duties vide the Basic Rights and Duties Enforcement Act. It is important to note that the effect of doing this stays criminal proceedings in the Subordinate Court."

15. In the Applicant's case, when he first applied to the High Court to enforce his basic rights, contrary to the provisions of the Basic Rights

and Duties Enforcement Act, the High Court ruled that it could not decide on the matter as the proceedings against him at the District Court were pending yet the effect of such an Application is meant to be the stay of proceedings at the District Court. Most of the Applications took a long time to dispose of yet the Applicants liberty depended on their finalisation.

16. As a result, if a person is challenging the legality of criminal charges against him, the effect of the said procedure for enforcement of one's basic rights forces one to choose between going through criminal proceedings that may have been brought unlawfully then appealing against the decision therefrom or challenging the legality of those proceedings under the Basic Rights and Duties Enforcement Act and having the criminal proceedings filed against one, stayed. One may have to choose the lesser of two evils in the circumstances, each of which may have the tendency to violate the rights of such a person.

17. In the instant case, the Applicant chose to apply for the respect of his basic rights by challenging the legality of the preferment of the criminal charges against him and his subsequent arrest and detention and the seizure of his property. However, most of his Applications were dismissed due to technicalities. Indeed, Counsel for the Respondent stated during the public hearing that: "...the Applicant was registering his complaints in the form of ordinary criminal Applications rather than constitutional petitions vide Basic Rights and Duties Enforcement Act. Hence his Applications were being handled by a single Judge."

18. Indeed, being an unrepresented litigant, rather than basing his Applications on the Basic Rights and Duties Enforcement Act, the Applicant, in his apparent ignorance, was initially basing them on the Criminal Procedure Act. This was the case in the first two Miscellaneous Applications. Having followed the wrong procedure at the High Court, there would have been no chance of success of an appeal from the decisions of the High Court, dismissing or striking out his Applications, regardless of the submission by the Respondent during the public hearing, to the effect that the Respondent ought to have appealed against these decisions of the High Court. Rather, the Applicant chose to file new Applications in which he thought he was following the correct procedure.

19. Though his third Application cited the provisions of the Bill of Rights under the Constitution that he alleged were violated, it was dismissed for the reason that it was not filed through a petition and originating summons. Again, it is doubtful that he could have appealed a decision of the High Court that found that his Application thereto was filed using the wrong procedure due to the apparently established jurisprudential orientation toward strict regard to technicalities.

20. The fourth and fifth Applications also cited provisions of the Bill of Rights under the Constitution that were allegedly violated by the Police but these Applications were withdrawn by the Applicant.

21. A day after he withdrew the aforesaid two Applications, he filed his final Application. This is the Application in respect of which the empanelling of the statutory three-Judge Bench to hear it was delayed or denied. On two occasions, on 29 June 2011 and 14 November 2011,

the Applicant requested the Registrar in Charge to empanel the Bench to hear his Application but this did not happen. What recourse did he have regarding this situation? Logically, it is obvious that he could not have appealed to the Court of Appeal on the issue of empanelling of the three-Judge Bench as there was no judicial decision to appeal from, to the Court of Appeal. He was thus compelled to wait for the empanelling lacking a mechanism to resolve this delay in the national jurisdiction, he decided to file an Application to this Court on the grounds that his attempts to access local remedies against his rights, were unduly prolonged and delayed. At no time could he have accessed the Court of Appeal as there were no decisions from which he could appeal thereto.

22. It is noteworthy to reiterate that at the point in time, when he filed the Application at this Court on 30 September 2011, the Applicant had been in prison custody for 3 years and 11 months without trial.

23. In this matter, from what point in time ought the consideration of whether or not there has been an undue delay in accessing the local remedies to be reckoned? In our considered opinion, this should be reckoned from the time the Applicant filed his first Application to the High Court, that is, in 2007. Right from that time, the effect of his Application was for the enforcement of his human rights. Even though this and the second and third Applications were not expressly based on the Basic Rights and Duties Enforcement Act, they were, in effect Applications for the enforcement of the Applicant's basic rights under the Constitution. A reading of section 4 and 8(2) of the Basic Rights and Duties Enforcement Act shows that matters in respect of which one may apply under the Act to the High Court for redress, might also be resolved through other legal procedures.

24. Section 4 of the Act provides that: "If any person alleges that any of the provisions of sections 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress."

25. Section 8(2) of the same provides that: "The High Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law, or that the Application is merely frivolous or vexatious."

26. These provisions indicate that basic rights provided for under section 12 to 29 of the Constitution of the United Republic of Tanzania need not be enforced only through this Act; thus, the Applicant's Application for redress under the Criminal Procedure Act ought to have been properly considered as Applications for enforcement of his basic rights, albeit not under the Basic Rights and Duties Enforcement Act. Therefore, the Applicant's actions for redress

including seeking administrative remedies through the Ministry of Home Affairs, Ministry of Justice and Constitutional Affairs, the Directorate of Public Prosecutions of the Attorney General's Chambers and the Commission on Human Rights and Good Governance, which commenced in 2007 and continued until the time he applied to this Court for a remedy, were appropriate within the meaning of the Basic Rights and Duties Enforcement Act.

27. In these circumstances, we find, therefore, that the obstacles placed in the way of the Applicant's attempts to access the local remedies effectively rendered the remedies inaccessible and unduly prolonged. The principle established by the African Commission on Human and Peoples' Rights in Communications 147/95 and 149/96 (Consolidated) *Sir Dawda K Jawara v The Gambia* in this regard is that "A remedy is considered available if the petitioner can pursue it without impediment. It is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint."¹

28. In the instant case, the Applicant's attempts to enforce his basic rights were fraught with impediments, which unduly prolonged the process of accessing local remedies. In this regard therefore, his Application herein is, in our view, admissible before this Court under the exception to the principle of exhaustion of local remedies, by virtue of the process of accessing local remedies being unduly prolonged.

29. In the circumstances we are also of the view that the Application was brought within a reasonable time.

IV. Objection to the Expert Witness

30. By a letter dated 23 September 2013 and confirmed by a letter dated 5 November 2013, the Applicant notified the Registrar of Court (which notice was also served on the Respondent) that he intended to call one Professor Leonard P Shaidi, a Professor of Law at the University of Dar es Salaam School of Law to "testify and assist the Honourable Court to understand the obtaining criminal law and procedure of the Respondent State} which should apply or should have been applicable to the Applicant."

31. During the public hearing, the Respondent objected to the calling of the expert witness. The Parties made submissions on this issue.

V. The Position of the Respondent

32. The Respondent contended that three things are essential for one to be qualified as an expert witness, that is;

- i. The expert should possess special knowledge;
- ii. Special skill; and
- iii. Experience or training inn that particular field.

33. The Respondent maintained that expert witnesses should only be allowed if they are chosen by the Court, and that the Court does not

1 Thirteenth Activity Report, 1999 - 2000 paragraph 32.

need an expert opinion on the Criminal Procedure applicable in Tanzania as these are common statutes that can be easily interpreted. Furthermore, Counsel for both parties are officers of the Court who ought to assist the Court to come to a just decision without resorting to experts

34. The Respondent maintained that the interpretation of statutes is the preserve of Courts and not of experts. The Respondent cited the decision of the Court of Appeal of Tanzania, in the Case of *Director of Public Prosecutions v Shida Manyama and Selemani Mabuba*, App No 81 of 2012 (Unreported), wherein the Court (per Rutakangwa, JA) quoted the opinion of the Supreme Court of India in *Alamgir v State of Delhi (2003)* ISCC 21 to the effect that: “We think it would be extremely hazardous to condemn the appellant merely on the strength of opinion evidence of a handwriting expert. It is now settled law that expert opinion must always be received with great caution”.

35. On this basis, the Respondent called on the Court to exercise caution and disqualify the witness as an expert.

36. According to the Respondent, in the same cited case (*supra*), the Court of Appeal of Tanzania also quoted the decision of the Indian Supreme Court in the case of *Romesh Chandra Aggarwal v Regency Hospital Ltd (2009)* 9 SCC 709 which set out three requirements for the admission of an expert witness as follows:

- i. An expert witness must be within a recognized field of expertise;
- ii. Evidence must be based on reliable principles;
- iii. The expert witness must be qualified in the discipline.

37. The Respondent argued that the expert witness the Applicants intend to call does not meet these three requirements, as he is not an expert in any field of law, let alone Criminal Procedure, with renowned writings that have given substantial contribution to the knowledge of Criminal law in Tanzania. On this basis the Respondent prayed that its objection to the expert witness be sustained.

VI. The Position of the Applicant

38. The Applicant opposed the Respondent’s preliminary objection on three grounds.

39. The first ground is that the Respondent’s objection to the expert witness is not in good faith as it has been done very late in the day despite the Respondent being aware as far back as 23 September 2013 that the Applicant intended to call the expert witness.

40. Further, according to the Applicant, the Respondent did not provide any basis for challenging the witness’s qualification. Instead, the Respondent merely requested the Court to provide it with grounds for challenging this expert yet the Respondent’s sole duty is to plead their case. They submitted that the Court is under no obligation to provide the Respondent or any of the Parties for that matter with grounds for argument or objection.

41. The Respondent, in support of the objection, had cited Rule 53 (2) and Article 19(1) of the Rules of Court and the Statute, of the Inter-

American Court of Human Rights respectively, which provides for disqualification of experts on the basis that they have a direct interest in the matter. The Applicant maintained that the Respondent did not put forward any evidence to show what, if any, relationship exists between the expert and the matter currently before the Court. The Applicant pointed out that, unlike the Inter-American Court of Human Rights, this Court's Rules of Procedure do not contain any explicit provisions on disqualifications of experts. In view of this, the Applicant urged the Court, as a human rights court to adopt a liberal and victim-centered approach to this issue towards ensuring truth and justice is achieved.

42. The second ground argued by the Applicant was that the expert witness is competent and credible because he is a Professor of Law at the Faculty of Law of the University of Dar es Salaam with relevant scholarly research and professional expertise. The Applicant also called on the Court to apply Rule 45(1) which empowers the Court to call for "any evidence which in its opinion may provide clarification of the facts of a case or which in its view is likely to assist it in carrying out its task" to admit the oral evidence of the expert as well as the particulars of his qualification including his Curriculum Vitae.

43. The third ground on which Counsel for the Applicant based his argument, was that the testimony of the expert was intended to be limited in scope to issues of domestic law which would assist the Court in reaching a fair and just decision on the same. This, in the Applicant's view, would not be prejudicial to the Respondent. In addition, according to the Applicant, the Court may order that the expert testimony be limited to specific areas of competence. This would be in line with the approach adopted by various international courts and tribunals such as in the case of *Prosecutor v Bagasora et al*, ICTR Case Number 98/41T.² On these grounds, the Applicant pleaded for the admission of Professor Leonard P Shaidi as an expert witness in this case.

VII. Our Opinion

44. We observe that, the practice in international courts shows that they are "intolerant of any restrictive rules of evidence that might tend to confine the scope of a search after those facts. With certain exceptions, they do not hesitate to supplement, upon their own initiative, the evidence supplied by the parties if they regard it as inadequate."³

45. The Inter-American Court of Human Rights, for example, will admit testimony from a qualified expert when it is consistent with purpose for which it is proposed.⁴ Experts may testify regarding a wide range of topics. They are often called to testify as to the domestic law in the Respondent State, as domestic law must be proven as a fact before international tribunals. Furthermore, any party can name expert witnesses and the Court may also appoint an expert.

2 Decision of 20 September 2004.

3 *Durward v Sandifer Evidence Before International Tribunals* (Chicago: Foundation Press 1939) 3-4.

4 *Painagua Morales v Guatemala* (Reparations, 2001) para 71.

46. Taking into account the scope of this case and having considered the corresponding arguments of the Parties, and, bearing in mind that it is essential to assure not only the determination of truth and the most complete presentation of facts and arguments from the Parties, we are of the view that, other than general assertions, the Respondent did not present any objective or cogent grounds for the disqualification of the expert witness and his alleged bias. Furthermore, the cases cited in support of the objection were irrelevant and immaterial to the objection, that is, the qualification of the proposed witness, not the quality of evidence to be given by him. Indeed, the Respondent asserted in Court that they did not know the exact nature of the evidence that the witness was going to adduce nor did they know whether he was an expert or not. The Respondent then went on to argue that the expert witness was not an “authority on criminal law and procedure of Tanzania.” This is even though the objection was made before the witness had been sworn in and given the opportunity to highlight his qualifications and expertise. Thus it is rather unfortunate that the learned majority of this Court was taken in by such unfounded assertions on the part of the Respondent.

47. As regards the alleged concurrence of the expert’s opinion with the position of the Applicant, we are of the view that, even when the statements of an expert witness would contain elements that supports the arguments of one of the parties, this does not, *per se*, amount to bias such as would disqualify the expert. In any event, as is the norm with all testimony, a Court would normally only admit expert witnesses’ testimony that is in keeping with the purpose for which it is required and will evaluate it together with the body of evidence, taking into account the rules of sound judicial discretion. For these reasons, the Court should have admitted the testimony of the expert witness.

48. For these reasons, the Court ought to have admitted the testimony of the expert witness. In our respectful view, the reasons upon which the majority members of this Court refused to admit the Applicant’s witness as an expert witness are unacceptable, particularly since the matters in respect of which the Applicant sought to call him were statutory law, to be treated as peculiar to the Respondent State and foreign to the Court, and the Court cannot arrogate to itself an omnipotent power to know and/or interpret the same. Moreover, the jurisdiction of the Court in terms of Article 3(1) of the Protocol does not extend to the interpretation of domestic law. We reject the rationales given for declining the expert witness. We also reject the purported interpretation of Rule 45(1) of the Rules of Court which is tantamount to the creation of a new rule outside the normal procedure of the Court.

49. Consequently, we maintain the view that Applicant’s expert should have been heard, to help the Court decide whether or not the Applicant’s arrest, detention and the seizure of his properties were in compliance with the national criminal law procedure, the crux of Applicant’s case. Fortunately for the Applicant, the Respondent, apart from a little more than a mere bald assertion that the arrest, detention and the seizure of his properties were in accordance with the law, offered nothing substantive to controvert the Applicant’s systematic factual outline, with reference to the provisions of the Criminal Procedure Act, to buttress its

case; as a result, no real contest ensued between the parties around this issue. That being the case, the Court was, mercifully, saved from an untoward situation where it would have needed the assistance of the evidence of an expert, something which could have happened had the Respondent offered a more diligent contrary case. In our view, a Court should not lightly, or as a matter of routine, bar a party from adducing expert evidence; it may not always and necessarily find itself in the fortunate situation in which we fortuitously found ourselves on this occasion.

VIII. The Evidence

50. Having concluded that the Application is admissible, we will proceed to express ourselves on the merits of the matter. Though it may appear to be an exercise in futility, because the case was heard on the merits, we will consider the merits of the Application.

51. The Applicant alleges that he was unlawfully arrested, interrogated, detained, charged and imprisoned contrary to the provisions of the Criminal Procedure Act. The Applicant also alleges violation of his rights under the Constitution of the United Republic of Tanzania and the African Charter on Human and Peoples' Rights (hereinafter referred to as the Charter).

52. At the public hearing of this matter, the Court received testimonies as follows:

- i. The Applicant testified to the events leading to his alleged unlawful arrest, detention, interrogation and preferment of charges of murder, kidnapping, armed robbery and rape and the alleged unlawful seizure of his property by the Police.
- ii. Mr Ramadhani Athumani Mungi, currently the Regional Police Commander in Iringa, who was the Officer Commanding the Criminal Investigation Department (OCCID) in Arusha at the time the events forming the basis of the Applicant's complaints allegedly occurred. He testified regarding the various criminal incidents of crime that had occurred between July and September 2007, in Arusha, as well as the particular incident leading to the Applicant's detention, interrogation and subsequent charging in Court.
- iii. Mr Salvas Viatory Makweli, currently a Police Officer in Muleba District, and Assistant Superintendent of Police who was an Inspector of Police in Arusha at the time the events forming the basis of the Applicant's complaints allegedly occurred, and who was in charge of the search conducted in the Applicants house on 12 September 2007. He testified on the procedure that was followed following the seizure of the Applicant's property, allegedly in connection with the crimes with which the Applicant and his wife were eventually charged. According to him, he supervised the search process though he did not personally conduct it.
- iv. Mr John Mathias Marc, currently the OCCID in Shinyanga District and Assistant Superintendent of Police, was an officer on the Criminal Investigation Department in Arusha of the rank of Assistant Inspector at the time the events forming the basis of the Application occurred. He testified as to how he conducted the search of the Applicant's house and seized his property allegedly in connection with the crimes that the Applicant and his wife were eventually charged with.

- v. Mr Leonard Paul , currently an Assistant Commissioner of Police and the Regional Police Commander of Geita Region, who had the rank of Superintendent of Police in Arusha was a Regional Criminal Officer at the time the events forming the basis of the Application occurred. According to him, he was in charge of ensuring prevention of crimes and supervised the administration of the Department of Criminal Investigation. He testified that, in this capacity, he handled several police files involving the Applicant, particularly involving incidents of kidnapping, rape and armed robbery and armed robbery that occurred in Njiro, Arusha on 24 August 2007 and on 12 September 2007 respectively, with which the Applicant was charged and in respect of which he allegedly refused to attend the trial proceedings, leading to their withdrawal and reinstatement. He also testified to his handling of the Case No. 993/2007 where the Applicant was charged with murder and in respect of which the Applicant was acquitted to due to lack of evidence.
- vi. Mr Wilson Mushida an Assistant Superintendent of Prisons at the Central Prison of Arusha who, at the time the events forming the basis of the Applicant's complaints allegedly occurred, was an Assistant Inspector of Prisons working at the Reception Department of the Central Prison of Arusha. He testified to the handling of the Applicant while in remand at the Arusha Central Prison including the facilitation of his Court appearances and how the Applicant's alleged refusal to attend Court for his cases was addressed.

53. Additionally, we admit the evidentiary value of those documents, filed by the Parties at the appropriate procedural stage, that were not disputed or challenged and those that the Court ruled were admissible, as the case may be.

IX. Assessment of the Evidence

54. Given that the Applicant has a direct interest in the case, his testimony is useful insofar as it provides more information on the alleged violations and their consequences. It is the well-established case law of the Inter-American Court of Human Rights that a person's interest in the outcome of a case is not sufficient, *per se*, to disqualify him or her as a witness.⁵ In most cases, particularly those involving alleged violation of human rights, often the only witnesses who are willing to put themselves at risk to testify are those who have a personal interest in the case. Thus, the Inter-American Court of Human Rights has stated that the testimony of the victim has a 'unique import', as the victim may be the only person who can provide the necessary information.⁶

55. As to the testimony of the Respondent's witnesses, overall, it is our view, as well as apparent from the record, that they were self-serving and geared towards justifying their possibly illegal actions. It appears to us that their actions regarding the matters they testified to lean more towards an indication that, in their respective opinions it was a foregone conclusion that the Applicant should be the one held responsible for the

5 *Suarez Rosero v Ecuador* (Merits), Inter-American Court of Human November 1997 Ser C No 35 para 32.

6 *Loayza Tamayo v Peru* (Reparations, 1998) para 73.

alleged incidents of crime that were happening in Arusha, and it was simply a matter of throwing at him, as many charges as possible in the expectation that some would eventually stick. Despite this concerted activity, there were contradictions in their testimony.

56. Witnesses Ramadhani Athumani Mungi and John Mathias Maratestified to the occurrence of several incidents of crime prior to 12September 2007 when the incident in which the Applicant was allegedly involved occurred. According to Mr Mungi, despite the fact that other suspects in respect of these criminal incidents had been identified, only the Applicant was ever charged in any of the Criminal Cases. Witness Leonard Paul, however, testified that other suspects were charged with these crimes and that the cases against them proceeded, but nonconcrete information was provided to the Court in relation to those other cases. There is no evidence showing that the cases against the other suspects with whom the Applicant was initially charged proceeded. Even the Respondent has not argued so.

57. Regarding the search, even assuming that Police Officers could conduct a search of the Applicant's property without a search order or search warrant, witnesses Ramadhani Athumani Mungi, Salvias Viatory Makweli and John Mathias Mara were hard pressed to explain why a Seizure List or Certificate of Seizure was never issued in respect of the seized property, as required under the Criminal Procedure Act and conceded in Court. It is evident that this was not drawn up.

58. In addition, witness Ramadhani Athumani Mungi conceded that an arrest warrant was never issued in respect of the Applicant from 12September 2007 when the alleged incident of crime that the Applicant was allegedly involved in occurred, until he was detained from 26October 2007, when he went to the Police Station to find out about his wife, and further on until 8 November 2007 when he was first arraigned before a Magistrate. This, in our view, evidences an intention on the part of the Police to disregard the laid down procedures relating to arrest of suspects and the provision of twenty (24) hours period within which suspects must be arraigned in Court as set out in Section 32(1) of the Criminal Procedure Act Hence, even where it became apparent that the "evidence" that the Police had mounted against the Applicant in respect of the various charges would not pass muster, as admitted by witness Leonard Paul on cross-examination by Counsel for the Applicant, there were still continuous attempts to manufacture evidence to ensure that the murder charge against the Applicant would be upheld. However this failed as the Applicant was eventually acquitted of that charge in May 2013.

59. The testimony of Wilson Mushida an Officer of the Arusha Central Prison also failed to convincingly establish that the Applicant refused to attend Court in respect of the Criminal Cases he was facing such as to justify the long period of detention of over five and half years without trial. We observed that the witness appeared to have selective memory and could only recall the Applicant's movements (or lack thereof) in respect of the criminal charges he was facing but virtually nothing of his movements regarding the Miscellaneous Applications he had filed, except for Miscellaneous Application No 16 of 2011 in respect of which the Respondent, unsuccessfully sought, by doubtful evidence, through

this witness, to prove that the Applicant was in Court when the Application was withdrawn, even though, as evidenced by the Respondent's own pleadings and the documentary evidence on record, the contrary was true .

X. The Merits

60. To recap briefly, the Applicant alleges that he was unlawfully arrested, interrogated, detained, charged and imprisoned without trial contrary to Sections 13(1)(a) and (b), 3(a), (b) and (c), 32(1), (2) and (3), 33, 38 (1), (2) and (3), 50 (1) and 52(1), (2) and (3) of the Criminal Procedure Act, Chapter 20 of the Laws of Tanzania (Criminal Procedure Act). These provisions deal with warrant of arrest, detention of persons arrested, police to report apprehensions, power to authorise search warrant or authorise search, periods for interviewing persons and questioning suspect persons, respectively. According to him, his unlawful arrest, detention, charging and imprisonment in relation to the multifarious Criminal Cases mounted against him violated his right, under Article 15(1) and (2)(a) of the Constitution of the United Republic of Tanzania, to freedom and the guarantee that such freedom shall only be deprived under circumstances, and in accordance, with procedures prescribed by law, respectively and that the unlawful seizure of his property in this regard is in contravention of his right to property as set out in Article 24(1) and (2) of the Constitution of the United Republic of Tanzania. The Applicant also claims the violation of his rights as enshrined in Articles 3, 5, 6, 7(1), 14 and 26 of the Charter.

61. Article 3 of the Charter provides for equality before the law and equal protection of the law. Article 5 thereof provides for the right of every individual to the respect of the dignity inherent in a human being and to the recognition of his legal status. Article 6 provides for the right of every individual to liberty and to the security of his person and a right not to be deprived of his freedom except for reasons and conditions previously laid down by law. Article 7(1) of the Charter provides for the right of every individual to have his cause heard and for due process rights. Article 14 of the Charter provides for the right to property which may only be encroached upon in accordance with the provisions of appropriate laws. Article 26 of the Charter commits States Parties to the Charter to guarantee the independence of the Courts and to allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed in the Charter.

62. For purposes of this dissenting opinion, we shall examine whether or not the actions of the Respondent in arresting, interrogating, detaining, charging and imprisoning the Applicant and the seizure of his property was in compliance and consonance with the Criminal Procedure Act and the Constitution of the United Republic of Tanzania, and more importantly, in compliance with the aforesaid provisions of the Charter.

63. Central to this is the question of the procedural integrity or lawfulness of the Applicant's arrest, detention in custody at the Police station and subsequent detention in prison awaiting trial. From the

outset, it should be reiterated that the Applicant was purportedly arrested when he presented himself at the Police station to enquire why his wife was being detained. Strangely, no warrant of arrest had been issued against the Applicant at any time during the period of two months that, as alleged in Court, he had run away and the Police were looking for him. In the absence of a warrant of arrest, the Police could arrest the Applicant provided that they strictly complied with the other procedural requirements particularly that requiring that he be arraigned in court within twenty (24) hours. There is no good reason and none was provided to this Court for not charging him in court within twenty (24) hours and for detaining him at the Police Station for fourteen (14) days in violation of the Criminal Procedure Act and the Charter. In addition, the charges in these cases kept metamorphosing and increasing year to year. From the time the Applicant was arrested and detained in remand and subsequently in prison awaiting trial from 26 October 2007 to 3 May 2013, when he was released, a period of about five and half years had lapsed.

64. Our examination of the documentary and testamentary evidence presented shows that the Respondent has failed to prove that the Applicant's arrest and detention for fourteen (14) days before trial is a matter of grave concern. As this is an issue dealing with the Applicant's liberty, the presumption is in favour of the Applicant and the onus is on the Respondent to rebut the Applicant's allegations of the Respondent's unlawful action in respect of his interrogation, detention and charging with serious crimes. The documentary and, particularly, the testimonial evidence leads us to the conclusion that the Respondent has not discharged this onus of proof, therefore, the presumption being in favour of the Applicant, we have no hesitation in finding that he was unlawfully detained, interrogated and charged. When it comes to an individual's liberty, the onus of proof that he or she has been lawfully arrested lies with the State.

65. Flowing from the actions of the Respondent as indicated above, we make the following findings:

66. The Applicant's right to equality before the law and equal protection of the law (Article 3 of the Charter) was violated as the laid down procedures for arrest, interrogation and charging of the Applicant were not followed.

67. The Applicant's right to the respect of the dignity inherent in a human being and to protection from cruel, inhuman or degrading punishment and treatment (Article 5 of the Charter) was violated.

68. The Applicant's right to liberty and to the security of his person and to not be deprived of his freedom except for reasons and conditions previously laid down by law, in particular, the right not to be arbitrarily arrested or detained (Article 6 of the Charter) was violated.

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

"Every individual shall have the right to have his cause heard. This comprises:

- (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws and customs in force

- (b) The right to be presumed innocent until proved guilty by a competent court or tribunal
- (c) The right to defence, including the right to be defended by counsel of his choice
- (d) The right to be tried within a reasonable time by an impartial court or tribunal.”

70. Article 26 of the Charter provides that: “State parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.”

71. These two provisions of the Charter come into play when considering the inordinate length of the disparate proceedings in the Criminal Cases against the Applicant, as well as in the handling of his attempts to seek redress before the Courts of the Respondent for the alleged violation of his basic rights, as provided for under the Constitution of applicable laws of the United Republic of Tanzania. This resulted in his languishing in prison for five (5) years plus, without trial.

72. Having believed, and we agree with the Applicant on this score, that his rights were violated, the Applicant sought redress for the violation of his rights through various domestic procedures inconsonance with Article 7(1)(a) and 26 of the African Charter. The basic import of these Applications was that he sought enforcement of his rights. But due to the unduly technical approach of the courts, he was unable to obtain redress. Jurisprudential developments across the world require that when addressing issues of fundamental rights, Courts should not take an overly technical approach which approach do not ensure substantial justice but rather tend to derogate from it. Indeed , so important is this that, some jurisdictions, such as India , provide for epistolary jurisdiction wherein petitions regarding the respect for fundamental rights need not follow a specific format, what is considered important is the content therein, and it will be admissible if it indicates possible violations of basic rights.

73. This Court is also following this jurisprudential orientation as, in the instant case, it has decided that Applicants need not specify the particular provisions of the Charter that have allegedly been violated, rather, that they only need to be discernible from the alleged violations.

74. With regard to the Respondent, the enactment of the Basic Rights and Duties Enforcement Act was evidently intended to provide a procedure for the enforcement of the rights set out in Articles 12 to 29 of the Constitution of the United Republic of Tanzania. Though, in theory, there is such a procedure, as evidenced by this Application, there is a *lacuna* in its Application which is detrimental to an Applicant in the situation the Applicant herein found himself. The Applicant knows only too well about this as his attempts to enforce his basic rights since 2007 came to naught.

75. Articles 7(1) (b) to (d) of the Charter are relevant in respect of the Criminal Cases facing the Applicant. The issue here is whether the time taken to conclude the cases against him was reasonable. The time

lapse between his detentions in 2007 until May 2013 when he was acquitted of the murder charge is in our view not a reasonable time. This is particularly so considering the Respondent's almost culpable actions of withdrawing and reinstating the charges. It behoves the Respondent to withdraw the cases against the Applicant if there was insufficient evidence against him, no matter how heinous the crimes alleged to have been committed, rather than detaining the Applicant indefinitely while attempting to obtain evidence against him. The rule of law demands that laid down procedures should be followed. It is telling that there was chilling witness testimony by Mr Ramadhani Mungi, who was a witness for the Respondent that the Respondent was waiting for the matter before this Court to come to an end to deal with the Applicant's cases. When asked to clarify his statement, the witness indicated that he meant preferment of more criminal charges against the Applicant and not as a threat to the person of the Applicant. We merely observe that criminal prosecution is not a game to be played whimsically and vengefully for gratification.

76. Freedom of the person is sacrosanct, and in our view, any act on the part of the State which curtails such freedom must fulfil the requirements of the Charter, in both word and spirit. Where a person is incarcerated pending trial, justice requires that the trial be concluded in the optimal time to enable the person know his or her fate, and more importantly, to prevent inordinately lengthy remand of a possibly innocent person; this is merely the concomitant of the presumption of innocence.

77. Article 26 of the Charter is also relevant in the instant case. It provides that: "States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

78. Our admission of the Applicant's Application on the ground that the local remedies were unduly delayed and prolonged is an indication that there exists in the Respondent State ample room for improvement to assure adequate protection of human rights in the administration of criminal justice.

79. Regarding the claim concerning the guarantee of the right to property (Article 14 of the Charter), it is our view that on the face of the record, the seizure of the Applicant's property was not done in accordance with the law. However, this is a moot point as the judgment dated 30 April 2013 delivered in respect of Criminal Case No. 712 of 2009 ordered the return of his property after the Court found that the prosecution had failed to prove the case against the Applicant in that matter. We will say no more on this aspect of the Application.

X. Compensation and Reparation

80. Since this a dissenting opinion, even if we would otherwise have been inclined to grant to the Applicant, in due course, compensation and or reparation, and costs, such orders would in the circumstances hereof be mere *brutum fulmen* and we will, therefore, not embark on such an exercise in futility.

81. On the prayers:

In Conclusion:

82. Having found the Application admissible and that the Court has jurisdiction to consider the Applications, we find that:

1. The Respondent has violated Articles 3, 5, 6, 7(1) (a) and (d) and 26 of the Charter;
2. There is no need to make a finding with regard to the alleged violation of Article 14 of the Charter, because the matter is moot;
3. The finding of a violation constitutes *per se* a form of reparation;
4. The Respondent must take steps to examine and address the possible *lacunae* occurring in the implementation of the Basic Rights and Duties Enforcement Act and remedy the same.

Separate opinion: NGOEPE

1. Although I agree with the conclusion reached by the majority, I do not agree with them regarding the Ruling on the admissibility of the evidence of Prof Leonard P Shaidi, professor of law at the University of Dar es Salaam, whom the Applicant had sought to call as his expert witness.

2. I was one of the minority against that Ruling. With respect, I still disagree with the majority decision on this point and associate myself with, and support entirely, the position held in the separate minority opinion of S.A. Akuffo - President, Thompson and Kioko JJ, appended to the majority decision.

3. I adopt the reasons given in the said minority opinion and therefore need not deal with the issue relating to the admission of the witness's evidence any further, except to make a few observations.

4. The objection against receiving the evidence of the professor on the basis that he is not an expert is misconceived:

4.1 That kind of argument only arises after the witness has testified and qualified or failed to qualify himself or herself as an expert.

4.2 If the Court finds that he/she is not an expert, the evidence would be discarded.

4.3 If the Court finds that he/she is an expert, the next step is to decide how much weight, if any, is to be attached to the evidence.

5. It is therefore hard to see how an argument that a witness is not an expert can be sustained before the witness is given the opportunity to qualify himself/herself; certainly not even on a curriculum vitae.

Separate opinion: OUGUERGOUZ

1. I voted against the operative provision of the Ruling because I am of the view that the Application filed by Mr Peter Joseph Chacha meets the condition of exhaustion of local remedies required by Article 56(5) of the African Charter.

2. This issue of exhaustion of local remedies should be assessed in the light of the rights which the Applicant alleges have been violated.

3. In his Application, the Applicant, who was detained from 26 October 2007 to 13 May 2013,¹ alleges primarily, the violation of “his fundamental rights to life, liberty and security of person”, as guaranteed by the Constitution of Tanzania, as well as the violation of some provisions of the Criminal Procedure Code of Tanzania on arrest, detention, trial and imprisonment.

4. Even though the Applicant has not specifically mentioned any provision of the African Charter on Human and Peoples’ Rights or any other international legal instrument ratified by Tanzania, there is no doubt that the violations he alleges relate mainly to his right to liberty as well as his right to fair trial.

5. It should be noted here that, in his letter of 20 February 2012, in response to a letter from the Registrar of the Court, dated 13 February 2012, requesting him to show proof of exhaustion of local remedies, the Applicant stated that consideration of his complaint was unduly prolonged and that it was at variance with Article 7 of the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the African Charter”), which he quoted extensively in his letter.

6. In his Reply dated 15 May 2013, Counsel for the Applicant also referred to Articles 3, 5, 6, 7 (1), 14 and 26 of the African Charter (Reply, para. 4)

7. In his Rejoinder dated 23 July 2013, the Respondent State described reference made to these provisions of the African Charter by the Applicant as “new facts” or “new issues”, which were not contained in the pleadings or raised in the initial Application (Rejoinder, paras. 5 and 16).²

8. That is a characterization to which I will not subscribe because by referring to some articles of the African Charter, the Applicant is only highlighting the rights allegedly violated by the Respondent State and referring to the provisions of the African Charter which guarantee them.

1 This corresponds to a period of detention of 5 years, 6 months and 18 days.

2 “The Applicant has pleaded/sought new reliefs which were not pleaded in the original Application”.

9. In so doing, the Applicant is only responding to the preliminary objection of the Respondent State which stems from the absence of reference in the Application, to an international legal instrument to which it is a party. It is indeed what the Respondent State seems to admit, when it declares in relation to the reference to these Articles of the African Charter that “this also will be a prejudice to the Preliminary objection raised by the Respondent in the reply to the effect that the jurisdiction of the Court cannot be moved by citing provisions of the Constitution of the United Republic of Tanzania alone ...” (Rejoinder, para. 5 *in fine*).

10. The Applicant’s claim that Article 7 of the African Charter was violated by the Respondent State is bound to have serious consequences on the content of the Ruling of the Court. Article 7 confers the right to fair trial of an individual, and this right is generally defined in relation to a number of procedural guarantees or requirements. On the list of the rights of the human being, this right is therefore one of the most lengthily expressed; if not the longest, as evidenced in Article 7 of the African Charter and Article 14 of the International Covenant on Civil and Political Rights.

11. This is a typical procedural right because it guarantees the effectiveness of all substantive rights set out in the African Charter. It is the only human right whose respect will in turn determine the effectiveness of ensuring the implementation of all the other rights set out in the Charter.

12. It behoves therefore on the State Parties and their Executive and Legislative branches to ensure the effective implementation of the provisions of the African Charter. In case of breach of their obligations, it is primarily the responsibility of their judiciary to redress the situation. It is only after internal legal procedure fails, and therefore as a subsidiary, that the African Charter and its Protocol (as well as other international human rights treaties) provide for the intervention of organs which they establish.)

13. The rule of exhaustion of local remedies thus recognizes fair trial as a pillar in law, a rule which, to a certain extent, serves as a nexus between domestic and international law. It is therefore the qualitative weight of this law which, to a great extent, explains its qualitative weight in the African Charter and other international human rights conventions.

14. Article 7 of the African Charter defines this right as follows:

- “1. Every individual shall have the right to have his cause heard. This comprises:
 - a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
 - b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
 - c) the right to defence, including the right to be defended by Counsel of his choice;
 - d) the right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender”.

15. Since it was established in 1987, the African Commission on Human and Peoples’ Rights (hereinafter referred to as ‘the African Commission’), has always interpreted this provision extensively and has even adopted an entire resolution on the provision. At its 11th Ordinary Session (Tunis, Tunisia, 2 to 9 March 1992), it adopted a resolution entitled “Resolution on the Right to Recourse and Fair Trial”³ which mainly:

“Considers further that the right to fair trial includes, among other things, the following:

- a) All persons shall have the right to have their cause heard and shall be equal before the courts and tribunals in the determination of their rights and obligations;
- b) Persons who are arrested shall be informed at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them;
- c) Persons arrested or detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or be released;
- d) Persons charged with a criminal offence shall be presumed innocent until proven guilty by a competent court;
- e) In the determination of charges against individuals, the individual shall be entitled in particular to:
 - i) Have adequate time and facilities for the preparation of their defence and to communicate in confidence with counsel of their choice;
 - ii) Be tried within a reasonable time;
 - iii) Examine or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them;
 - iv) Have the free assistance of an interpreter if they cannot speak the language used in court;
3. Persons convicted of an offence shall have the right of appeal to a higher court”.

16. The Court thus could draw from this resolution and jurisprudence of the African Commission, in the interpretation and Application of Article 7 of the African Charter. Articles 60 and 61 of the African Charter, on the applicable principles, also allow the Court to draw inspiration from the relevant provisions of the International Covenant on Civil and Political Rights, as well as from their interpretation by the United Nations Commission on Human Rights.

³ At its 52nd Ordinary Session held from 9 to 22 October 2012 in Yamoussoukro (Côte d’Ivoire), the Commission also adopted a resolution “*Resolution on the need to issue guidelines on the conditions of custody and preventive detention in Africa*” and charged the Rapporteur on prisons and detention conditions in Africa to draft such guidelines as well as instruments for its effective implementation.

17. I wish to underscore the fact that in the instant case, the Court was seized of the alleged violation of many rights of the Applicant, including his right to freedom and his right to fair trial. It was therefore difficult for the Court to consider the objection to the admissibility raised by the Respondent State, with respect to the exhaustion of local remedies, without hearing the merits of the matter concerning the two abovementioned rights.

18. Regarding the rule of exhaustion of local remedies, it is true that generally, as rightly pointed out by the Respondent State, both in written pleadings and at the hearing, “the exhaustion of local remedies is a fundamental consideration in the admissibility test” (Brief in Response, para 49; CR, p 14, line 10). The Court also agrees with this in paragraphs of the Ruling, based on the established jurisprudence of the African Commission on Human and Peoples Rights in this area.

19. The African Commission has highlighted very early that: “The requirement of exhaustion of local remedies is founded on the principle that a government should have notice of a human rights violation in order to have the opportunity to remedy such violations before being called before an international body”.

Still, according to the Commission, “requiring the exhaustion of local remedies also ensures that the African Commission does not become a tribunal of first instance, a function that is not in its mandate and which it clearly does not have the resources to fulfil”.

20. This rule should however be applied with a certain degree of flexibility and without being too formal, given the context of human rights protection. It is generally acknowledged that some specific circumstances may discharge the Applicant of the obligation to exhaust the local remedies available to him.

21. Referring both to the letter and spirit of Article 56(5) of the African Charter, the Commission thus declared admissible a considerable number of communications on the basis of what was referred to as “the principle of constructive exhaustion of local remedies”. For instance, it declared some communications admissible because the procedure was unduly prolonged.

22. In its decision on the communication of *Sir Dawda K Jawara v the Gambia*, the Commission was of the view that local remedies should not only exist but must also be “available, efficient and satisfactory”. It considers a remedy as “available” when the author of the communication could file it without hindrance, it is “efficient” where there are chances of success and it is “satisfactory” where it makes it possible to redress the alleged violation.⁴

23. In the practice of the African Commission and other international quasi-judicial and judicial organs, consideration is given not only to remedies provided for in theory in the national legal system, but also the

⁴ Communications 147/95 and 149/96, *Sir Dawda K Jawara v the Gambia*; see paras 31 and 32 of the decision of the Commission, adopted on 11 May 2000, at its 27th Ordinary Session in Algiers, Algeria.

general legal and political context as well as the personal situation of the Applicant.

24. In the instant case, it is for the Court to consider in particular if the remedies available to the Applicant were “efficient”, and this, through reasonable distribution of the burden of proof between the Applicant and the Respondent State.

25. In the jurisprudence of the African Commission, the Inter-American Commission and the European Court, the burden is on the Respondent State which raises the objection of failure to exhaust local remedies, to prove that the Applicant did not use a remedy which was both available and effective. The remedy should be able to redress the grievance in question and to provide reasonable chances of success for the victim of the alleged violation.

26. Thus, according to the European Court,

“Article 35 § 1 of the Convention provides for a distribution of the burden of proof. As far as the Government is concerned, where it claims non-exhaustion it must satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the Applicant’s complaints and offered reasonable prospects of success”.⁵

27. Once the Government concerned discharges its by demonstrating that there is still an effective, efficient and available remedy to the Applicant, the burden shifts to the latter to prove that either this remedy was exhausted or for one reason or another, it was inappropriate and ineffective.

28. The European Court also allows the Applicant to raise some specific circumstances which exempt it from this requirement, such as the total passiveness of national authorities when faced with serious allegations that State Agents have committed offences or caused prejudice, for example, when they fail to carry out investigation or fail to provide any help. Under such conditions, the burden of proof shifts once again, and it is for the Respondent State to show what measures it has taken in view of the magnitude and gravity of the issues raised.

29. In short, the issue here is to determine, whether, considering all the circumstances surrounding the matter, an Applicant has done all what could possibly be expected of him to exhaust the local remedies available in the Responded State.

30. In the instant case, I am of the view that the Applicant has effectively done all what could reasonably be expected of him to exhaust the local remedies available in Tanzanian Courts and that the Respondent State failed to provide the proof that the Applicant has not made use of a remedy which was both “available and effective”. That is what I intend to demonstrate in the following areas; I will focus on the main phases of investigation of the Application by the Registry of this Court in order to prove that this issue of exhaustion of local remedies led to a

5 *Scoppola v Italy (No 2)*, Application No 10249/03, Grande Chambre, Ruling of 17 September 2009, para 71.

considerable exchange of letters between the Registry and the Applicant.

31. The Application was received at the Registry of the Court on 30 September 2011; it was only registered at the end of the month of February 2012 and was only communicated to the Respondent State on 27 June 2012, that is, nearly nine months after it was received. Such a lengthy delay can be explained notably by the fact that the Applicant was requested on several occasions to prove that his Application met the requirements under Rule 34 of the Rules of Court.

32. The Registrar indeed acknowledged receipt of the Application by letter of 4 October 2011, in which he invited the Applicant, in order for his Application to be registered, to prove that the requirements under Rule 34 of the Rules of Court had been fully met.

33. By letter dated 20 October 2011,⁶ the Applicant replied that his Application met these requirements and intended to show proof by submitting copies of some ten documents, including some letters to the Minister of Interior, the Minister of Justice, the National Commission for Human Rights and Good Governance, and to the Attorney General of Tanzania, as well as the responses to these letters.

34. On 13 February 2012, the Registrar of the Court acknowledged receipt of the said letter and, in order to register the Application, requested the Applicant to prove that the requirements under Rule 34(4) of the Rules of Court, and in particular, on the exhaustion of local remedies have been met.

35. The Applicant responded to this request by letter dated 20 February 2012, received at the Registry on 22 February 2012. In this handwritten letter, fingerprinted, the Applicant stated that he informed the Minister of Interior, the Minister of Justice, and the Attorney General of Tanzania of the violation of his rights but that they had not yet taken any action. He underscored the fact that the letters in response received from them, on 27 February 2008, 9 January 2009 and 28 September 2010, respectively, were proof of “unduly prolonged remedy”.

36. He further stated that, he had seized the High Court of Tanzania in Arusha, in an urgent action of the violation of his constitutional rights (supported by certificate of urgency) Criminal Application No. 16 of 2011, received by the district Registrar on 19 May 2011), but that his Application was not considered because of the lack of quorum of three (3) judges required under the Basic Rights and Duties Enforcement Act No. 33 of 1994 (An Act to provide for the procedure for enforcement of constitutional basic rights, for duties and for related matters).⁷

6 This letter was received at the Registry of the Court on 13 February 2012, nearly four months later.

7 See paragraph 1 of its Section 10 entitled “Constitution of the High Court” and which provides that: “For the purposes of hearing and determining any petition mad under this Act including references made to it under section 9, the High Court shall be composed of three Judges of the High Court, save that the determination whether an Application is frivolous, vexatious or otherwise fit for hearing may be made by a single judge of the High Court”. Section 9, entitled “Where a matter arises in a

37. He concluded that the procedure for consideration of his Application was unduly prolonged and that it was inconsistent with Article 7 of the African Charter on Human and Peoples Rights (hereinafter “The African Charter”), which has been quoted exhaustively in his letter.

38. By letter dated 27 February 2012, the Registrar of the Court informed the Applicant that his Application had been registered; it was only four (4) months later, 27 June 2012, that the Application was communicated to the Respondent State, pursuant to a decision taken in that regard, by the Court at its 25th Ordinary Session (11-26 June 2012).

39. By letter dated 25 April 2012, the Registrar of the Court requested the Applicant to submit to him copies of letters and any other document, including judgments to prove that he had exhausted local remedies.

40. In his handwritten reply dated 2 May 2012, the Applicant recalled that the High Court of Tanzania in Arusha had still not constituted a quorum of three (3) judges required under the Basic Rights and Duties Enforcement Act No. 33 of 1994 mentioned above and had therefore violated Article 30 (3) of the Constitution.⁸

41. The Applicant also pointed out that he had filed an appeal before the High Court of Tanzania in order for his fundamental rights, guaranteed by the Constitution, to be respected and that he was detained for five (5) years. He further underscored that in spite of the promises made by the Minister of Interior, the Minister of Justice and the Attorney General of Tanzania, no action had been taken.

42. He finally stated that he was yet to receive a copy of the (“Search warrant”) and the (“Certificate of seizure”) of his vehicle and of his audio/video/studio equipment which he had requested from the Regional Crime Officer of Arusha by letter dated 18 January 2011.

43. By letter dated 21 May 2012, the Registrar of this Court requested the Applicant to submit copies of his letter of 19 February 2012 to the Minister of Interior and copied to the Tanzanian Commission of Human Rights and Good Governance, his two letters of 8 February 2010 and 15 July 2010 addressed to the Attorney General’s Chambers, Public Prosecution Division, the response received on 5 October 2011 to his appeal, Criminal Application No. 16 of 2011 filed before the High Court

subordinate court”, provides as follows: “Where in any proceedings in a subordinate court any question arises as to the contravention of any of the provisions of sections 12 to 29 of the Constitution, the presiding Magistrate shall, unless the parties to the proceedings agree to the contrary or the Magistrate is of the opinion that the raising of the question is merely frivolous or vexatious, refer the question to the High Court for decision; save that if the question arises before a Primary Court, the Magistrate shall refer the question to the Court of a resident Magistrate which shall determine whether or not there exists a matter for reference to the High Court”.

8 Paragraph 3 of Article 30 of the Tanzanian Constitution of 1977 provides that “Any person claiming that any provision in this Part of this Chapter or in any law concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in the United Republic, may institute proceedings for redress in the High Court”.

of Tanzania,⁹ as well as any other document which he would like to adduce.

44. The Applicant responded by letter dated 25 May 2012, reiterating the fact that the High Court of Tanzania had still not constituted a quorum of three (3) judges required to consider his Criminal Application No. 16 of 2011; he attached to this letter, copies of the three letters requested, notably:

- his letter of 19 February 2008, addressed to the Minister of Interior, with copies to the Tanzanian Commission for Human Rights and Good Governance, in which he complained about the behaviour of Mr Ramadhani Mungi, Head of the Department of Criminal Investigation in the Arusha District;¹⁰
- his letter of 8 February 2010, addressed to the Attorney General's Chambers, Public Prosecutions Division, where he claimed that proceedings in the criminal matters No. 912/2007, No 931/2007, No 933/2007, No 1027/2007, No 1029/2007, No 883/2008, had been carried out against him illegally, that is, in the absence of a report from the Police or the Department in charge of criminal matters;¹¹ and
- his letter of 15 July 2010, also addressed to the Attorney General's Chambers, Public Prosecutions Division, in which the Applicant, in reference to the Criminal Application No 6 of 2010, filed pursuant to Article 90(1)(c)(4) of the Criminal Procedure Code, was requesting for an end to proceedings in the criminal matters No 915/2007, No 931/2007, No 933/2007, No 1027/2007, No 1029/2007, No 883/2008, No 712/2009 and No 716/2009; in support of his request, he argued that the proceedings were to be conducted based on concrete and detailed facts and that the Director of Public Prosecution could not in any case prosecute him as long as there was no First Information Reports against him, that he had not been interrogated by a Police Officer pursuant to Sections 50(1) and 51(1) of the Criminal Procedure Code, that his detention was in violation of Sections 32 and 33 of the Criminal Procedure Code, and that he was detained for fourteen (14) days, between 26 October 2007 and 8 November 2008, without a Police Officer making any report to the competent judge; the Applicant

9 In his appeal files on 19 May 2011 against the *Attorney General* of Tanzania and relating to a criminal suit pending before the High Court of Tanzania in Arusha, the Applicant, alleged, the violation, by the Police of Articles 13 (1), 14, 15 (1) (2) and 30 (3) of the Constitution, and the violations of Sections 13 (1) (a) and (b), (3) (a), (b) and (c), 32 (1), (2) and (3), 33, 50 (1) and 52 (1) and (2) of the Criminal Procedure Code.

10 Mr Mungi is said to have abused his authority and to have seized his vehicle, his audio/video/studio equipment illegally under the pretext that this equipment had been stolen. Mr Mungi is said to have wrongfully accused him of murder and four cases of armed robbery (criminal matter No. 915/2007, No. 931/2007, No. 933/2007, No. 1027/2007 and No. 1029/2007). In this letter, he referred to the violation of his constitutional right of liberty, of his person, his property and for the Police to respect fair trial in relation to the investigation of the accused.

11 In this letter, the Applicant also claimed that cases No. 712/2009 and No. 716/2009 had been entirely fabricated by the Officer in charge of Investigations in the Arusha region and that they were registered when he was absent from the Court. He informed the *Attorney General's Chambers, Public Prosecutions Division*, that he had decided to seize the *High Court* of Tanzania in Arusha pursuant to Article 90(1)(c)(4) of the Criminal Procedure Code, and this, to find out why he had been arrested without a police report.

consequently requested that the Director of Public Prosecution should ensure that the procedure was not abused.

45. In his letter dated 25 May 2012, the Applicant also attached copies of:

- the response of 27 February 2008, by the Minister of Interior, to his letter of 19 February 2008, informing him that his file was under consideration and that he would be informed in due course of any further developments;
- the response of 25 March 2008 by the Tanzanian Commission for Human Rights and Good Governance to his letter of 19 February 2008, advising him to follow up the handling of his file by the Minister of Interior who had been seized thereof;
- his letter of 22 December 2008 to the Minister of Justice and Constitutional Affairs, in which he complained about having been charged in the absence of any Police report and requested his assistance in the handling of his complaints;
- the response made on 9 January 2009 by the Minister of Justice and Constitutional Affairs to his letter of 22 December 2008, advising him to follow the handling of his file by the Minister of Interior who had been seized of it ;
- his letter of 18 September 2009 to the Minister of Interior, informing him that in the absence of a response from his Ministry to the complaints brought to his attention in his letter dated 19 February 2008, he would seize the courts; he prayed the latter to refer to the (“Criminal Record Office”) of the District of Arusha and Arumeru for the year 2007, which according to him, did not contain any report concerning the crimes they claim he had committed or the seizure of his property; and he underscored that Mr Mungi abused his authority by keeping him in detention illegally and retaining his property illegally;
- his letter of 8 February 2010, to the Minister of Interior, reminding him of his earlier letter of 19 February 2008 and requesting once more his assistance in the treatment of his complaints;
- the response of the Attorney General’s Chambers, Public Prosecutions Division, dated 30 March 2010, in which he informed the Applicant that he had contacted his office in Arusha “to enquire about the situation and to make the necessary decision in the interest of justice”;
- the letter of the Attorney General’s Chambers, Public Prosecutions Division, dated 28 September 2010, and in reply to the letter of the Applicant dated 15 July 2010, in which he informed the latter that his file was under consideration, requesting him to exercise patience and promising to inform him of any developments relating to his file;
- his letter of 18 January 2011 to the Regional Crime Officer of Arusha, requesting for copies of the (“Search warrant”) and the (“Certificate of seizure”) of his vehicle and his audio/video/studio equipment;
- his appeal against the Attorney General of the United Republic of Tanzania, filed on 19 May 2011 before the High Court of Tanzania in Arusha (Criminal Application No. 16 of 2011), alleging the violation by the Police of some of his rights guaranteed under Articles 13 (1) and 15 (1) and (2) (a) of the Constitution and Sections 13 (1) (a) and (b), (3) (a), (b) and (c), 32 (1), (2) and (3), 33, 50 (1) and 52 (1) and (2) of the Criminal Procedure Code, and requested for a declaration under part III of Chapter 1 of the Tanzanian Constitution.

- his letter of 29 June 2011, to the (“Resident Judge”) of the High Court of Tanzania in Arusha, requesting for the setting up of a panel of three (3) judges to consider his Criminal Application No. 16 of 2011.
- his letter of 14 November 2011 to the (“District Registrar”) of the High Court of Tanzania in Arusha, to be informed of the date of hearing of his appeal in the Criminal Application No. 16 of 2011.
- The Order issued on 16 November 2010 by a judge of the High Court of Tanzania in Arusha, removing from the Cause List, the appeal in the Criminal Application No. 6 of 2010, which had been declared inadmissible because it was founded on the provisions of the Criminal Procedure Code, which had been repealed under Section 90 (1) (c) (4);
- a (“Notice of preliminary objection”) raised by the Attorney General, on the merits of the response, and a “Counter Affidavit” relating to the appeal in the Criminal Application No. 16 of 2011.

46. Up to this stage of the procedure before the Court, the Applicant was not assisted by any Counsel. By letter dated 27 June 2012, the Registrar (of this Court) however requested the Pan-African Lawyers’ Union, (hereinafter referred to as “PALU”), if they could assist the Applicant in the matter before the Court; by letter date 16 July 2012, PALU accepted to provide assistance to the Applicant and, by letter dated 27 July 2012, the latter accepted their assistance. By letter dated 14 August 2012, the Registry requested the Respondent State to kindly facilitate the contact between the Applicant and his Counsel, that is, PALU.

47. The Brief in Response of the Respondent State dated 30 August 2012 was submitted to the Registry of the Court on 3 September 2012; it was communicated to Counsel for the Applicant on 4 September 2012, requesting him to respond within thirty (30) days.

48. By letter dated 17 October 2012, Counsel for the Applicant informed the Registry that he had still not been authorised to visit the Applicant in the Arusha Prison, to receive instructions from him on how to prepare his reply to the Brief in Response of the Respondent State; consequently, he requested for an extension by thirty (30) days of the deadline for the deposit of the said reply.

49. After a few reminders, the Reply of the Applicant, dated 15 May 2013, was finally filed at the Registry on 16 May 2013. Based on the circumstances, the Court decided to consider this Reply as submitted within time and requested the Respondent State to submit a rejoinder, if it so desired. The rejoinder of the Respondent State dated 25 July 2013, on its part, was filed to the Registry on 2 August 2013.

50. In the light of this brief overview of documents submitted to the Court by the Applicant, to prove that he had exhausted available and effective local remedies, it appears *prima facie* that the procedure in this matter was unduly prolonged. The Applicant did not only go on appeal before the High Court of Tanzania, but also seized some administrative authorities, such as, the Ministry of Justice or the National Commission of Human Rights and Good Governance; the latter, which is even empowered by the Constitution to deal with

complaints,¹² contented itself with referring the matter to the Tanzanian Ministry of Interior.

51. The Applicant also pointed out some abnormalities in the handling of the matter before local courts, such as, the absence of a quorum of three (judges) at the High Court of Tanzania for the matter to be considered.

52. It therefore appears that the Applicant, in addition to being a detainee, indigent, probably an illiterate, without the assistance of Counsel, did what could possibly be expected of him to exhaust the local remedies in the Respondent State.

53. As stated earlier (see paras 25 to 27), it behoves on the Respondent State to prove to the Court that there were accessible and effective remedies available to the Applicant.

54. In their written submissions and at the Public Hearing, the Respondent State merely highlighted the availability of local remedies which are still open to the Applicant. It failed to show their effectiveness.

55. In its Brief in Response, the Respondent State admitted that the Applicant filed many appeals, in the following words: “since the arrest of the Applicant and prior to filing this Application in the African Court, the Applicant made several Applications (petitions) in the High Court of Tanzania in Arusha Registry whereby he was contesting the very same issues brought before this Honourable Court, being: the right to personal freedom and the right to property” (para 25).

56. Regarding the appeal in the Criminal Application No. 7 of 2007, rejected by the High Court for reasons of its premature nature, the Respondent State averred that “the available legal remedy was for the Applicant to appeal to the Court of Appeal of Tanzania”, and cites the constitutional and legislative provisions on the functions of the Court of Appeal (Brief in Response, para 27). He concludes that “the Applicant did not pursue any of the available legal remedies. This being the case it cannot be said that local remedies were exhausted” (Brief in Response, para 29).

57. On the appeal in the Criminal Application No 47 of 2010, rejected by the High Court because it was (“improperly filed”), the Respondent State notes that the Applicant had two available remedies. The first was constitutional, because according to it, the Applicant could “reinstitute the matter under the proper jurisdiction being the Constitutional Court through the Basic Rights and Duties Enforcement Act” (Brief in

12 In fact, in terms of Article 130 of the 1977 Constitution, the Commission can, in particular, exercise the following functions:

- “b. to receive complaints in relation to violation of human rights in general;
- c. to conduct inquiry on matters relating to infringement of human rights and violation of principles of good governance;...
- e. if necessary, to institute proceedings in court in order to prevent violation of human rights or restore a right that was caused by that infringement of human rights, or violation of principles of good governance;
- f. inquire into the conduct of any person concerned and any institution concerned in relation to the ordinary performance of his duties or functions or abuse of the authority of his office”.

Response, para 33). The second available remedy would have been to go on appeal before the Court of Appeal of Tanzania (Brief in Response, para 34).

58. The Respondent State reiterated this position at the Public Hearing of 4 December 2013.¹³ The first remedy mentioned however, does not seem to be available to the Applicant because in terms of Articles 125 to 128 of the 1977 Constitution, the Constitutional Court of Tanzania can only be seized in exceptional cases and to resolve very specific issues.

59. Again, without showing how, the Respondent State concluded that “the Applicant did not pursue this available legal remedy. This being the case, it cannot be said that the local remedies available to the Applicant were exhausted” (Brief in Response, para 35).

60. Lastly, regarding the appeal in the Criminal Application No 78 of 2010, Criminal Application No 80 of 2010, Criminal Application No 16 of 2011, all three of them withdrawn at the behest of the Applicant, the Respondent State, and again without demonstrating the efficiency of the remedies, underscores as follows: “a local remedy was available as withdrawal of an Application does not mean its finality. The Applicant could have reinstated the matter. The Applicant did not pursue the matter. Therefore the Applicant did not exhaust this local remedy which was available to him” (Brief in Response, paras 38, 39 and 41).

61. The Respondent State notes that generally, in criminal matters, where the Applicant is the subject: “If the Applicant is of the view that his constitutional rights were infringed, there were and still there are adequate avenues for redress which have ben/are available to the Applicant, but have not been exhausted by the Applicant” (rejoinder para 4). Or “The local remedies are available and have been available to the Applicant. The local remedies are effective, adequate, fair and impartial” (Rejoinder para 13).

62. The Respondent State also noted that:

“The criminal cases are at various stages in the High Court of Arusha Registry, in the Resident Magistrate Court of Arusha and in the District Court of Arusha District. The said Courts have not conducted the hearing of the cases facing the Applicant to determine the fate of the Applicant as whether he is guilty or not of the offences/charges facing him. For the cases which are pending in the Resident Magistrate Court and the District Court, the Applicant has to wait for the judgements of the courts of which if he is not satisfied has the remedy/right to appeal to the High Court of Tanzania as per Section 359 (1) of the Criminal Procedure Act ...” (Brief in Response, para 47).

It further noted as follows:

¹³ “In Miscellaneous Criminal Application Number 47 of 2010; the High Court struck out the Application, the available legal remedy included reinstating the matter and the proper jurisdiction being the Constitutional Court through the Basic Rights and Duties Enforcement Act. Or to appeal against the decision of the Court to strike out the Application as per Section 4(1) of the Appellate Jurisdiction Act”, *Report of the Public Hearing of 4 December 2013*, page 31, lines 7-11 (English version).

“The Applicant has in no manner demonstrated/proven that the local remedies have indeed failed him as he chose not to pursue them. Further, the Applicant has not even faulted the system in his Application. Indeed, the legal system of Tanzania is very effective and sufficient, since the Constitution of the United Republic of Tanzania provides/guarantees the independence of Judiciary in the exercise of its mandate”. (Brief in Response, para 48).

Given the numerous grievances expressed by the Applicant, it is very difficult to agree with the Respondent State when it declares in paragraph 48 above, in its Brief in Response that “the Applicant has not even faulted the system in his Application”.

63. Besides, the Respondent State was not able to explain to the Court why the quorum of three (3) judges required under the Basic Rights and Duties Enforcement Act No 33 of 1994 for the High Court of Tanzania to make a decision on the Applicant’s Application was never constituted.

64. At the Public Hearing, when the Court asked a question relating to the quorum, Counsel for the Respondent State merely responded as follows:

“With respect to the question as to whether there was a need for a quorum of Three Judges we submit that: Section 10 (1) of the Basic Rights and Duties Enforcement Act CAP 3 of the Laws of Tanzania, states that the High Court in hearing a Petition requires a three judge bench, save for the purposes of making a determination as to whether the Application is frivolous, vexatious, or otherwise fit for hearing it may be heard by a single judge. However, in this case, the single judge who terminated the petition in the absence of the Applicant did not make such determination” (the emphasis is mine)

The rule is therefore to have a bench of three (3) judges and exceptionally, the appointment of a single judge; the frivolous or vexatious nature of the Application which justifies this exception was however not established by the Respondent State.

65. Further, regarding the relations between domestic Courts in Tanzania and this Court, the Respondent State argued as follows:

“The Applicant is soliciting this Honourable Court to adjudicate on matters of local jurisdiction. If the Court proceeds to do so it will be in fact usurping the powers of the local municipal courts which is not the jurisdiction of the Honourable Court” (Brief in Response, para 49).

“Indeed the Application before the Honourable Court is the Applicant’s list of grievances with the administration of justice in relation to his on-going cases in the municipal courts. We are of the strong belief that a body of the stature (of) the African Court on Human and Peoples’ Rights was not established to adjudicate grievances of on-going cases within the national jurisdiction of State parties” (Brief in Response, para 12).

66. To state that the Court cannot hear cases being considered in domestic Courts is to misunderstand the true role of the African Court. It is the mission of the Court to ensure the proper respect of international obligations to which a State Party is a signatory. It however has to ensure first of all that the domestic Courts of the country were able to deal with the matter. That is why we have the rule on exhaustion of local remedies, and it is the duty of the Court to ascertain

whether or not these remedies meet some requirements to ensure their effectiveness.

67. Thus, when the Respondent State argues that some of the criminal matters concerning the Applicant “have been tried according to the laws governing the criminal proceedings of the United Republic of Tanzania” (rejoinder para 9) (c), this is not sufficient to make it not liable to its international obligations which it accepted freely, and this does not prevent this Court either from verifying whether the relevant provisions of the criminal procedure code, for example, comply with the requirements under the norms of international law applicable to the Respondent State.

68. The Respondent State however, did not at any moment show, or tried to show, that procedural guarantees offered to the Applicant were consistent with these requirements, and in particular, those under Article 7 of the African Charter.

69. In the light of the foregoing, it is evident that even though local remedies, which were in theory available to the Applicant, were not formally exhausted, the Respondent State did not prove that the said remedies were both “available” and “effective”, that is, the Applicant could “concretely” avail himself of them and that these remedies could produce the results for which they were established.

70. In the reasoning of the present Ruling, the Court dealt with this fundamental issue only in three short paragraphs (paras 118, 122 and 127). It did not consider the conduct of the judicial authorities of the Respondent State, as it should have done, and in so doing, it did not distribute the burden of proof equally between the parties in the matter.

71. The Respondent State did not also show proof of the fact that the duration of the procedure in domestic Courts was reasonable in the circumstances, as provided for in the African Charter (Article 7: “the right to be tried within a reasonable time by an impartial Court or tribunal”). And the International Covenant on Civil and Political Rights (Article 14: “The right to be tried without excessive delay”), to which the Respondent State is a party. Article 107 A(2) of the 1977 constitution of Tanzania is also very clear on that issue, it provides as follows:

“In delivering decisions in matters of civil and criminal matters in accordance with the laws, the Court shall observe the following principles, that is to say ...

(b) not to delay dispensation of justice without reasonable ground. ...

(e) to dispense justice without being tied up with technical provisions which may obstruct dispensation of justice.”

72. It is not sufficient for the Respondent State to state that “the judiciary dispenses justice without being tied up with technical provisions which may obstruct dispensation of justice” Rejoinder para.9 (d); it is necessary for the Respondent State to prove it in relation to each grievance raised in that respect by the Applicant.

73. Again, I am of the view that the Court did not distribute the burden of proof equally between the parties and was too severe towards the Applicant and not so severe towards the Respondent State (paras. 124 to 127). It is therefore imperative for the Court to define and apply

precise and relatively balanced standards of proof on this condition of exhaustion of local remedies.

74. Since this condition was, in my view, fulfilled in the instant case, it was still necessary to ensure that the Application was filed “within a reasonable time from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter” (Rule 40(6) of the Rules).

75. Contrary to the assertions made by the Respondent State, it is not a condition which poses any problem, considering the wording of Rule 40 (6) of the Rules, which is not restrictive and the relatively liberal practice of the Court in this area. Be that as it may, the critical date for the assessment of reasonable time is not, as the Respondent State claims (brief in response, para 56, verbatim record, 2 December 2013, page 14, line 10), the date it ratified the Protocol, that is, 10 February 2006,¹⁴ but the date of deposit of the declaration provided for under Article 34(6), that is, 9 March 2010; it is only on that date that our doors were opened to its citizens.

76. To conclude, Mr Peter Joseph Chacha’s Application met all the conditions for admissibility under Article 56 of the African Charter and ought to have been considered on the merits by the Court.

14 “Furthermore, the United Republic of Tanzania deposited its instrument to the Court on 10th February 2006. Therefore the Court was in existence at the time the Applicant withdrew or had his Application dismissed or struck out by the municipal Courts. The Applicant could therefore have instituted his Application before the honourable Court before the elapse of the period of six (6) months; rather, he waited over a year to file his Application before the honourable Court” (Brief in response, para 56).

Chrysanthe Rutabingwa v Rwanda (striking out) (2014) 1 AfCLR 462

Chrysanthe Rutabingwa v The Republic of Rwanda

Order, 14 May 2014. Done in English and French, the French text being authoritative.

Judges: AKUFFO, NGOEPE, NIYUNGEKO, OUGUERGOUZ, RAMADHANI, TAMBALA, THOMPSON, ORE, GUISSSE, KIOKO and ABA

Procedure (case struck out at the request of the Applicant, 17, 18)

1. By email of 19 April 2013, Mr Chrysanthe Rutabingwa filed an Application to the Registry of the African Court on Human and Peoples' Rights (the Court) against the Republic of Rwanda, for alleged violation of Articles 10 and 11 of the Rwandan Constitution. The Registry acknowledged receipt and registered the Application under No. 003/2013.
2. According to the Application, Mr Chrysanthe Rutabingwa, was recruited by a Technical Committee of the State of Rwanda, in a decision approved by the Council of Ministers on 17 September 1999. He was assigned to work as an Expert in charge of Audit and Evaluation in the Secretariat for Privatization.
3. By Decision No 116/PRIV/BR/RU signed by Mr Robert Bayigaiviba, Executive Secretary, the Applicant was dismissed on 27 February 2001 for the aggravated offence of "having divulged confidential documents of the institution".
4. Dissatisfied with the Decision, the Applicant seized the Court of First Instance of Kigali, and by judgement RC 37604/02 of the Court, compensation was awarded to the Applicant. The latter, believing that the amount was small, called for his reinstatement in his duties.
5. By letter dated 23 December, 2013, and pursuant to Rule 35(2) of the Rules of Court, the Registry served the Respondent State with the Application, requesting it to submit the names and addresses of its representatives and to respond to the Application within a period of sixty (60) days.
6. By letter dated 21 March 2014, on behalf of the Respondent State, the Ministry of Justice of Rwanda acknowledged receipt of the letter from the Registry dated 23 December 2013 and forwarded to the Registry the name and address of its representative, Mr Epimaque RUBANGO KAYIHURA, Principal State Attorney in the Ministry of Justice.
7. In the same letter, and pursuant to Rule 37 of the Rules, the Representative of the Respondent State also requested the Court for

leave to extend the time for the submission of the response to the Application set at sixty (60) days.

8. By separate letters dated 1 April 2014, the Registry notified the Applicant of the letter from the Respondent State dated 21 March 2014, containing the name and address of its representative, and also notified him of the request for an extension of time of sixty (60) days made by the Respondent State, and further requested the Applicant to react to the said request within fifteen (15) days.

9. After consultations by members of the Court, the Court decided to extend time for the Respondent State to respond to the Application, by thirty (30) days.

10. By letter dated 8 April 2014, the Registry notified the Respondent State of the decision of the Court to grant it an extension of thirty (30) days from the date of the letter of notification; the said deadline was to run until 7 May 2014.

11. By letter dated 11 April 2014, the Applicant filed his reaction to the Respondent's request for extension of time and indicated that "I totally agree with him because I want to (take) (sic) contact with him and try to make an arrangement with the government of my country. I am quite sure that the solution will be found and a bad arrangement is better than a good trial".

12. By letter dated 15 April 2014, the Registry acknowledged receipt of the response of the Applicant with regard to the request for extension of time, and copied the Respondent.

13. By letter dated 21 April 2014, received at the Registry on 22 April 2014, the Applicant informed the Court about his meeting with the representative of the Republic of Rwanda on this matter and stated that "...I have no interest in pursuing that matter and request the Court to put an end to that matter".

14. By letter dated 22 April 2014, the Registry acknowledged receipt of the request made by the Applicant, to strike out the matter from its cause list, and served a copy on the Respondent State.

15. Rule 58 of the Rules of Court provides that "where an Applicant notifies the Registrar of its intention not to proceed with a case, the Court shall take due note thereof, and shall strike the Application off the Court's Cause List. If at the date of receipt by the Registry of the notice of the intention not to proceed with the case, the Respondent State has already taken measures to proceed with the case, its consent shall be required".

16. In the light of the above-mentioned Rule, it is observed that at the time the Registry received the letter from the Applicant not to proceed with the case, that is, 21 April 2014, the Respondent State had not yet taken any measures to proceed with the case.

17. In view of the foregoing, the Court notes that it is not necessary to seek the consent of the Respondent State on the Applicants notice of discontinuance.

18. Consequently, and pursuant to Rule 58 of the Rules of Court, the Court hereby Orders that the matter be and the same is hereby struck out from the Cause List of the Court.

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

Alex Thomas v The United Republic of Tanzania

Judgment, 20 November 2015. Done in English and French, the English text being authoritative.

Judges: THOMPSON, NIYUNGEKO, TAMBALA, ORÉ, GUISSÉ, KIOKO, BEN ACHOUR and BOSASSA

Recused under Article 22: RAMADHANI

The Court held that Mr Thomas had been subjected to an unfair trial when he was tried and sentenced to 30 years' imprisonment. The Court also held that a delay of three years and five months in submitting the case was not unreasonable considering the circumstances of Mr Thomas as 'a lay, indigent, incarcerated person, compounded by the delay in providing him with Court records'. On the merits, the Court held that various fair trial rights had been violated, including the non-provision of legal aid.

Jurisdiction (specific provisions of the Charter need not be invoked in the Application: 45; violations before ratification of protocol, 48)

Admissibility (exhaustion of local remedies, extra-ordinary remedies, 63-65; submission within reasonable time, 73-74)

Fair trial (the right to be heard, 93-94; legal aid, 123-124)

Remedies (release as remedy in compelling circumstances, 157)

Separate opinion: THOMPSON AND BEN ACHOUR

Remedies (release as remedy in compelling circumstances, 4-6)

I. The Parties

1. Mr Alex Thomas, ("hereinafter referred to as the Applicant") is a citizen of the United Republic of Tanzania ("hereinafter referred to as the Respondent"), who at the time of filing his Application is a convict serving a thirty (30) year custodial sentence at Karanga Central Prison at Moshi, Kilimanjaro Region, United Republic of Tanzania. He is convict number 355/2009.

2. The Applicant filed his Application against the United Republic of Tanzania through the Attorney General of the United Republic of Tanzania, being the Principal Legal Adviser to the Government of the United Republic of Tanzania.

II. Nature of the Application

3. The Applicant brings the Application on the basis of Criminal Case Number 321 of 1996 in the District Court of Rambo at Mkuu, Criminal Appeal Number 82 of 1998 in the High Court of Tanzania at Moshi and Criminal Appeal Number 230 of 2008 in the Court of Appeal of Tanzania at Arusha, in respect of which he was convicted of armed robbery and sentenced to thirty (30) years' imprisonment.

4. The Applicant alleges that the trial and Appellate Courts wrongfully convicted him because, he alleges that, in accordance with Sections 181 and 387 of the Criminal Procedure Act, the Respondent's courts lacked jurisdiction to try him as the alleged robbery occurred in Kenya. He also alleges that he was wrongly convicted because the charges against him were defective, contrary to Section 132 of the Criminal Procedure Act because, there were inconsistencies between the charge sheet and the evidence. In this regard therefore, the Applicant claims that the prosecution did not prove the case against him beyond reasonable doubt. The Applicant alleges that this is particularly so, with regard to the ownership of the property alleged to have been stolen, the actual property alleged to have been stolen, the value of the property and whether or not the Applicant attacked the complainants with a gun.

5. The Applicant also alleges that he was not given an opportunity to defend himself during the trial. In addition, the Applicant states that, after being denied the right to defend himself and subsequently being convicted for robbery with violence, he was still denied the opportunity to explain the reasons for his absence during the defence, contrary to Section 226(2) of the Criminal Procedure Act.

6. The Applicant further states that he was not provided with a lawyer to defend him during the trial and appeal as required by Article 13 of the Constitution of the United Republic of Tanzania and by the Universal Declaration of Human Rights, as he had been charged with the serious offence of armed robbery. This situation resulted in contravention of the principle of equality of arms. In addition, the Applicant alleges that he was not given the opportunity to make a rejoinder to the prosecution's statement during the hearing of his appeal.

III. Procedure

7. The Application was filed on 2 August 2013 and served on the Respondent by a letter dated 10 September 2013. Pursuant to the Rules of Court, by a letter dated 10 September 2013, the Application was notified to the Chairperson of the African Union Commission and through the Chairperson of the African Union Commission, to the Executive Council of the African Union and State Parties to the Protocol and requesting that any State Party to the Protocol wishing to intervene in the proceedings should do so as soon as possible, and in any case, before the closure of the written proceedings.

8. At the request of the Court, Pan African Lawyers' Union (PALU) is representing the Applicant.

9. On 11 December 2013, and following the decision of the Court taken at its 31st Ordinary Session, the Registrar reminded the Respondent

that it is yet to file a Response to the Application, that it had fifteen (15) days from receipt of the reminder within which to do so and to note the provisions of Rule 55 of the Rules of Court.

Thereafter, on 16 December 2013, the Respondent requested an extension of time to file the Response, which the Court granted by thirty (30) days.

10. The Respondent's Response dated 23 January 2014, was received at the Registry on 5 February 2014, out of time. The Court, in the interest of justice, accepted the Respondent's response out of time and served it on the Applicant by a letter of the same date and giving the Applicant thirty (30) days from receipt thereof to file his Reply.

11. At the request of the Applicant, on 7 March 2014, the Court granted the Applicant's request for extension of time to file its Reply to the Respondent's Response on or before 7 April 2014. The Applicant filed his response on 8 April 2014, within time. Pleadings were closed on 17 April 2014 after the Applicant's Reply to the Respondent's Response was duly filed.

12. During the public hearing on the matter held on 3 December 2014 at the Headquarters of the African Union in Addis Ababa, Ethiopia, the parties made oral submissions in support of their positions. The appearances were as follows:

For the Applicant:

- i. Mr Donald Deya
- ii. Ms Evelyn H. Chijarira

For the Respondent:

- i. Ms Sarah D. Mwaipopo
- ii. Ms Nkasori Sarakikya
- iii. Mr Jumanne Ramadhan Mziray
- iv. Mr Mark Mulwambo
- v. Mr Elisha Suka

13. Further, the parties were directed to provide additional documents within thirty (30) days from the date of the hearing. The Applicant was to provide a copy of the Applicant's Notice of Motion for Review of the decision of the Court of Appeal in Criminal Appeal Number 230 of 2008. The Respondent was to provide a certified copy of the record of proceedings in Criminal Appeal Number 230 of 2008 of the Court of Appeal and a certified copy of warrant of commitment on a sentence of imprisonment issued.

14. On 22 January 2015, PALU submitted the documents requested by the Court during the public hearing.

15. On 5 February 2015, the Respondent submitted to the Registrar, a certified copy of the record of proceedings at the Court of Appeal in Criminal Appeal Number 230 of 2008 and its observations on the authenticity of the copy of the Applicant's Notice of Motion for Review of the decision of the Court of Appeal in Criminal Appeal Number 230 of 2008 submitted to the Registrar by PALU.

16. On 24 February 2015, PALU objected to the Respondent's purported explanation of some of the issues arising from the record of proceedings in Criminal Application Number 230 of 2008. The Respondent did not respond to PALU's contention. The decision of the Court on this objection follows in this judgment (infra paragraphs 79-80).

IV. The Applicant's Prayers

17. In his Application dated 2 August 2013, the Applicant asks that the Court makes any orders and reliefs that it may deem fit to grant. The Applicant also requests that the Court quashes the decisions by the trial court and the Appellate courts convicting him of the offences he was charged with, acquits him and sets him free.

18. The Applicant filed the Application and subsequently, PALU started representing him.

19. In the Reply to the Respondent's Response dated 8 April 2014, filed by PALU, the prayers are that:

"The Applicant seeks the following reliefs from this Honourable Court;

- a. A Declaration that the Respondent State has violated the Applicant's rights as guaranteed under Articles 1, 3, 5, 6, 7(1), and 9(1) of the African Charter on Human and Peoples' Rights.
- b. An Order compelling the Respondent State to release the Applicant from detention.
- c. An Order for reparations.
- d. An Order compelling the Respondent State to report to this Honourable Court every six (6) months on the implementation of its decision.
- e. Any other Order or remedy that this Honourable Court may deem fit."

20. During the public hearing, the Applicant reiterated his prayers, and specifically with regard to reparations, requested that if the Court finds for the Applicant, it should schedule a public hearing on reparations.

V. The Respondent's Prayers

21. In its Response to the Application, dated 5 February 2014:

"The Respondent prays that the African Court on Human and Peoples' Rights grant the following orders with respect to the admissibility of the Application:

- i. That the Application be dismissed as it has not met the admissibility requirements stipulated under Rule 40(1-7) of the Rules of Court, Article 56 of the Charter and Article 6(2) of the Protocol.
- ii. That the Application be dismissed in accordance with Rule 38 of the Rules of Court.
- iii. That the Application has not evoked (sic) the jurisdiction of the Honourable Court.
- iv. That the costs of this Application be borne by the Applicant."

"The Respondent prays that the African Court on Human and Peoples' Rights grant the following orders with respect to the merits of the Application:

- i. That the Government of the United Republic of Tanzania has not violated the Applicant's right to be heard.
 - ii. That the Government of the United Republic of Tanzania has not violated the Applicant's right to defend himself.
 - iii. That the Government of the United Republic of Tanzania has not violated the Applicant's right to liberty.
 - iv. That all aspects of the prosecution of Criminal Case No. 321 of 1996 were conducted lawfully and the prosecution proved its case against the Applicant beyond reasonable doubt.
 - v. That there has been no delay of justice for the Applicant."
- 22.** During the public hearing the Respondent reiterated its prayers as stated in its Response to the Application.

VI. Historical and factual background to the Application

23. On 31 December 1996, the Applicant was charged with the offence of armed robbery, allegedly committed along the Kenya/Tanzania border in Rambo District. It was alleged that he stole one hundred (100) sets of clutch covers valued at Tanzania Shillings Eight Hundred Thousand (Tshs. 800,000/=), the property of Mr Elimani Maleko. He was charged with four other persons before the District Court of Rambo at Mkuu in Criminal Case Number 321 of 1996. The Applicant pleaded not guilty.

24. On 30 January 1997, the Applicant applied for bail on the grounds of ill health and this Application was heard on 31 January 1997 and granted on 5 February 1997. On 20 March 1997 when the matter was mentioned, the Applicant was absent and the Magistrate ordered the arrest of the Applicant and his sureties. On 26 March 1997, when the matter came up for mention and the Court directed the Applicant to show cause why his bail should not be forfeited, he explained that he had been sick. The Court was satisfied with this explanation and, by an order of the same date, extended his bail. The prosecution opened its case on 26 March 1997 and closed its case on 12 June 1997. The Applicant was present throughout the prosecution's case. The defence opened its case on 24 June 1997 and finalised the same on 25 June 1997.

25. When the defence opened its case on 24 June 1997, the Applicant was absent and the prosecution applied to the trial court that the trial should proceed under Section 226 of the Criminal Procedure Act and that the Applicant be arrested for jumping bail. The Application was granted and the matter proceeded under Section 226 of the Criminal Procedure Act. This provision, specifically Section 226(1) thereof, allows the trial court to proceed with a hearing that had been adjourned, if an accused person is not present when the trial resumes. On 25 June 1997, the trial court ordered that a warrant of arrest be issued against the Applicant, and his sureties be summoned to show cause why their bail bond should not be forfeited. The record shows that the Applicant had been admitted to hospital on 20 June 1997, suffering from extra *pulmonary tuberculosis* and *asthmatic statae*. He was hospitalised until 21 February 1998.

26. On 30 June 1997, judgment was delivered in the absence of the Applicant, wherein he was convicted of armed robbery and sentenced to thirty (30) years imprisonment under the Minimum Sentences Act No.1 of 1972 as amended by Miscellaneous Amendment Act No. 10 of 1989. He was also to receive twelve (12) strokes of the cane. The Applicant and the first co-accused were also ordered to pay compensation in respect of the stolen properties yet to be recovered, with a total value of Tanzania Shillings One Hundred and Fifty Thousand (Tshs.150,000/=). The Applicant commenced his sentence on 3 June 1998 and is currently serving his sentence at Karanga Central Prison at Moshi, Kilimanjaro Region.

27. The Applicant appealed against his conviction and sentence, vide Criminal Appeal Number 82 of 1998 at the High Court of Tanzania at Moshi. This appeal was dismissed on 23 March 2000. The High Court held that, as the Applicant did not appear when the case was fixed for the defence, he cannot blame the trial court for convicting him *in absentia*, on the strength of the prosecution's case. The High Court found that the trial magistrate acted properly under section 227 of the Criminal Procedure Act and that the sentence of thirty (30) years' imprisonment is the statutory minimum and therefore dismissed the appeal in its entirety. Section 227 of the Criminal Procedure Act provides as follows:

"Where in any case to which section 226 does not apply, an accused being tried by a subordinate court fails to appear on the date fixed for the continuation of the hearing after the close of the prosecution case or on the date fixed for the passing of sentence, the court may, if it is satisfied that the accused's attendance cannot be secured without undue delay or expense, proceed to dispose of the case in accordance with the provisions of section 231 as if the accused, being present, had failed to make any statement or adduce any evidence or; as the case may be, make any further statement or adduce further evidence in relation to any sentence which the court may pass: Provided that - (a) where the accused so fails to appear but his advocate appears, the advocate, subject to the provisions of this Act, be entitled to call any defence witness and to address the court as if the accused had been or is convicted, and the advocate shall be entitled to call any witness and to address the court on matters relevant to any sentence which the court may pass; and (b) where the accused appears on any subsequent date to which the proceedings may have been adjourned, the proceedings under this section on the day or days on which the accused was absent shall not be invalid by reason only of his absence."

28. Following the dismissal on 23 March 2000, of the Applicant's Appeal to the High Court of Tanzania at Moshi in Criminal Case Number 82 of 1998, the Applicant filed his Notice of Appeal at that Court of Appeal of Tanzania at Moshi on the same date. The Applicant subsequently filed his appeal on 17 April 2003, which was registered as Criminal Appeal Number 153 of 2003.

29. In order to prosecute this appeal, on 23 April 2003, the Applicant wrote to the High Court requesting for the court record of the proceedings at the High Court in Criminal Case Number 82 of 1998. On 27 January 2004, the Applicant wrote to the Court of Appeal requesting

the same, and again on 5 August 2004,¹ to the Registrar of the High Court at Moshi. On 13 September 2004, he wrote a letter to the Registrar of the Court of Appeal requesting a copy of the court record of proceedings at the High Court. On 19 October 2004, the Applicant filed a complaint with the Commission for Human Rights and Good Governance of Tanzania for failure to be furnished with copies of the court record.² On 17 June 2005, he wrote a further letter to the Registrar of the Court of Appeal regarding the delay in having his appeal heard. On 21 September 2005, after the expiry of two (2) years and five (5) months, the Applicant's appeal to the Court of Appeal, Criminal Appeal Number 153 of 2003, was heard and dismissed. At the time of the hearing of this appeal, the Applicant had not been provided with a copy of the court record. The Appeal was dismissed for being filed out of time.

30. On 31 October 2005, the Applicant made an Application to the High Court at Moshi, vide Miscellaneous Criminal Application Number 40 of 2005, for leave to file his Notice of Appeal out of time. The High Court of Tanzania at Moshi granted his Application, on 12 February 2007 and on the same date, the Applicant filed a Notice of Appeal to the Court of Appeal, being Criminal Appeal Number 217 of 2007. On 28 June 2007, and after the expiry of four (4) years and six (6) months, the Applicant received the record of proceedings in Criminal Appeal Number 82 of 1998 at the High Court of Tanzania at Moshi. On 15 October 2007, Criminal Appeal Number 217 of 200 was struck out on the basis that the Notice of Appeal was unsigned and was filed out of time.

31. On 7 February 2008, the Applicant filed Miscellaneous Criminal Case Number 3 of 2007 at the High Court of Tanzania at Moshi seeking that his Notice of Appeal be heard out of time. In the course of the proceedings for this Application, the Applicant requested to amend the Application in order to cite the proper provisions applicable and the Court granted this Application. The Court ordered that the Applicant file the amended Application before 11 June 2008. In compliance with this order, on 6 June 2008, the Applicant applied to the High Court of Tanzania at Moshi vide Amended Miscellaneous Application Number 3 of 2008, seeking leave to lodge a fresh appeal out of time. On 11 June 2008, the High Court, being satisfied that the Applicant had complied with the Order to file the amended Application, granted the Applicant leave to file the Notice of Appeal to the Court of Appeal within ten (10) days thereof. On 13 June 2008, the Applicant filed at the High Court of Tanzania at Moshi, a Notice of Appeal to the Court of Appeal. This new appeal to the Court of Appeal was filed as Criminal Appeal Number 230 of 2008.

32. On 10 July 2008, the Applicant wrote a letter to the Registrar of the Court of Appeal to inform him of the delay in the hearing of his appeal. On 2 February 2009 the Applicant wrote a letter to the District Registrar

1 This is the letter wherein the Applicant makes reference to the letters of 23 April 2003 and 27 January 2004.

2 This is deduced from the Commission's letter of acknowledgment dated 23 November 2004, of the Applicant's letter of 19 October 2004.

of the High Court of Tanzania at Moshi requesting the record of the proceedings at the High Court. On 17 March 2009, the Applicant received a copy of the court record.

33. On 29 May 2009, the Court of Appeal delivered its judgment in Criminal Appeal Number 230 of 2008, dismissing the appeal, and finding that the prosecution's case had merit, upheld the Applicant conviction and sentence.

34. On 10 June 2009, the Applicant filed a Notice of Motion for review of the decision of the Court of Appeal in Criminal Appeal Number 230 of 2008. On 4 January 2010, the Applicant wrote to the Chief Justice of the United Republic of Tanzania reminding him of his request for *pro bono* legal counsel and requesting hearing of his Application for Review.

35. Though it is not clear from the record when the Applicant first requested for *pro bono* legal counsel, on 3 September 2010, the Applicant wrote a further letter reminding the Chief Justice of his request for *pro bono* legal counsel and requesting hearing of his Application for Review.

36. On 10 January 2011 and 20 September 2011, the Applicant wrote to the Chief Justice reminding him of his request to have his Application for Review heard. On 12 July 2013, he further wrote to the Registrar of the Court of Appeal requesting that his Application for Review be included and heard at the next Court of Appeal session. The Applicant alleges that, at the time of filing this Application at the African Court on 2 August 2013, he has received "no substantive response as to the status of his review".

VII. The Preliminary Objections

37. The Respondent raises preliminary objections on issues of jurisdiction and admissibility.

A. Preliminary objections on jurisdiction

38. The Respondent contends that the Applicant's citation of Articles 5 and 34(6) of the Protocol and Rule 33 of the Rules of Court to invoke the jurisdiction of the Court is not proper as these articles only provide him standing before the Court. The Respondent argues that, therefore, the jurisdiction of the Court has not been invoked.

39. The Respondent contends further that, the Application does not refer to, or ask for, the interpretation or Application of the Charter, the Protocol or any other relevant human rights instrument ratified by the United Republic of Tanzania. The Applicant has merely listed his grievances against the Application of the Criminal Procedure Act in relation to the originating criminal case against him, being Case Number 321 of 1996.

40. The Respondent asserts that, because the Applicant is not clear in the remedies he seeks, he therefore, has not invoked the jurisdiction of the Court and the Application should be dismissed.

41. The Applicant maintains that the Court has the jurisdiction *ratione materiae* to determine this case on the basis that there are allegations of violations of the human rights of the Applicant as guaranteed under the Charter.

42. In the Reply to the Respondent's Response, the Applicant alleges violation of the obligation of Member States to give effect to the rights, duties and freedoms enshrined therein, violation of the right to equality before the law and equal protection of the law and violation of the prohibition of torture, cruel, inhuman and degrading treatment which resulted from the inordinate delay in the hearing of the Applicant's cases. The Applicant also states that his right to personal liberty and protection from arbitrary arrest have been violated by his continued detention occasioned by the delay in the hearing of his cases. He asserts that his right to a fair trial was violated because he was not given the opportunity to present his defence, he was not provided *pro bono* legal aid despite being charged with a serious offence and that there were systematic and prolonged delays in his appeals and his Application for review at the Court of Appeal. The Applicant maintains that these delays were compounded by the dilatory conduct of the state in providing the record of proceedings of the trial courts which hampered his ability to file his appeal. The Applicant maintains that this also violated his right to receive information and his right to freedom of expression.

43. The Applicant also argues that, the Court has jurisdiction *ratione personae* and that he is entitled to file an Application before the Court on the basis that he is a citizen of the United Republic of Tanzania, and the Respondent State has ratified the Protocol and filed a declaration allowing direct access for individuals to file cases before this Court.

44. The Applicant further asserts that, the Court has held a similar view on its jurisdictional requirements in Application Number 001/2012 *Frank David Omary and Others v The United Republic of Tanzania* and Application Number 003/2012 *Peter Joseph Chacha v The United Republic of Tanzania*.

B. Jurisdiction *ratione materiae*

45. The Court considers that the Respondent's objection that "the Court lacks jurisdiction because the Applicant improperly cites Articles 5 and 34(6) of the Protocol and Rule 33 of the Rules of Court and that the Articles only provide him standing before the Court" lacks merit. The Court finds that as long as the rights allegedly violated are protected by the Charter or any other human rights instrument ratified by the State concerned, the Court will have jurisdiction over the matter. The Court first elaborated on this in Application Number 001/2012 *Frank David Omary and Others v United Republic of Tanzania* and thereafter, in Application Number 003/2012 *Peter Joseph Chacha v United Republic of Tanzania*. The Court, in the above cases held that, the substance of the complaint must relate to rights guaranteed by the Charter or any other human rights instrument ratified by the State concerned. It is not necessary that the rights alleged to have been violated are specified in the Application.

46. In any event, in the instant case, the Applicant's Reply to the Respondent's Response specifies the rights guaranteed by the Charter alleged to have been violated (*supra* paragraph 42).

47. The Court finds that the Applicant's Application states facts which relate to human and peoples' rights protected under the Charter, and therefore holds that it has jurisdiction *ratione materiae*.

C. Jurisdiction *ratione personae*

48. Although the parties raised an issue purportedly relating to the Court's jurisdiction *ratione personae*, the Court does not consider this to be an objection on its jurisdiction *ratione personae*. The Respondent is a State Party to the Protocol, which has also made the declaration in terms of Article 34(6) of the Protocol accepting the seizure of the Court by an individual. The Respondent deposited its instrument of ratification of the Protocol on 10 February 2006 and deposited the declaration required under 34(6) of the Protocol on 29 March 2010. Though the alleged violations occurred before the deposit of the instruments of ratification and declaration aforementioned, the Court finds that it has jurisdiction *ratione personae*.

D. Preliminary objections on admissibility

49. The Respondent raises preliminary objections on admissibility based on different components of the requirements of Article 56 of the Charter. These are on incompatibility of the Application with the Charter and the Constitutive Act of the African Union, on non-exhaustion of local remedies and in the alternative thereto, that the Application has not been filed within a reasonable time from when local remedies were exhausted.

i. Incompatibility of the Application with the Charter and the Constitutive Act of the African Union

50. The Respondent contends that the Application does not comply with the Constitutive Act of the African Union and the Charter as it does not address issues compatible with the Charter or the principles enshrined in the Charter of the Organisation of African Unity and further, that no provisions of the African Charter have been referenced in the Application.

51. The Applicant avers that he has met the requirements of Article 56(2) of the Charter which stipulate that Applications must be compatible thereto. This is because, the Court has decided, in Application Number 003/2012 *Peter Joseph Chacha v The United Republic of Tanzania* that, so long as the rights alleged to have been violated are contained in the Charter, they need not be specifically cited in the Application.

52. Regarding the Respondent's objection to the Application on the grounds of its incompatibility with the Charter of the Organization of African Unity, now the Constitutive Act of the African Union, the Court notes that this argument lacks merit. The Constitutive Act of the African Union provides that one of the objectives of the African Union shall be

to promote and protect human and peoples' rights in accordance with the Charter and other relevant human rights instruments. In addition, the Court finds that the Applicant's Application states facts which relate to human and peoples' rights protected under the Charter. Moreover, the Court has decided on this issue in Application Number 001/2012 *Frank David Omary and Others v United Republic of Tanzania* and Application Number 003/2012 *Peter Joseph Chacha v United Republic of Tanzania*. In the latter case, the Court found that " ... the Applicant's Application states facts which revealed a *prima facie* violation of his rights; furthermore, the Court finds that the Application relates to human and peoples' rights protected under the Charter, therefore the requirements of Article 3(1) of the Protocol and Article 56(2) of the Charter have been met".

ii. Non-exhaustion of local remedies

53. The Respondent states that the Application has not been filed after exhausting local remedies. The Respondent states that the Applicant should have waited for the 5 June 2009³ Notice of Motion to Review the Court of Appeal's decision in Criminal Appeal Number 230 of 2008 to be heard. The Respondent further states that the Applicant could have also instituted a Constitutional Petition before the High Court of Tanzania vide the Basic Rights and Duties Enforcement Act, 1994, regarding the alleged violation of his rights, which form the basis of his Application before this Court.

54. The Applicant avers that local remedies were fully exhausted when the Court of Appeal of Tanzania, the highest court of the land, finally and in its entirety, dismissed his appeal on 29 May 2009.

55. The Applicant avers that one need not file an Application for review so as to exhaust local remedies. He also states that the assertion of the Respondent State that the Applicant should have filed a constitutional petition to challenge the delay in the hearing of the review is both unnecessary and redundant as it imposes a requirement to utilise a procedure that falls outside the scope of the rule requiring exhaustion of local remedies.

56. On the preliminary objection that the Applicant did not exhaust local remedies, the Court finds that the Applicant went through the required criminal trial process up to the highest Court in the land and finally applied for review to the Court of Appeal. In a case involving the Respondent State before the African Commission, the Respondent State maintained that the Court of Appeal is the highest Court in the land.⁴ Additionally, the procedures followed on local remedies were unduly prolonged.

3 The Notice of Motion for Review in the matter of Criminal Appeal Number 230 of 2008 in the Court of Appeal of Tanzania. It was signed by the Applicant by way of thumbprint on 5 June 2009 and lodged in the Registry at Dar es Salaam on 10 June 2009.

4 See Communication 333/06 *Southern Africa Human Rights NGO Network and Others v Tanzania* 28th Activity Report November 2009- May 2010 para 29.

57. The Court finds that there were systematic and prolonged delays in the determination of his appeal to the Court of Appeal. Following the dismissal, on 23 March 2000 of the Applicant's appeal to the High Court, being Criminal Appeal Number 82 of 1998, it was only on 17 April 2003 that his Appeal to the Court of Appeal was registered. There were also unreasonable delays in providing the Applicant with the record of proceedings of the appeal heard by the High Court, (Criminal Appeal Number 82 of 1998), which he required to prosecute his Appeal at the Court of Appeal. A period of two (2) years and five (5) months lapsed between 23 April 2003, when the Applicant first requested for this record of proceedings, and 21 September 2005, when the appeal at the Court of Appeal was heard and dismissed, for being filed out of time. The Court notes that by the time the Court of Appeal dismissed his appeal, the Applicant was yet to be provided with the record of the proceedings of Criminal Appeal Number 82 of 1998.

58. The Applicant then filed a Miscellaneous Application at the High Court, on 31 October 2005, seeking leave to file his Notice of Appeal to the Court of Appeal, out of time. Once this Application was granted on 12 February 2007, his new appeal to the Court of Appeal was registered on the same date, as Criminal Appeal Number 217 of 2007. It was only after the filing of this second appeal to the Court of Appeal that, on 28 June 2007, four (4) years and six (6) months after first requesting for the record of proceedings of the appeal at the High Court (Criminal Appeal Number 82 of 1998), the Applicant received the record. However, on 15 October 2007, the Court of Appeal struck out Criminal Appeal Number 217 of 2007 on the basis that the Notice of Appeal was unsigned and was filed out of time.

59. On 7 February 2008, the Applicant filed a Miscellaneous Application at the High Court seeking leave to file his Appeal out of time. This Application was subsequently granted and on 13 June 2008, the Applicant filed a new appeal to the Court of Appeal vide Criminal Appeal Number 230 of 2008. This appeal was dismissed on 29 May 2009 on the basis that the prosecution had proven the case against the Applicant in the original criminal case. The Applicant represented himself throughout these processes, despite the fact that the charges against him were serious offences and carried a heavy custodial sentence and his requests for *pro bono* legal counsel were not responded to.

60. Regarding the Respondent's contention that the Applicant should have applied for a constitutional petition to vindicate his rights under the Basic Rights and Duties Enforcement Act, the Court finds that the Applicant was not under an obligation to do so. The alleged non-conformity by the trial court, with the due process, with its bundle of rights and guarantees, formed the basis of his appeals to the High Court and the Court of Appeal. The Court of Appeal decided on the Applicant's appeal with finality therefore he accessed the highest Court in the Respondent State.

61. Furthermore, the Court notes that if in proceedings in a subordinate court, basic rights are alleged to have been contravened, an Application is made under the Basic Rights and Duties Enforcement Act, to the

High Court to be decided by a three -Judge Bench and an appeal therefrom lies to the Court of Appeal.⁵

62. In the instant case, once the Court of Appeal of Tanzania decided on the Applicant's appeal, it would have been unreasonable to require him to lodge a fresh Application regarding his right to a fair trial, to the High Court, which is a court lower than the Court of Appeal of Tanzania.

63. Regarding the Respondent's contention that the Applicant should have pursued the Application for review to its conclusion, the Court finds that this was neither necessary nor mandatory. The final appeal in criminal trials lies, as of right, to the Court of Appeal, which the Applicant has proved that he accessed. In addition, his appeal to the Court of Appeal was based on allegations of violations of his basic right to a fair trial, which the Court of Appeal also decided on,⁶ therefore, it was not necessary for him to file a separate constitutional petition to the High Court vide, the procedure set out in the Basic Rights and Duties Enforcement Act, based on the alleged violation of his basic right to a fair trial. The Court also finds that an Application for review is an extraordinary remedy because the granting of leave by the Court of Appeal to file an Application for review of its decision is based on specific grounds⁷ and is granted at the discretion of the Court.⁸

64. The Court is persuaded by the reasoning of the African Commission in *Southern African Human Rights NGO Network v Tanzania*,⁹ where it stated that, the remedies that need to be exhausted are ordinary remedies.

65. In view of this, the Court finds that the Respondent's assertion that the Applicant should have filed a Constitutional Petition to challenge the

5 Basic Rights and Duties Enforcement Act, Act Number 33 of 1994, Sections 9 and 10.

6 Court of Appeal of Tanzania at Arusha, Criminal Appeal Number 230 of 2008 *Alex Thomas v The Republic* Judgment of 29 May 2009.

7 See Section 66(1) of the Court of Appeal Rules of the Court of Appeal of Tanzania, which provides:

"The Court may review its judgment or order, but no Application for review shall be entertained except on the following grounds -

- (a) the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice; or
- (b) a party was wrongly deprived of an opportunity to be heard;
- (c) the court's decision is a nullity; or
- (d) the court had no jurisdiction to entertain the case; or
- (e) the judgment was procured illegally, or by fraud or perjury."

8 *Karim Karia v Republic* [Criminal Application N[umber] 4 of 2007 Court of Appeal of Tanzania at Dodoma quoting the case of *Tanzania Transcontinental Co. Ltd v Design Partnership Ltd (Civil) Application N[umber] 62 of 1996*.

9 Communication 333/2006 28th Activity Report November 2009- May 2010, para 64. The Commission held that: "Furthermore, the 'remedies' referred to in Article 56(5) include all judicial remedies that are easily accessible for justice. The Commission in *INTERIGHTS and Others v Mauritania*, declared: 'The fact remains that the generally accepted meaning of local remedies, which must be exhausted prior to any communication/complaint procedure before the African Commission, are ordinary remedies of common law that exist in jurisdictions and normally accessible to people seeking justice.'"

delay in the hearing of the Application for Review, would have been impractical and an extra-ordinary measure that was not required of the Applicant. Since the Applicant's appeal was dismissed by the Court of Appeal of Tanzania, the Applicant therefore exhausted local remedies.

iii. The Application has not been filed within a reasonable time after exhaustion of local remedies.

66. In the alternative, and without prejudice to the Respondent's argument that the Application is inadmissible for non-exhaustion of local remedies, the Respondent argues that the Application has not been filed within a reasonable time vis-a-vis his Notice of Motion of 5 June 2009, to Review the Court of Appeal's decision in Criminal Appeal Number 230 of 2008. This is because three (3) years and almost three (3) months have lapsed since this Notice of Motion was filed. The Respondent submits that the "reasonable period; specified in the Charter for filing Applications after exhaustion of local remedies should be set at six months in line with developments in international human right; jurisprudence and considering this, the Applicant has filed his Application out of time". The Respondent maintains that, by these standards, the Applicant would still be out of time for filing the Application, if time was reckoned from 20 September 2011, being the date of the Applicant's correspondence to the Chief Justice, reminding the Chief Justice of the Application for Review of the judgment of the Court of Appeal.

67. The Respondent concludes that on this basis, since the Application has failed to meet some of the conditions of admissibility, it should be declared inadmissible and be dismissed with costs.

68. The Applicant contends that this Application was filed within a reasonable period following the exhaustion of local remedies, given the circumstances and position of the Applicant, being a lay, indigent and incarcerated person.

69. The Applicant contends that, without prejudice to the above, should the Court consider that the period from the exhaustion of local remedies to the filing of the Application before this Court was unreasonably prolonged, there are sufficient reasons to explain the delay.

70. The Applicant contends that he embarked on a reasonable pursuit to have his complaints disposed of within his national jurisdiction by filing an Application for Review of the decision of the Court of Appeal.

71. In addition, the Applicant contends that he repeatedly wrote several letters to the Chief Justice and Registrar of the Court of Appeal requesting to have his Application for Review heard. The last letter was sent to the Registrar of the Court of Appeal on 12 July 2013 and the Applicant seized this Court on 2 August 2013. The multiple requests to agents of the Respondent State went unanswered. It is the Applicant's strong contention that he gave reasonable time to the Respondent State to finally remedy the violation of his rights.

72. The Applicant, in support of the above facts, relies on the jurisprudence of the African Commission which has held, in *Southern Africa Human Rights NGO Network and Others v Tanzania*, that

awaiting responses on Applications or judicial reviews are sufficient grounds to explain a delay in seizing an international body. It is the contention of the Applicant that the jurisprudence of the African Commission on the matter forms a highly persuasive source of law and that this Court be inclined to reach the same decision.

73. On the preliminary objection that the Applicant did not file the Application within a reasonable time from the time local remedies were exhausted, the Court finds that in considering whether the Application was filed within a reasonable time, time should have started running from 29 May 2009 when the Court of Appeal dismissed the Applicant's appeal. However, the Respondent deposited its declaration under Article 34(6) of the Protocol on 29 March 2010, therefore the time should be reckoned from that date. This Court has, in Application 013/2011 *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo & The Burkinabe Movement on Human and Peoples' Rights v Burkina Faso* (Ruling on Preliminary Objections of 21 June 2013) set out the principle that, "the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case by case basis".

74. Considering the Applicant's situation, that he is a lay, indigent, incarcerated person, compounded by the delay in providing him with Court records, and his attempt to use extraordinary measures, that is, the Application for review of the Court of Appeal's decision, we find that these constitute sufficient grounds to explain why he filed the Application before this Court on 2 August 2013, being three (3) years and five (5) months after the Respondent made the declaration under Article 34(6) of the Protocol. For these reasons, the Court finds that the Application has been filed within a reasonable time after the exhaustion of local remedies as envisaged by Article 56(5) of the Charter. The Court therefore overrules this preliminary objection and dismisses the same.

E. Respondent's objection to the alleged introduction of new issues by the Applicant

75. Following the Respondent's Response dated 5 February 2014, to the Application, the Applicant filed, in conformity with the deadline provided by the Court, a Reply dated 8 April 2014 responding to the Respondent's Response. The Applicant sought the reliefs listed in paragraphs 17, 19 and 20 above.

76. During the public hearing, the Respondent raised an objection to the Applicant's Reply to the Respondent's Response. The Respondent contended that "... the Rejoinder has raised new issues, which were not part of the Application, being issues related to both jurisdiction and admissibility of the case." The Respondent maintained that, "a Rejoinder is only meant to address and answer issues raised in the Reply and not to raise new issues. However, the so-called Rejoinder by the Applicant is a fresh Application, which raises new allegations." The Respondent further stated that, this results in an unfair situation and is contrary to the principle of equality of arms. The Respondent also

stated that the “Court should only address itself on the issues raised in the Application and not the issues raised in the purported Rejoinder. This is especially as there is no provision for a Sur-Rejoinder in the Rules of Court.”

77. The position of the Applicant as stated during the public hearing is that “there is no allegation that the Applicant makes pursuant to having Counsel assigned to him that the Applicant did not himself make, albeit without the sophistication that comes with having Counsel.” In other words, the Applicant’s rejoinder merely refined the Applicant’s Application which followed from his being represented by Counsel. The Applicant stated that “ ... in total, the fourteen pages that the Applicant, on his own, without the benefit of Counsel filed, contains all the allegations and all the complaints that he has made that are merely reiterated in the Rejoinder. In fact, apart from perhaps a change of language, the only thing the Rejoinder articulates that was not there in the earlier fourteen pages, are the specific Articles of the African Charter alleged to have been violated”.

78. The Court notes that the Applicant’s Reply to the Respondent’s Response largely restated the Applicant’s position as enunciated in the Application. Counsel for the Applicant merely links the alleged violations with the relevant articles of the Charter. The Application alluded to alleged violations of the right to fair trial as set out in Article 7 of the Charter and Counsel merely expressly stated the same in the Reply. The Reply to the Respondent’s Response alleges violations of Articles 1, 3, 5, 6, 7(1) and 9(1) of the Charter. The Court finds that the Applicant’s Reply to the Respondent’s Response linked more precisely with the Charter, the rights that the Applicant alleged were violated, and that it did not introduce new issues.

F. Applicant’s objection to the Respondent’s explanations relating to the Record of Proceedings in Criminal Appeal Number 230 of 2008

79. On 22 January 2015, PALU submitted the documents requested by the Court during the public hearing. On 5 February 2015, the Respondent submitted to the Registrar, a certified copy of the record of proceedings at the Court of Appeal in Criminal Appeal Number 230 of 2008 and its observations on the authenticity of the copy of the Applicant’s Notice of Motion for Review of the decision of the Court of Appeal in Criminal Appeal Number 230 of 2008 submitted to the Registrar by PALU. On 24 February 2015, PALU objected to the Respondent’s purported explanation of some of the issues arising from the record of proceedings in Criminal Appeal Number 230 of 2008. This was on the basis that by doing so, the Respondent was analysing freshly, both its own and the Applicant’s arguments and that the Respondent is providing information and arguments to strengthen its defence. PALU urged that these explanations be disregarded as they were not included in the prior written and oral submissions. The Respondent did not respond to PALU’s contention.

80. The Court did not direct that the parties provide explanations regarding the documents to be submitted after the public hearing. In

this regard therefore, the Respondent was merely required to submit the documents as directed. An examination of the purported explanation by the Respondent of the record of proceedings in Criminal Appeal Number 230 of 2008 shows that this indeed amounts to fresh arguments by the Respondent, on its case and on the Applicant's submissions. The pleadings having been closed, the Parties could not make fresh arguments. Therefore, the said explanation, provided by the Respondent regarding the record of proceedings in the Appeal at the Court of Appeal will be disregarded and will not affect the decision of the Court on the merits of the Application.

G. The Merits

i. The alleged denial of the right to be heard and to defend oneself

81. The Applicant alleges that he was denied the right to be heard and to defend himself because the trial court proceeded to hear the case in his absence. During the trial, the Applicant alleges that he was admitted in hospital for eight (8) months, suffering from *pulmonary tuberculosis* and *asthmatic statae*. He also alleges that even after he was convicted *in absentia*, he was also not allowed to provide the trial court with reasons for his absence, pursuant to section 226(2) of the Criminal Procedure Act which reads: "If the court convicts the accused person in his absence, it may set aside the conviction, upon being satisfied that his absence was from causes over which he had no control and that he had a probable defence on the merit."

82. The Respondent contends that section 226(1) of the Criminal Procedure Act provides for circumstances in which a court can proceed with a hearing and convict and sentence an accused person *in absentia*. The Respondent puts the Applicant to strict proof regarding this allegation. Section 226(1) of the Criminal Procedure Act provides that:

"If at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court in which the order of adjournment was made, it shall be lawful for the court to proceed with the hearing or further hearing as if the accused were present; and if the complainant does not appear, the court may dismiss the charge and acquit the accused with or without costs as the court thinks fit."

83. In the Respondent's written submissions to the High Court at Moshi, in respect of Criminal Appeal Number 82 of 1998, the Respondent conceded that, if the record does not show compliance with Section 226(2) of the Criminal Procedure Act, which requires that even after being tried *in absentia*, the Applicant (who was the Appellant in that Appeal) should have been allowed an opportunity to provide the Court with reasons for his absence, then the Applicant should be granted this opportunity.

84. The Respondent's submission before this Court on this issue is to maintain that the Applicant was absent during the defence case at the trial court and that Section 226(1) of the Criminal Procedure Act was properly applied in proceeding with the trial.

85. It is also the Applicant's allegation that the court did not admit his rejoinder in the appeal before the High Court. The Respondent's position is that it denies these allegations and the Applicant is put to strict proof thereof.

86. The Court observes that Article 7(1)(c) of the Charter is relevant in this regard. It provides that: "Every individual shall have the right to have his cause heard. This comprises: (a) ... (b) ... (c) the right to defense, including the right to be defended by counsel of his choice"

87. Article 7 of the Protocol provides that: "The Court shall apply the provision of the Charter and any other relevant human rights instruments ratified by the State concerned."

88. In view of the fact that the Respondent acceded to the International Covenant on Civil and Political Rights (ICCPR) on 11 June 1976 and deposited its instrument of accession on the same date, in accordance with Article 7 of the Protocol, the Court can interpret Article 7(1)(c) of the Charter in light of the provisions of Article 14(3)(d) of the ICCPR.

89. Article 14(3)(d) of the ICCPR is more elaborate than Article 7(1)(c) of the Charter and it reads:

"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) . . .
- (b) . . .
- (c) . . .
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."

90. The above mentioned provision of the ICCPR, Article 14(3)(d) contains three distinct guarantees. First, the provision stipulates that accused persons are entitled to be present during their trial. Second, the provision refers to the right of the accused to defend himself or herself, whether in person or through legal assistance of their own choosing. Third, the provision guarantees the right to have legal assistance assigned to accused persons whenever the interests of justice so require, and without payment by them in any such case, if they do not have sufficient means to pay for it.

91. Article 7(1)(c) of the Charter and Article 14(3)(d) of the ICCPR required that the Applicant be present to defend himself. The Applicant was not physically able to defend himself during the hearing of Criminal Case Number 321 of 1996 as he had been granted bail by the trial magistrate on grounds of ill health and, according to the trial record, had been admitted to hospital at the time the defence was making its case on 24 and 25 June 1997.

92. It is worthy to note that, prior to the defence case, the Applicant was not present in Court during the mention of the case on two occasions, that is, on 20 and 26 March 1997. With regard to both occasions, when the Applicant later presented himself to Court, the magistrate was

satisfied with his explanation that he failed to attend court because of his ill health. During the trial of the case, in the Applicant's absence, despite the magistrate being aware of the Applicant's sureties, he did not enquire from them as to the Applicant's whereabouts.

93. Given the serious nature of the offence that the Applicant had been charged with, the fact that the magistrate had granted the Applicant bail on the basis of his serious ill health and that he was unrepresented, warranted the Court to have more consideration for the Applicant and adjourn the proceedings to give him the opportunity to defend himself.

94. It is also important to note that, from the record, the Applicant was never prosecuted for jumping bail. This would suggest that the court was aware of the reasons for his absence during the trial at the time of his defence. It would, in the circumstances have been prudent for the trial magistrate to make an enquiry on the whereabouts of the Applicant, especially because, from the trial record, the Court had knowledge of the Applicant's ill health.

95. The Court is fortified in its reasoning by the decisions of the African Commission and the European Court of Human Rights and the Inter-American Court of Human Rights, which are courts of similar jurisdiction.

96. The African Commission considered the right to defend oneself, in *Avocats Sans Frontieres (on behalf of Gaetan Bwampamye) v Burundi* and held that the right implies an accused's presence at each stage of the proceedings.¹⁰

97. In the case of *Colozza v Italy*,¹¹ the European Court of Human Rights held that the right to a hearing in one's presence is part of the right to a 'fair hearing' in Article 6(1) of the European Convention on Fundamental Rights and Freedoms (the European Convention).¹² The Court notes that Article 6 of the European Convention is similar to Article 7 of the Charter.¹³

98. In a similar vein, the Inter-American Court of Human Rights has found violations of Article 8 of the American Convention on Human Rights which provides for the right to a fair trial, similar to the provisions of Article 7 of the Charter. Of note is the *Case of Suarez-Rosero v Ecuador* where the Inter-American Court of Human Rights affirmed the minimum guarantees to which every person is entitled under Article

10 Communication 231/99 14th Activity Report 2000-2001 para 28.

11 Application No. 9024/80 A 89 (1985) 7 European Human Rights Reports 516.

12 In that case, the European Court of Human Rights stated that "Although this is not expressly mentioned in paragraph 1 of Article 6 (art. 6-1), the object and purpose of the Article taken as a whole show that a person 'charged with a criminal offence' is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 (art. 6-3-c, art. 6-3-d, art. 6-3-e) guarantee to "everyone charged with a criminal offence" the right "to defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court", and it is difficult to see how he could exercise these rights without being present."

13 Application No. 9024/80 *Colozza v Italy* A 89 (1985) 7 *European Human Rights Reports* 516 para 27.

8(2)(c), (d) and (e) of the American Convention on Human Rights, with full equality.¹⁴

99. In the circumstances, the Court finds that the Applicant was denied the right to be heard and to defend himself in respect of Criminal Case Number 321 of 1996.

ii. The alleged inordinate delay in the appellate and review proceedings

100. The Applicant alleges that there has been an inordinate delay in the hearing or determination of his Notice for Review of the judgment of the Court of Appeal.

101. The Respondent states that the alleged delays in the Applicant's Appeals have been caused by the Applicant and that he has been afforded ample opportunity to keep pursuing his appeal. The Respondent avers that the Applicant even received guidance from the Court on how to seek extension of time to file his Notice of Appeal out of time. The Respondent maintains that their records do not show that the Applicant filed any Application for review.

102. The applicable law in this regard is Article 7(1)(d) of the Charter which provides for "The right to be tried within a reasonable time by an impartial court or tribunal." In determining whether this right has been violated, the Court has to assess whether the trial was concluded within a reasonable time. The standards to be applied in this regard have been set out in jurisprudence.

103. The African Commission has found that the right to be tried by an impartial tribunal within a reasonable time is one of the cardinal principles of the right to a fair trial¹⁵ and that the undue prolongation of the case at the appellate level is contrary to the letter and spirit of Article 7(1)(d) of the African Charter.¹⁶

104. Similarly, the Inter-American Court of Human Rights has elaborated on the principle of reasonable time, as set forth in Article 8(1) of the American Convention on Human Rights, which is similar to Article 7(1)(d) of the Charter.¹⁷ In doing so, the Inter-American Court

14 Judgment of 12 November, 1997 (Merits) paragraph 82. These guarantees include "[a]dequate time and means for the preparation of his defense [t]he right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; [and] the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law [.]"

15 Communication 301/05 *Haregewoin Gebre-Sellaise & Institute for Human Rights and Development in Africa (on behalf of former Dergue officials) v Ethiopia* decision of 7 November 2011 para 215.

16 Communication 199/97 *Odjouriby Cossi Paul v Benin* (17th Activity Report 2003-2004) para 28.

17 *Case of Suarez-Rosero v Ecuador* Judgment of 12 November 1997 (Merits) para 72. See also *Case of Ximenes-Lopes v Brazil*, 4 July 2006, IACHR Series C No 149, para 196; and *Case of the Ituango Massacres v Colombia*, 1 July 2006, IACHR Series C No 148 para 289, *Case of Baldeon Garcia v Peru*, IACHR Judgment of 6 April 2006, para 15.

has adopted the approach of the European Court of Human Rights in this regard, in respect of which the latter Court has laid out three elements which should be taken into account to establish the fairness of the time incurred in judicial proceedings. These are: a) the complexity of the matter, b) the procedural activities carried out by the interested party, and c) the conduct of judicial authorities.¹⁸

105. In the instant Application, the Court finds that there was no inordinate delay in the hearing of the appeal to the High Court as it was filed on 8 September 1998 and dismissed on 24 March 2000, one (1) year and seven (7) months after the appeal was filed.

106. The Court also finds that there was inordinate delay with regard to the hearing of the appeal at the Court of Appeal. Following the dismissal of the Applicant's appeal to the High Court at Moshi in Criminal Case Number 82 of 1998 on 23 March 2000, the Applicant commenced what would turn out to be a lengthy process of filing an appeal at the Court of Appeal of Tanzania.

107. The chronology of the Applicant's actions in this regard has already been set out in paragraphs 28 to 33 of this judgment. It was only on 6 June 2008, when the Applicant's appeal, was finally deemed properly filed before the Court of Appeal. This amounted to a period of eight (8) years and three (3) months of attempting to file an appeal at the Court of Appeal.

108. The Applicant's previous attempts to file the appeal failed due to the lack of court records, which the Applicant consistently requested for, but was not provided with. Furthermore, being a lay, indigent and incarcerated person, the Applicant filed Notices of Appeal which were dismissed on the ground that they were procedurally defective for being unsigned or filed out of time. The Applicant could not have proceeded with his appeal without the Court record, therefore the Respondent's contention that the delays in the appeals were caused by the Applicant lacks substance.

109. It was the responsibility of the Courts of the Respondent to provide the Applicant with the Court record he required to pursue his appeal. Failure to do so and then maintain that the delay in the hearing of the Applicant's appeal was the Applicant's fault is unacceptable. The Applicant's case was not a complex one, the Applicant made several attempts to obtain the relevant records of proceedings but the judicial authorities unduly delayed in providing him with these records.

110. Regarding the Applicant's Application for review and whether it contributed to the inordinate delay of hearing the Applicant's matters, the Court considers this to be moot. This is because the Court has found that there was an inordinate delay in the hearing of the Applicant's appeal by the Court of Appeal emanating from the original Criminal Case Number 321 of 1996.

¹⁸ See ECHR *Ruiz Mateos v Spain* Judgment of 23 June 1993, Series A No 262, para 30.

iii. The alleged denial of legal aid

111. The Applicant alleges that his right to free legal assistance was violated when he was denied legal aid despite being a lay, indigent and incarcerated person, having been charged with a serious offence.

112. The Applicant states that Section 3 of the Legal Aid (Criminal Proceedings) Act places a positive obligation on the certifying authority to make a determination to grant legal aid where it is desirable, in the interests of justice, or where the accused does not have the means to retain legal aid. The Applicant further states that there is no requirement under the Act stipulating that the accused must request legal aid in order for it to be granted to him or her. He states that his right to *pro bono* legal assistance was and continues to be violated to date, as he has still not been provided with legal aid regarding his Notice for Review, despite repeated requests.

113. The Respondent contends that the Applicant is put to strict proof regarding his allegation that he was not given free legal counsel by the State in any of his cases, which contributed to his various convictions by the Court and that he should prove that he requested for such assistance and that he is indeed an indigent person.

114. The relevant provision of the Charter in this regard is Article 7(1)(c) which has been previously set out. As stated earlier, even though Article 7(1)(c) of the African Charter does not specifically provide for legal aid, the Court can, in accordance with, Article 7 of the Protocol, apply this provision in light of Article 14(3)(d) of the ICCPR. Article 14(3)(d) of the ICCPR provides for one to be provided legal assistance where the interests of justice so require and for such assistance to be provided free of charge where one is unable to pay for the same.

115. In view of the Respondent having acceded to the ICCPR, it was enjoined to provide the Applicant with legal aid, given the serious nature of the charges against him and the potential sentence he faced if convicted.

116. The Court is fortified in this position by jurisprudence of the African Commission, which also applies and interprets the Charter, the European Court of Human Rights, which is a Court of similar jurisdiction and applies provisions similar to those in the Charter, being Article 6(3)(c) of the European Convention and the Human Rights Committee which applies Article 14(3)(d) of the ICCPR.

117. The African Commission has, in Communication 231/99 *Avocats Sans Frontieres (on behalf of Gaetan Bwampamye) v Burundi* elaborated on this provision in relation to the right to legal assistance.¹⁹

¹⁹ Communication 231/99, para 30, 14th Activity Report 2000 - 2001. "The Commission emphatically recalls that the right to legal assistance is a fundamental element of the right to fair trial. More so where the interests of justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case."

118. The European Court has identified four factors that should be taken into account, either severally or jointly, when determining if the "interests of justice" necessitates free legal aid, namely:

- (i) The seriousness of the offence;
- (ii) The severity of the potential sentence;
- (iii) The complexity of the case and;
- (iv) The social and personal situation of the defendant.²⁰

119. In *Benham v The United Kingdom*²¹ the Applicant had been charged with non-payment of a debt and faced a maximum penalty of three (3) months in prison. The European Court held that this potential sentence was severe enough that the interests of justice demanded that the Applicant ought to have benefited from legal aid. In *Salduz v Turkey*, the Court held that legal aid should be available for people accused or suspected of a crime, irrespective of the nature of the particular crime and that legal assistance is particularly crucial for people suspected of serious crimes.²²

120. The Court draws inspiration from the jurisprudence of the Human Rights Committee on the interpretation and Application of Article 14(3)(d) of the ICCPR. This is with respect to *Anthony Currie v Jamaica*, whose circumstances are similar to those of the Applicant in the case before this Court, as they both raised issues of compliance with constitutional guarantees of their rights to fair trial in their criminal trials and appeals. In this communication, the Human Rights Committee held that Article 14(3)(d) of the ICCPR requires the provision of legal aid in the course of criminal proceedings, where the interests of justice so require.²³

121. The African Commission has elaborated on the question of legal assistance in the '*Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*' which it adopted in 2003. The guidelines state that an accused person or a party to a civil case has a right to have free legal assistance, where the interest of justice so require or if he is indigent. The guidelines state that, in criminal matters, whether an accused should be provided free legal assistance in the interests of justice is to be determined by the seriousness of the offence and the severity of the sentence. The *Lilongwe Declaration on Accessing Legal*

20 *Benham v United Kingdom*, ECtHR, Judgment of 10 June 1996, para 59; *Quaranta v Switzerland*, ECtHR, Judgment of 24 May 1991, para 33; *Zdravka Stanev v Bulgaria*, ECtHR, Judgment of 6 November 2012, para 38; *Talat Tunc v Turkey*, ECtHR, Judgment of 27 March 2007, para 56; *Prezec v Croatia*, ECtHR, Judgment of 15 October 2009, para 29. *Biba v Greece*, ECtHR, Judgment of 26 September 2000, para 29.

21 Application No 19380/92, Judgment of 10 June 1996 (Grand Chamber).

22 Application No. 36391/02, *Salduz v Turkey*, Judgment of 27 November 2008 (Grand Chamber) para 54.

23 Communication Number 377/89 paragraph 13.2. "The author has claimed that the absence of legal aid for the purpose of filing a constitutional motion itself constitutes a violation of the Covenant. The Committee notes that the Covenant does not contain an express obligation as such for a State to provide legal aid for individuals in all cases but only, in accordance with Article 14(3)(d), in the determination of a criminal charge where the interests of justice so require".

Aid in the Criminal Justice System in Africa goes further to require that legal aid programmes should include all stages of the criminal process from investigation to appeals and all proceedings brought to ensure the protection of human rights.²⁴ The Court notes that the Guidelines and Declaration are in line with the jurisprudence elaborated.

122. In addition, the situation in the United Republic of Tanzania is that the law governing the provision of legal aid is the Legal Aid (Criminal Proceedings) Act, 1969. Section 3 thereof requires an officer presiding over judicial proceedings to determine if an accused person should, in the interests of justice, get legal aid in the preparation and conduct of his defence or appeal and if such a person has insufficient means to obtain such aid, the officer should certify that the person ought to have such legal aid. Once it is so certified, the Registrar shall, as far as practicable assign to the accused person, an advocate for that purpose. The Court observes that the Court of Appeal of Tanzania has held that this provision, read together with Section 310 of the Criminal Procedure Act provides for the right of accused persons to get legal aid, the right to be informed of that right and that failure to so inform an accused person will render a trial a nullity.²⁵

123. In conclusion, the Court finds that, the Applicant was entitled to legal aid and he need not have requested for it. The Court notes that even after requesting for it, his request was not granted. The Applicant was charged with the offence of armed robbery, which is a serious offence and which carries a minimum sentence of thirty (30) years imprisonment. He was unrepresented and of ill health, which occasioned him to be absent during the presentation of his defence. Under these circumstances, it was desirable and in the interests of justice for the courts of the Respondent State to have provided the Applicant with legal aid.

124. In the instant case, the relevant factors that the Court finds should have been borne in mind in the determination of the provision of legal aid to the Applicant, are, the gravity of the offences that the Applicant was facing, the minimum sentence the offence carries as specified under the Minimum Sentences Act and his being unrepresented. Having considered all the above circumstances, the Court finds that it was incumbent upon the trial magistrate and Appellate Judges to ensure that, the Applicant was provided with legal aid. Therefore the Respondent failed to comply with its obligations under the Charter and the ICCPR to provide the Applicant with legal representation in respect of the trial and subsequent appeals.

²⁴ This Declaration was adopted by the Conference on Legal Aid in Criminal Justice: the Role of Lawyers and Other Service providers in Africa held in Lilongwe from 22 to 24 November 2004. The declaration has been endorsed by the African Commission on Human and People's Rights vide its *Declaration on the Adoption of the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System* adopted during the Commission's 40th Ordinary Session, held in Banjul, The Gambia, from 15 – 29 November 2006.

²⁵ *Moses Muhagama Laurance v Government of Zanzibar* Criminal Appeal N[umber] 17 of 2002 citing *Thomas Miengi v R[epublic]* [1992] JTLR 157 pages 11 - 14 of the Judgment 8 October 2001.

iv. The alleged manifest errors at trial with regard to Criminal Case Number 321 of 1996 and their subsequent consideration by the High Court and Court of Appeal

125. The Applicant contends that there were grave inconsistencies between the Charge Sheet and the evidence of the Prosecution Witnesses which adversely affected his right to a fair hearing at the trial and Appellate Courts. These inconsistencies related to:

- i. Attribution of ownership of stolen items: The Charge Sheet stated that the stolen goods belonged to Mr Elimani Maleko while in evidence, Prosecution Witness 1, Mr William Mika, stated that the stolen goods belonged to him.
- ii. Description of items stolen: The Charge Sheet describes the stolen items as “clutch covers” while Prosecution Witness 1, Mr Mika describes them as “clutch plates” and Prosecution Witness 2, Mr Fredrick Martin Minja, describes them as “clutch facings.”
- iii. Number of items stolen: The Charge Sheet states that the number of stolen items were one hundred (100) sets of clutch covers while Prosecution Witness 1, Mr Mika said they were two hundred and fifty (250) sets of clutch covers.
- iv. Value of items stolen: The Charge Sheet states that the items were valued at Eight Hundred Thousand Tanzania Shillings (Tshs. 800,000/=) while Prosecution Witness 1, Mr Mika testified to their value being Two Million Two Hundred Thousand Tanzania Shillings (Tshs. 2,200,000/=).
- v. Proof that the offence of armed robbery occurred. The Applicant states that Prosecution Witness 4, Mr Ally Saidi who was one of the two persons alleged to have been attacked and injured during the robbery did not testify to seeing the Applicant at the scene of the robbery incident. The Applicant maintains therefore, that it was wrong to charge him with the offence of armed robbery and that, instead he should have at most, been charged with the offence of being in possession of stolen property.
- vi. The authenticity of the Police Form 3 issued to the alleged victim of the armed robbery: Prosecution Witness 4, Mr Ally Saidi. The Police Form 3 is issued by a Police Officer who holds the rank of Police Constable and above, to a person claiming to have been injured as a result of a criminal act. The form allows him or her to obtain medical attention from a health facility. The Applicant contends that there was no prosecution testimony to authenticate the Police Form 3 issued to Mr Ally Saidi.
- vii. The causal connection between the Applicant and the alleged recently stolen goods, thus the invocation of the doctrine of recent possession²⁶ to link him to the crime. In his memorandum of appeal to the High Court at Moshi, vide Criminal Appeal Number 82 of 1998, the Applicant contends that there is no traceability to him, of the items alleged to have been stolen from Mr William Mika, as these could have been obtained from any motor spares shop. He states that he was at

²⁶ This doctrine relates to a common law principle applied where an accused person is in possession of property which has been recently stolen and the accused either gives no explanation as to how he came to have it, or gives an explanation which could not reasonably be true thus the conclusion that he stole it or that he received it knowing it to be stolen.

the shop of Prosecution Witness 2, Mr Fredrick Martin Minja, to collect money that one Mr Kipisi owed him and not that he was there to sell the alleged stolen items. He alleges that Mr Kipisi was selling some items to Mr Minja then Mr Kipisi would pay him back from the money he received from Mr Minja.

126. The Respondent contends that the Applicant is put to strict proof regarding the above allegations. The Respondent also contends that the Applicant was lawfully charged with the offence of armed robbery and that the trial courts had jurisdiction to try the matter. The Respondent further states that these are matters that are not within the purview of this Court because the Court of Appeal of Tanzania, being the final court of appeal has already adjudicated upon them.

127. In the Respondent's written submissions to the High Court at Moshi, in respect of Criminal Appeal Number 82 of 1998, the Respondent maintains that though the Applicant was not identified at the scene of the crime, he was found selling the stolen items, a few hours after the robbery.

128. The record of proceedings for the Applicant's appeal to the High Court at Moshi shows that, in its judgment, the High Court did not consider the issues of inconsistencies between the charge sheet and one of the prosecution witness's statements regarding the ownership of the property alleged to have been stolen, the description, number and value of the items stolen, proof that the offence occurred and the Application of the doctrine of recent possession to link the Applicant to the crime. These issues were raised by the Applicant in his Appeal. Instead, the High Court upheld the Applicant's conviction on the basis that he did not use the opportunity to defend himself in the trial court and that the trial magistrate must have therefore been convinced of the strength of the prosecution's case. The High Court upheld the Applicant's conviction and sentence, the latter being the statutory minimum under the Minimum Sentences Act.

129. The Court of Appeal of Tanzania, considered these points of appeal raised by the Applicant but it did not determine the issue of the ownership of the property alleged to have been stolen.

130. This Court does not accept the Respondent's contention that, the issue of manifest errors at trial are not within the purview of this Court because the Court of Appeal of Tanzania has determined them with finality. Though this Court is not an appellate body with respect to decisions of national courts,²⁷ 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 instrument ratified by the State concerned. With regard to manifest errors in proceedings at national courts, this Court will examine whether the national courts applied appropriate principles and international standards in resolving the

27 See Application 001/2013 *Ernest Francis Mtingwi v Republic of Malawi*.

errors. This is the approach that has been adopted by similar international courts.²⁸

131. The Court finds that the alleged manifest errors relating to the value of the property, proof that the offence of armed robbery occurred, the authenticity of the Police Form 3 issued to the alleged victim of the armed robbery and the causal connection between the Applicant and the allegedly recently stolen goods were not of such a nature as to deny the Applicant his right to a fair trial. However, the Court finds that the failure to determine the issue of the ownership of the property alleged to have been stolen and the discrepancies in the description of this property, were violations of a fundamental nature and adversely affected his right to a fair hearing at the trial and Appellate Courts.

v. The alleged violation by the Respondent of its obligation to recognise the rights, duties and freedoms enshrined in the Charter and to adopt measures to give them effect.

132. The Applicant contends generally, that the Respondent has violated Article 1 of the Charter on the obligation to recognise the rights, duties and freedoms enshrined in the Charter and to undertake to adopt measures to give effect to them.

133. In response, the Respondent denies violating Article 1 of the Charter. The Respondent states that it has domesticated the Charter through the Bill of Rights of its Constitution, the Basic Rights and Duties Enforcement Act and the Criminal Procedure Act. The Respondent has also made the declaration under Article 34(6) of the Court's Protocol.

134. The Court notes that the Respondent State has ratified the Charter and adopted constitutional and statutory measures to domesticate it and made the declaration under Article 34(6) of the Protocol.

135. However, it should be noted that, in assessing whether the obligation set out under Article 1 of the Charter has been fulfilled, the Court does not merely examine whether the Respondent has enacted legislation or adopted other measures to domesticate the Charter. The Court will also assess whether the Application of those legislative or other measures is in line with the achievement of the rights, duties and freedoms enshrined in the Charter, that is, the attainment of the objects and purposes of the Charter. This means that when the Court finds that any of the rights, duties and freedoms set out in the Charter are curtailed, violated or not being achieved, this necessarily means that

²⁸ See *Application No. 76809101 Bavmann v Austria* ECHR Judgment of 7 October 2004 para 49; Communication 375/09 *Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Center for the Protection of Human Rights) v Kenya* ACHPR 5 November 2011 para 36; *Case of Santiago Marzoni v Argentina* 11.673, *Report No. 39196, Inter-American Commission on Human Rights, OEA/Ser. UV/11.95 Doc. 7 rev. at 76* (1997) para 51. Also see *Application No. 30544/96 Garcia Ruiz v Spain*, Judgment of 21 January 1999 (Grand Chamber) para 28, *Application No. 47287/99 Perez v France* Judgment of 12 February 2004 (Grand Chamber) para 81, *Application No 34553/97, Dufaurans v France* Judgment of 21 March 2000, para 39.

the obligation set out under Article 1 of the Charter has not been complied with and has been violated.

136. The Court reiterates its finding in Application No 13/2011 *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo & The Burkinabe Human and Peoples' Rights Movement v Burkina Faso*. In that case, the Court found that, by not seeking out, investigating, prosecuting and putting to trial the killers of Norbert Zongo and his companions, Burkina Faso violated Article 7 of the Charter and that by so doing, it simultaneously violated Article 1 of the Charter. The Court is also persuaded by the reasoning of the African Commission with regard to the overarching applicability of Article 1 of the Charter.²⁹

137. Having found that the Applicant was denied a right, to be heard, to defend himself and to legal assistance, the Court therefore finds that the Respondent has violated its obligation under Article 1 of the Charter.

vi. The alleged denial of the right to equality before the law and equal treatment of the law

138. The Applicant makes general allegations regarding the violation of his right to equality before the law and equal treatment of the law as provided for in Article 3(1) and (2) of the Charter.

139. On its part, the Respondent maintained that Articles 12 and 13 of the Constitution of the United Republic of Tanzania enshrine these rights and that the Applicant has failed to demonstrate how these guarantees of equality were not applied to him therefore resulting in the alleged violations.

140. The Court finds that the Applicant has failed to substantiate how the guarantees of equality before the law and equal treatment of the law have resulted in a violation of Article 3 of the Charter. The Applicant has failed to show whether and how he was treated in a manner different to that meted out to others who were in the same position as he was. General statements to the effect that this right has been violated are not enough. More substantiation is required. The Court therefore finds no violation of the said Article.

²⁹ Communication 147/95- 149/96 *Sir Dawda K Jawara v The Gambia* 13th Activity Report 1999-2000 para 46. The Commission held that "Article 1 gives the Charter the legally binding character always attributed to international treaties of this sort. Therefore a violation of any provision of the Charter automatically means a violation of Article 1. If a State party to the Charter fails to recognise the provisions of the same, there is no doubt that it is in violation of this Article. Its violation, therefore, goes to the root of the Charter."

vii. The alleged denial of the right to the respect of the dignity inherent in a human being and to the recognition of his legal status and the prohibition from all forms of exploitation and degradation of man, particularly torture, cruel, inhuman or degrading punishment and treatment

141. The Applicant alleges that the undue delay in the hearing of his appeal and review amounts to torture, cruel, inhuman and degrading punishment and treatment contrary to Article 5 of the Charter.

142. The Respondent maintains that torture, cruel, inhuman and degrading punishment and treatment are prohibited under Section 13(c) and (e) of the Constitution of the United Republic of Tanzania and that the Applicant should show proof of the same. The Respondent asserts that there has been no delay in hearing the Applicant's appeal and review and that his imprisonment is lawful.

143. The Court has found that there has been an undue delay in the hearing of the Applicant's Appeal at the Court of Appeal. The Applicant started pursuing his appeal from 23 March 2000 to 29 May 2009, when the Court of Appeal dismissed the appeal. This was a period of nine (9) years and two (2) months. The issue for determination is whether this nine (9) years and two (2) months' delay in the Applicant's appeal amounts to torture, cruel or inhuman or degrading punishment and treatment.

144. The Court, like the African Commission, applies and interprets the Charter. In this regard, the Court takes into consideration, 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*.³⁰ These Guidelines refer to the definition of torture as set out in Article 1 of the United Nations Convention Against Torture which reads:

- “1. For the 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 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.
2. This Article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider Application.”

145. In view of the above, the Court finds that the Applicant has not proved that the delay in the hearing of his appeal is tantamount to

30 The African Commission adopted these guidelines in 2008; the Guidelines are commonly known as the *Robben Island Guidelines*. See also Application 288/04 *Gabriel Shumba v Zimbabwe* Decision of 2 May 2012, paras 142 to 166.

torture. This is because he has not proved that the delay caused him severe mental or physical pain which was intentionally inflicted for a particular purpose. In addition, he is serving a prison sentence pursuant to lawful sanctions imposed on him. For this reason therefore, the Court finds that there has been no violation of Article 5 of the Charter.

146. The Court also finds that the delay in the Applicant's appeal proceedings does not amount to cruel, inhuman and degrading punishment and treatment, as it does not meet the threshold of severity, intention, and severe humiliation required by the definitions established in jurisprudence.³¹ Moreover, the Court is of the view that the delay does not *per se*, constitute cruel, inhuman or degrading punishment and treatment, even if it may have caused the Applicant mental anguish. The Court is fortified in its decision in this regard by the jurisprudence of the Human Rights Committee.³²

viii. The alleged Violation of the Right to Liberty and Security of the Person.

147. The relevant provision in this regard is Article 6 of the Charter which provides that everyone shall have the right to liberty and security of his person and that no one shall be deprived of his freedom except for reasons and conditions laid down by law. In particular, no one may be arbitrarily arrested or detained.

148. The Applicant has contended that his arbitrary and continued detention caused by the delay in the hearing of his cases amounts to a violation of his right to liberty as provided by Article 6 of the Charter.

149. The Respondent on its part, maintains that it has not violated the Applicant's right to liberty. The Respondent states that the right to liberty is not absolute and can be curtailed under conditions laid down by the law, which in the Respondent's case, the law in this regard is the Criminal Procedure Act. The Respondent asserts that, the Applicant was arrested, arraigned in Court, prosecuted and convicted in accordance with the Criminal Procedure Act and the Penal Code. The Respondent maintains that the Applicant cannot therefore contend that his arrest and detention were arbitrary and unlawful and that his allegations on the violations of Article 6 are unfounded, baseless and without merit.

150. The Court's finding that there is an undue delay in the hearing of the Applicant's appeal at the Court of Appeal does not necessarily mean that there has been a violation of the right to liberty and security of the person. This may be so where the Court finds that there has been such a flagrant denial of justice that the resulting imprisonment of an Applicant would be incompatible with the provisions of Article 6 of the Charter. In the instant Application, the Applicant was tried and

31 *Price v United Kingdom*, Judgment of 10 July 2001, paras 24-30; *Valasinas v Lithuania*, Judgment of 24 July 2001, para 117; and *Pretty v United Kingdom*, Judgment of 29 April 2002, para 52.

32 Communications 210/1986 & 225/1987, *Earl Pratt & Ivan Morgan v Jamaica* CCPR/C/35/D/21 0/1986; CCPR/C/35/D/225/1987, 7 April 1989.

convicted by a legally constituted Court, which passed a sentence against the Applicant based on domestic law, therefore his imprisonment was being carried out pursuant to the court's order. This Court therefore finds that the undue delay in the hearing of the Applicant's appeal did not result in a violation of the right to liberty and security of his person.

ix. The alleged violation of the right to receive information

151. The Applicant has stated that the delay in providing him with the record of proceedings of the trial court in respect of Criminal Case Number 321 of 1996 and of the High Court in respect of Criminal Appeal Number 82 of 1998 and the lack of information regarding his Application for review, violated his right to receive information as provided for in Article 9(1) of the Charter.

152. The Respondent denies that there was a prolonged and unreasonable delay in providing the Applicant with the information that would enable the Applicant prepare his Appeal.

153. The Respondent maintains that the delays in the hearing of the Applicant's cases from the District Court to the Court of Appeal were caused by the Applicant himself and the fact that he had jumped bail. The Respondent asserts that this inadvertently led to him being late to request for copies of proceedings and documents which would have assisted him in the hearing of his appeals. The Respondent further asserts that it does not have a record of the Applicant's Notice for Review therefore, the Applicant's contention that the hearing of his Application for Review of the Court of Appeal's judgment cannot be maintained.

154. The Court notes that the record indicates that the Applicant filed a Notice of Review seeking leave to have the decision of the Court of Appeal reviewed. The Court has found that there was an undue delay in the Applicant receiving the record of proceedings in respect of Criminal Case Number 321 of 1996 and the record of proceedings at the High Court in respect of Criminal Appeal Number 82 of 1998 and the lack of information regarding his Application for review. Article 9(1) relates to the right to receive information in connection with the right to express and disseminate one's opinions within the law. The Court finds that since the requests for the record of proceedings of the High Court were made in the context of the Applicant's appeals to the Court of Appeal, this issue has been addressed by the Court when resolving the contention regarding the violation of the right to a fair trial as guaranteed by Article 7(1) of the Charter. The Court consequently finds that there was no breach of the right to information as set out in Article 9(1) of the Charter.

x. The Applicant's request to be released from prison

155. In his Application, the Applicant requested the Court to order his release from prison. He reiterated this prayer in his Reply to the Respondent's Response.

156. The Respondent did not specifically respond to the Applicant's request to be released from prison.

157. The Court observes that an order for the Applicant's release from prison can be made only under very specific and/or, compelling circumstances.³³ In the instant case, the Applicant has not set out specific or compelling circumstances that would warrant the Court to grant such an order.

158. The Court recalls that it has already found violations of various aspects of the Applicant's right to a fair trial contrary to Article 7(1)(a),(c) and (d) of the Charter and Article 14(3)(d) of the ICCPR. The appropriate recourse in the circumstances would have been to avail the Applicant an opportunity for reopening of the defence case or a retrial.³⁴ However, considering the length of the sentence he has served so far, being about twenty (20) years out of thirty (30) years, both remedies would result in prejudice and occasion a miscarriage of justice.

159. The Court therefore orders the Respondent State to take appropriate measures to remedy the violations taking into account the above factors.

xi. Costs

160. The Respondent prayed that the Court orders the Applicant to bear the costs of the Application. The Court notes that Rule 30 of the Rules of Court states that "[U]nless otherwise decided by the Court, each party shall bear its own costs." The Court will decide on the issue of costs when it considers the issue of reparations.

For these reasons:

161. The Court holds:

H. On the Respondent's preliminary objection on jurisdiction

- i. Unanimously, that the Respondent's preliminary objection on the lack of jurisdiction *ratione materiae* of the Court as required by Article 3(1) of the Protocol is dismissed and *declares* that the Court has jurisdiction.

I. On the Respondent's preliminary objections on admissibility

- ii. Unanimously, that the Respondent's preliminary objection on the admissibility of the Application for incompatibility with the African Charter and the Constitutive Act of the African Union as required by

³³ See Inter-American Court of Human Rights Case of *Loayza-Tamayo v Peru* Merits. Judgment of 17 September 1997. Series C No 33, Resolatory paras 5 and 84; In this case, the Court ordered the Applicant's release since not doing so would have resulted in a double jeopardy situation which is prohibited by the American Convention on Human Rights.

³⁴ See ECtHR *Stoyanov v Bulgaria*, Application No 39206/07, 31 January 2012.

Article 6(2) of the Protocol read together with Article 56(2) of the Charter and Rule 40(2) of the Rules is dismissed.

- iii. Unanimously, that the Respondent's preliminary objection on the admissibility of the Application for non-exhaustion of local remedies as required by Article 6(2) of the Protocol read together with Article 56(5) of the Charter and Rule 40(5) of the Rules is dismissed. The Court finds that the Applicant exhausted local remedies.
- IV. Unanimously, that the Respondent's preliminary objection on the admissibility of the Application for not being filed within a reasonable time after exhaustion of local remedies as required by Article 6(2) of the Protocol read together with Article 56(6) of the Charter and Rule 40(6) of the Rules is dismissed.
- v. Unanimously, that the Application is admissible.

J. On the merits

- vi. Unanimously, that there has been no violation of Articles 3, 5, 6, 7(1)(b) and 9(1) of the Charter.
- vii. Unanimously, that there has been a violation of Articles 1 and 7(1)(a), (c) and (d) of the Charter and Article 14(3)(d) of the ICCPR.
- viii. By a vote of six (6) to two (2), Judge Elsie N. THOMPSON, Vice-President and Judge Rafea BEN ACHOUR dissenting, that the Applicant's prayer for release from prison is denied.
- ix. Unanimously, that the Respondent is directed to take all necessary measures within a reasonable time to remedy the violations found, specifically precluding the reopening of the defence case and the retrial of the Applicant, and to inform the Court, within six (6) months, from the date of this judgment of the measures taken.
- x. Unanimously, that in accordance with Rule 63 of the Rules of Court, the Court directs the Applicant to file submission on the request for reparations within thirty (30) days hereof and the Respondent to reply thereto within thirty (30) days of the receipt of the Applicant's submissions.

Dissenting Opinion: THOMPSON and ACHOUR

1. We agree substantially with the merits of the judgment of the Court but there is one particular issue on the Order at paragraph 159 which we would approach in a different manner and make a specific order.

2. The Applicant alleges violation of several articles of the African Charter on Human and Peoples' Rights which have been set out in the judgment and he seeks amongst other reliefs, that he be released from prison.

3. The Court in its wisdom finds infractions of Articles 1, and 7(1)(a), (c) and (d) of the Charter and Article 14(3)(d) of the ICCPR based largely on lack of fair hearing and then orders the State to:

take all necessary measures within a reasonable time to remedy the violations found, specifically precluding the reopening of the defence case and the retrial of the Applicant, and to inform the Court, within six (6) months, from the date of this judgment of the measures taken.

4. On the specific issue as to the Order of his release, the Court opines and we entirely agree that an Order of release of a convict can only be done in “very specific/and or compelling circumstances”. The Court, however goes further to say that the Applicant has not shown exceptional circumstances and this is where we depart.

5. In spite of the fact that the Application does not state that particular facts exhibit exceptional circumstances, we are of the firm view that the Court found such specific/and or compelling circumstances when it noted that the Applicant has been in prison for 20 years out of the 30 year term of imprisonment and that the reopening of the defence case or a retrial “would result in prejudice and occasion a miscarriage of justice.”

6. We cannot find a more “specific and/or compelling” than that the Applicant has been in prison for about 20 years out of a 30 year prison term following a trial which the Court has declared to be an unfair trial, in violation of the Charter.

7. Furthermore, there is the recognition that the reopening of the defence or a retrial “would result in prejudice and occasion a miscarriage of justice.”

8. The Court fell shy of making the Order of releasing the Applicant. Our view is therefore that, there is no other remedy in the circumstance other than, that the Applicant be released.

9. In the circumstance of the case, rather than leaving the issue to the imagination of the Respondent, we would have granted the relief and ordered that the Applicant be released.

Femi Falana v African Commission on Human and Peoples' Rights (jurisdiction) (2015) 1 AfCLR 499

Femi Falana v The African Commission on Human and Peoples' Rights

Order, 20 November 2015. Done in English and French, the English text being authoritative.

Judges: RAMADHANI, THOMPSON, OUGUERGOUZ, TAMBALA, ORÉ, KIOKO, GUISSÉ, BEN ACHOUR, BOSSA and MATUSSE

Recused under Rule 8(4)(d): NIYUNGEKO

The Court held that it could not compel the African Commission on Human and Peoples' Rights to refer a case submitted by the complainant before the African Commission to the Court.

Jurisdiction (Respondent not party to the Court Protocol, 8, 9)

Complementarity (African Commission, 15, 16)

Separate opinion: OUGUERGOUZ

Jurisdiction (Application to be rejected by the Registrar, 3)

I. Nature of the Application

1. The Court received, on 7 September 2015, an Application by Femi Falana, (hereinafter referred to as "the Applicant") instituting proceedings against the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Respondent").

2. The Applicant is a Senior Advocate of Nigeria (SAN), with offices in Lagos, Abuja and Ekiti states of the Federal Republic of Nigeria. He has filed the Application in his personal capacity and on behalf of the victims of alleged human rights violations in Burundi.

3. The Applicant alleges that;

- a) He filed a Communication with the Respondent on 4 May 2015 regarding the systematic and widespread violations of human rights in Burundi, in which he requested the Respondent to refer the Communication to the Court;
- b) The Communication before the Respondent related to the alleged continuing human rights violations by the government of Burundi, in particular the attacks against peaceful protesters, journalists and human rights activists following protests over President Pierre Nkurunziza's decision to run for a third term;
- c) To date, the Respondent has failed and/or neglected to refer the Communication to the Court despite the request being brought

pursuant to Rules 84(2) and 118(3)(4) (sic) of the Rules of Procedure of the Respondent; and

- d) The failure and/or refusal of the Respondent to refer the Communication to the Court has continued to deny access and effective remedies of the victims of human rights violations in Burundi.

4. The Applicant requests the Court to grant him the following reliefs:

- a) Request the Respondent to refer the Communication against Burundi initiated before it on 4 May 2010 (sic) to the Court; and
- b) Hear the Applicant pursuant to Rule 29 of the Rules and the inherent jurisdiction of the Court.

II. The Position of the Court

5. The Court notes that the Respondent against which the Application is filed is an Organ of the African Union established under the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter").

6. Pursuant to Article 3(1) of the Protocol, the Court's jurisdiction extends to all cases and disputes submitted to it concerning the interpretation and Application of the Charter, the Protocol and any other relevant Human Rights instrument ratified by the State concerned.

7. The Court notes that while the facts giving rise to the Application make reference to alleged violations of human rights in Burundi, the Applicant has filed the Application against the Respondent, an entity which is not a State Party to the Charter or Protocol.

8. The Court further notes that the Applicant has filed the Application in his personal capacity against the Respondent. Pursuant to Article 5(3) and Article 34(6) of the Protocol, Applications can only be brought to the Court by individuals where the State against which the Application is filed has deposited a declaration under Article 34(6) of the Protocol.

9. Considering that the Respondent is not a State Party to the Charter and has not filed a declaration pursuant to Article 34(6), the Court finds that the Applicant has no standing to bring the Application against the Respondent in terms of Article 5(3) and Article 34(6) of the Protocol.

10. In bringing this Application, the Applicant has also relied on Rule 29 of the Rules. Further, the Applicant states that the Communication initiated before the Respondent was brought under Rules 84(2) and 118(3)(4) (sic) of the Rules of Procedure of the Respondent.

11. Rule 29 of the Rules which should be read together with Article 2 and 8 of the Protocol, guide the relationship between the Court and the Respondent.

12. Pursuant to Article 2 of the Protocol, the Court shall complement the protective mandate of the Respondent bearing in mind the provisions of the Protocol.

13. Pursuant to Article 8 of the Protocol, the Court shall lay down the detailed conditions under which the Court shall consider cases brought before it, bearing in mind the complementarity between the Respondent and the Court.

14. Further, pursuant to Article 5(1)(a) of the Protocol, the Respondent is entitled to submit cases before the Court, while under Article 6(3), the Court may transfer cases to the Respondent.

15. An examination of Article 2 of the Protocol and Rule 29 of the Rules as well as the related provisions of the Protocol cited above shows that while the Respondent is entitled to seize the Court, the Court cannot compel the Respondent to seize it.

16. The relationship between the Court and the Respondent is based on complementarity. Therefore, the Court and the Respondent work as independent yet mutually reinforcing partner institutions with the aim of protecting human rights on the whole continent. Neither institution has the mandate to compel the other to adopt any measures whatsoever.

For these reasons, the Court unanimously:

17. Finds that, in terms of Article 3(1), 5(3) and 34(6) of the Protocol, it has no jurisdiction to hear the case and dismisses the Application.

18. Finds that pursuant to Article 2 of the Protocol and Rule 29 of the Rules, the Court cannot compel the Respondent to seize it.

In accordance with Article 28(7) of the Protocol and Rule 60(5) of the Rules, the separate opinion of Judge Fatsah Ouguergouz is appended to this Order.

Separate Opinion: OUGUERGOUZ

1. I am of the opinion, same as all my colleagues, that the Court lacks the jurisdiction to hear and to rule on the “Application” filed by Mr Femi Falana against the African Commission on Human and Peoples’ Rights (hereinafter the “African Commission”).

2. Indeed, according to the Protocol, only States Parties to this instrument may be brought before the Court (see Articles 3(1), 5(1, *littera c*)), 7, 26, 30, 31 a11d 34(6)). The African Commission not being a State entity party to the Protocol, the Court manifestly lacks the jurisdiction *ratione personae* to entertain the said request. Furthermore, by virtue of its subject matter, this request does not fall within the jurisdiction *ratione materiae* of the Court as envisaged in Article 3 of the Protocol.

3. Unlike my colleagues, I am however of the view that this request, rather peculiar in nature,¹ cannot in any circumstance be registered in the General List of the Court nor *a fortiori*, be subject to judicial determination by the Court and be dismissed by way of an Order issued

1 Mr Falana indeed sets out his request as follows:

“The Applicant therefore seeks the following reliefs from the African Court:

1. Request the African Commission to refer the Communication against Burundi initiated before it on 4 May 2015 to the African Court.
2. Hear the Applicant pursuant Ju Rule 29 of the Rules of Procedure of the African Court and the inherent jurisdiction of the Honourable Court.”

by the Court. It ought to have been rejected by way of a simple letter from the Registrar.

4. I shall start by noting that, in his request, Mr Falana makes no reference to the provisions of the Protocol relating to the Court's jurisdiction in contentious matters (Articles 3 and 5); he merely indicates that

“the Application [is brought] pursuant to Rule 29 of the Rules of the African Court which provides that “the Court may also, if it deems it necessary, hear, under rule 45 of the Rules the individual or NGO that initiated a Communication to the Commission pursuant to Article 55 of the Charter.”

5. This request, which the Registry did not notify to the African Commission nor to other entities Listed in Article 35(3) of the Rules of Court, ought therefore to have been dealt with by way of a simple administrative action, in other words rejected *de plano* by letter from the Registrar same as in all other cases recently dealt with by the Court in which it manifestly lacked jurisdiction.²

6. It was indeed by office mail signed by the Registrar or Deputy Registrar that “Applications” filed by individuals against non-State entities such as the European Court of Human Rights or the *Conférence Inter africaine des Marchés des Assurances* (CIMA) were rejected.

7. In his reply to the author of the latter request, the Registrar thus stated as follows:

“[...] I would like to inform you that the Court has no jurisdiction to hear such an appeal for two main reasons: 1) The Court only receives petitions against States (Article 3 of the Protocol). 2) [...]”.³

8. In the reply to the request filed against the European Court of Human Rights (and France), the Registrar stated that:

“The Registry has decided not to register your Application as it does not meet any of the requirements provided by instruments governing the African Court on Human and Peoples' Rights.”⁴

To avoid any ambiguity, the Registrar similarly provided the following clarification:

“To be admitted, an Application must, among other conditions, be filed against an African State that is Party to the African Charter on Human and Peoples' Rights and to the Protocol related thereto.”

2 Until the 26 June 2014 decision by the Court dismissing the Application filed against Tunisia (*Baghdadi Ali Mahmoudi v the Republic of Tunisia*), Applications filed against African States that are not Parties to the Protocol or have not made the optional declaration under Article 34 of the Protocol were subject to judicial determination by the Court and dismissed by a decision of the latter (see my separate opinion appended to this decision of 26 June 2014): after this date, similar Applications were dismissed by way of a simple administrative action (letter from the Registry).

3 Letter from the Registrar dated 26 June 2015 (Ref AFCHPR/Reg./Ext/004.15) in reply to Mr Roger Kamdem's request against CIMA received at the Registry on 10 June 2015 and dated 19 [sic] June 2015.

4 Request filed by Mr Karim Benadjal against France and the European Court of Human Rights dated 3 January 2015 and rejected by letter from the Registrar dated 7 January 2015 (Ref AFCIJPR/Reg./Ext/004.15).

9. It is quite rightly that such requests, that the Court manifestly lacks jurisdiction to deal with, were dealt with through an administrative channel. It is moreover consistent with the practice in international jurisdictions such as the International Court of Justice where it is an official of the Registry which is entrusted with replying to requests filed by individuals, entities that do not have a *locus standi* before the World Court.⁵

10. It was equally through an administrative channel that the African Court disposed of requests filed by States which are not members of the African Union such as France⁶ or Japan.

11. Thus, in his reply to the request filed against Japan, the Deputy Registrar of the Court stated as follows:

“Please be informed that the subject matter of your Application is manifestly not within the jurisdiction of the Court. Further, since your complaint is being made against a non-State Party to the Protocol to the African Charter on Human and Peoples’ Rights on the establishment of an African Court on Human and Peoples’ Rights, the Court does not have jurisdiction to receive the matter.”⁷

12. It was exactly in the same manner that three requests filed against Egypt, a Member State of the African Union but not party to the Protocol, were rejected. In his reply to the latest of these three requests, the Deputy Registrar indeed informed the Applicant as follows:

“[. . .] I would like to inform you that Egypt has not yet ratified the Protocol establishing the Court. The Court can only receive Applications related to States which are Parties to the Protocol.”⁸

5 Requests from individuals are indeed rejected by a letter from the Deputy Registrar worded as follows:

“In reply to your letter dated xx, I regret to inform you that, by virtue of Article 34 of the Statute of the International Court of Justice, “only States may be parties in cases before the Court”, and that only international organizations authorized within the meaning of Article 65 of the Statute may request advisory opinions of the Court.

It follows that neither the Court nor its Members may consider Applications from private individuals or groups, provide them with legal advice, or assist them in their relations with the authorities of any country.

That being so, you will, I am sure, understand that no action can be taken on your letter.

Yours sincerely,”.

6 See the abovementioned request by Mr Karim Benadjal, footnote 4.

7 Letter from the Deputy Registrar dated 18 February 2015 (Ref AFCHPR/Reg./02/2015/009) in reply to a request filed by Madam Chie Miyakazi against Japan, dated 18 October 2014.

8 Letter from the Deputy Registrar dated 29 June 2015 (Ref AFCHPR/Reg./06/011) in reply to an Application filed by Osama Bardeeni against the Arab Republic of Egypt, dated 1 January 2015. See also the action taken on the Application filed by Mr Ibrahim Muhammed Agwa and three others against the Arab Republic of Egypt, dated 16 June 2014; this Application was rejected by a letter from the Deputy Registrar dated 20 June 2014 (Ref AFCHPR/Reg./06/2014/006) in which the latter stated as follows: “As I have already explained to you during our meeting on Wednesday, 18 June 2014, Egypt has not yet ratified the Protocol to the African Charter on Human and Peoples Rights on the establishment of an African Court on

13. It is similarly through an administrative, and not judicial, channel that were rejected Application filed against States Parties to the Protocol but have not made the optional declaration recognizing as compulsory the Court's jurisdiction to deal with cases filed by individuals or non-governmental organizations, as provided by Article 34(6) of the Protocol.

14. This is for instance the case of an Application filed against Tunisia, in regard to which the Registrar informed the Applicant of what follows:

"The Court considered your Application and noted that Tunisia, the Respondent against which your Application is filed, has not made the special declaration provided in Article 34(6) of the Article. It has therefore directed the Registry to inform you that it does not have jurisdiction to deal with your Application."⁹

Applications filed against the Republic of Congo¹⁰ and Lesotho¹¹ were disposed of in the same manner.

15. I would like to note that none of the abovementioned "*matters*" was registered in the General List of the Court.

16. I wish to further note that the judicial determination by the Court of Mr Falana's request, filed against an entity which can in any manner whatsoever be brought before the Court, markedly departs from the administrative action decided by the Court, during its 38th Ordinary Session, in the case of Mr Faustin Uwintije against Rwanda which State is moreover Party to the Protocol and has made the optional declaration recognizing as compulsory the Court's jurisdiction to deal with cases filed by individuals or non-governmental organizations, as provided by Article 34(6) of the Protocol. This Application, registered in the General List of the Court, was indeed rejected by way of a simple letter from the Registrar to the Applicant,¹² whereas the Court has manifestly

Human and Peoples' Rights. As such, the Court does not have jurisdiction to hear the matter". See finally the letter from the Registrar dated 24 June 2013 in reply to an Application filed on 17 June 2003 by the "Popular Front against the transformation of Egypt into a Muslim Brotherhood State" against the Arab Republic of Egypt.

9 Letter from the Registrar dated 14 April 2015 (Ref AFCHPR/Reg./04/007) in reply to the Application filed by Mr Mustapha Nasri against the Republic of Tunisia, dated 18 September 2014.

10 Letter from the Registrar dated 22 September 2015 (Ref AFCHPR/Reg./09/016) in response to the Application filed by Mr Jean-Claude Mbango and Others against the Republic of Congo, dated 7 September 2015; in that letter, the Registrar states *inter alia* as follows: "the Republic of Congo not having made the declaration, the Court does not have the jurisdiction to receive your appeal".

11 Application filed by Mr Rammutla against Lesotho, dated 25 May 2015, and rejected by letter from the Registrar dated 29 June 2015 (Ref AFCHPR/Reg/06/013): "I would like to inform you that although the Kingdom of Lesotho has ratified the Protocol establishing the Court, it has not made the declaration under Article 34(6) thereof; and as such the Court does not have jurisdiction to receive Applications directly from individuals and NGOs against the Kingdom of Lesotho".

12 This letter is mainly worded as follows: "I write to inform you that at its 38th Ordinary Session held from 31 August to 18 September 2015, the Court considered the above Application and instructed the Registrar to inform you that the said Application does not meet the requirements under Rule 34 of the Rules of Court, and as such it cannot be entertained by the Court. I hope you will be able to find another forum where your complaint can be addressed."

jurisdiction *ratione personae* to deal with it and has actually considered whether it was well-founded.

17. In light of the foregoing, it is my view that the Court ought to have spared itself issuing this Order and thus avoided delving into unnecessary considerations in order to dismiss Mr Falana's request (paragraphs 8-16). In acting as it did, the Court showed some inconsistency in its reasoning as it had concluded that it lacked the jurisdiction *ratione personae* to entertain the request (paragraphs 7, 9 and 17), and yet had ruled on it, that is on the "merits" when it concluded that "pursuant to Article 2 of the Protocol and Rule 29 of the Rules, the Court cannot compel the Respondent to seize it". (paragraphs 15 and 18).

18. This latter conclusion is all the more inopportune as Article 2 of the Protocol and Rule 29 of the Rules to which the Court refers cannot be used as the legal basis for its conclusion that it cannot compel the Commission to refer the matter to it.

19. Although I do obviously subscribe to this latter conclusion of the Court, I am of the view that the only applicable provision in this case is Article 5(1) of the Protocol. This provision does indeed allow the Commission to seize the Court; but it does not compel it to do so. This is evident in the French version of paragraph 1 of Article 5, worded as follows: "Ont qualité pour saisir la Cour [...]". The English version of this provision is more straightforward as it states: "The following are entitled to submit cases to the Court [...]" (emphasis added).

On the basis of Article 5(1) *littera a*) of the Protocol, the Commission is therefore wholly and fully free and independent and cannot in any manner be subject to an injunction from the Court.

20. Article 29(3) *littera c*) of the Rules, which Mr Falana refers to, can only apply in the circumstance where the Court is properly seized of an Application filed by the African Commission.

21. Ultimately, the Court ought not to have dealt with Mr Falana's request by way of judicial determination. Having opted for that line of action, it ought to have done so in a more straightforward manner and by avoiding to rule on the merits of this request.

22. I wish to recall as a reminder that this is the fourth time that the African Court has dismissed by way of judicial determination "Applications" filed against non-State entities which by definition cannot be brought before it.¹³ The Court having rather limited human and financial resources to deal effectively with a number of cases which is on the increase,¹⁴ it would be advisable not to congest its General List

13 See the Court Judgments of 26 June 2012 and 15 March 2013 in the matters of *Femi Falana v The African Union* and of *Atabong Denis Atemnkeng v The African Union* as well as the Decision delivered on 30 September 2011 in the matter of *Efoua Mbozo'o Samuel v The Pan African Parliament*; see in that regard my separate opinions appended to those three rulings of the Court.

14 Indeed, as of 20 November 2015, the Court has no less than 29 contentious matters and 3 requests for Advisory Opinion pending before it.

and workload with requests similar to the one considered in the present Order.

**Wilfred Onyango Nganyi and Others v Tanzania (merits)
(2016) 1 AfCLR 507**

Wilfred Onyango Nganyi and Others v The United Republic of Tanzania

Judgment, 18 March 2016. Done in English and French, the English text being authoritative.

Judges: THOMPSON, NIYUNGEKO, OUGUERGOUZ, TAMBALA, ORÉ, KIOKO, BEN ACHOUR, BOSSA and MATUSSE

Recused under Article 22: RAMADHANI

The Applicants alleged that they had been arrested in Mozambique and forcibly transferred to Tanzania by the collective actions of the Tanzanian, Kenyan and Mozambican police. In their Application the Applicants challenged the delay before the Tanzanian courts in processing their cases. The Court found Tanzania in violation of the right to be tried within a reasonable time as the criminal case against the Applicants had been pending for almost a decade. The Court also held that the Respondent State was under an obligation to provide the Applicants with legal aid when the judicial authorities realised they had no legal representation, even if this was not requested.

Jurisdiction (no need to cite provisions of African Charter alleged to have been violated, 57, 58; continuous violation, 66; ICCPR applicable, 165; ICCPR more detailed than African Charter, 166)

Admissibility (rule 34(1) does not set admissibility requirements, 71; exhaustion of local remedies, effective remedies, 88-89; unduly prolonged, 90-94; extra-ordinary remedies, 95)

Fair trial (trial within reasonable time, 127, 131, 132 135, complexity of case, 138, 139, 144, role of defendant in delay of trial, evidence, 149, duty of court to prevent unnecessary delay, 153, 154; legal aid, 166, 168, 172, 175, 181, 183, 184)

I. The Parties

1. The Application was filed on 23 July 2013, by Wilfred Onyango Nganyi, Peter Gikura Mburu, Jimmy Maina Njoroge, Patrick Muthee Muriithii, Simon Githinji Kariuki, Boniface Mwangi Mburu, David Ngugi Mburu, Michael Mbanya Wathigo, Gabriel Kungu Kariuki and Simon Ndugu Kiambuthi (hereinafter referred to as the “Applicants”), all citizens of the Republic of Kenya, against the United Republic of Tanzania (hereinafter referred to as the “Respondent”).

II. Subject matter of the Application

2. The Applicants allege that they were in Mozambique exploring business opportunities when, on 16 December 2005, they were, without lawful resort to legal measures of extradition, kidnapped and arrested by the Mozambican police, in collaboration with the Kenyan and Tanzanian Police Forces, after a false report made by a lady by name Maimouna Salimo, for being linked to dangerous elements of the Kenyan military forces and Kenya administration Police. They also allege that thereafter they were put on a military airplane referred to as *Buffalo* bound for Tanzania.

3. According to the Applicants, prior to their being brought to Tanzania, the Mozambican Police arraigned them before an investigating judge who acquitted them of any wrong-doing and ordered their release. They add that in defiance of the court order, Mozambican police kept them in custody until they were forcibly and unlawfully transferred to Tanzania on 16 January 2006.

4. The Applicants explain that in the morning of 14 January 2006, while still under the custody of the Mozambican authorities, they were handcuffed and bundled into police vans, driven to Maputo city airport, where they met a group of Kenyan and Tanzanian Police Officers, including a Tanzanian Officer whom they later came to know as SSP Kigondo, the Regional Criminal Officer, Kilimanjaro Region. This Police Officer they say who was holding their possessions, including boarding passes for a commercial flight scheduled for Dar-es-Salaam and a transparent plastic bag full of handcuffs.

5. According to them, they refused to board the commercial flight, although their luggage had been checked-in, and following their refusal to board the commercial flight, they were bundled into the vans and returned to the police station for lockup, until the morning of 16 January 2006, when they were again forcefully driven to a Mozambique military airbase and forcefully bundled into a Mozambique military aircraft, the "*Buffalo*", in the presence of Kenyan and Tanzanian Police Officers.

6. They allege that the aircraft landed at Mwalimu Julius Nyerere International Airport in Dar-es-Salaam, and upon their arrival in Dar-es-Salaam, they were blindfolded, bundled into waiting vehicles and driven to three different locations and locked up, still handcuffed with hands behind their backs. They add that on 19 January 2006, they were again bundled into heavily guarded vehicles, handcuffed with hands behind their backs and driven under tight heavily armed police presence to Moshi, at the Kilimanjaro International Airport Police Station, where they allege having been submitted to severe beatings with heavy sticks and metal rods, torture by use of electric shocks from a special torture police squad, led by one Inspector Duwan Nyanda, and refused access to communication with their lawyers who came several times to meet them.

7. The Applicants further claim that they were eventually charged for a range of serious criminal offences, which trials have been unduly and inordinately delayed and riddled with multiple violations of various rights.

8. According to them, two of the charges were later withdrawn by the Respondent, that is, Criminal Case 647 of 2006 and Criminal Case 881 of 2006, and the Respondent entered a *nolle prosequi* in respect of the dropped murder charge in Criminal Case 10 of 2006 in accordance with the provisions of Section 91(1) of the Criminal Procedure Act of the Respondent State.

9. They submit that three (3) of them were released after the murder charge was withdrawn for lack of evidence, five (5) were subsequently convicted for conspiracy to commit an offence, contrary to Section 384 of the Penal Code, and armed robbery, contrary to Section 287A of the Penal Code, and sentenced to 30 years in prison, and are currently serving their sentence at Ukonga Central Prison at Dar-es-Salaam, while two (2) died in detention in the course of the trial.

10. The three (3) who were released are: Boniface Mwangi Mburu, David Ngugi Mburu and Michael Mbaya, while the five (5) who were convicted and sentenced are: Wilfred Onyango Nganyi, Jimmy Maina Njoroge, Patrick Muthee Muriithii, Gabriil Kungu Kariuki, and Simon Ndugu Kiambuthi, and the two (2) who died in custody were: Peter Gikura Mburu and Simon Githinji Kariuki.

III. Proceedings before the national courts of Tanzania

11. The Applicants allege that on 24 January 2006, they were arraigned before the Moshi Resident/District Court and charged with a count of murder and three charges of armed robbery, after being accused of robbing the National Bank of Commerce Limited, Moshi Branch on 21 May 2004 and the murder of one Benedict Laurent Kimaro Mfuria at Moshi, on 26 July 2005.

12. They bring the Application before this Court on the basis of Criminal Case 2 of 2006 (conspiracy to commit an offence, contrary to Section 384 of the Penal Code and armed robbery, contrary to Section 287A of the Penal Code) at the Resident Magistrate Court Moshi and Criminal Case 10 of 2006 (murder) at the High Court of Tanzania.

13. Before these cases could be heard, the Applicants filed Misc. Criminal Application 7 of 2006 at the High Court of Tanzania to request for leave to file orders of *certiorari* and prohibition in order to challenge their alleged forceful kidnapping and abduction from Mozambique. In their Application they sought:

- a. an order to stay criminal proceedings against them;
- b. an order of *certiorari* to quash their committal to trial on the preliminary inquiry on the charge of murder;
- c. an order of *certiorari* to quash their arrest and the original four criminal charges as based on illegal and unlawful actions by the police and immigration services.
- d. an order prohibiting the Resident Magistrate, Moshi, from hearing or determining the criminal case against them;
- e. an order for their immediate release and for restoration of their property which included passports, unused air tickets, Kenyan identity cards, international vaccination certificates, ATM cards, frequent flier cards, US\$29,047, KSh28,000, four mobile phones, three gold rings, wrist watches and shoes; and

f. costs.

14. On 1 June 2006, the High Court of Tanzania granted the Applicants leave to apply for orders of *certiorari* and prohibition, but declined to order stay of proceedings.

15. After the grant by the High Court, the Applicants filed Criminal Application 16 of 2006, to request for prerogative orders of *certiorari* and prohibition as follows:

- a. An order to stay proceedings in Moshi District Court, Criminal Cases 647 of 2005, and 2 of 2006 and committal proceedings in Preliminary Inquiry No. 26 of 2006 which are pending before the Resident Magistrate, Moshi, who was cited as the fourth Respondent;
- b. An order of *certiorari* to quash an order of the third Respondent, that is, the Resident Magistrate Moshi, committing the Applicants for trial before the High Court;
- c. An order of *certiorari* to quash the illegal and unlawful actions of the first and second respondents, that is, the Inspector General of Police and the Director of Immigration services, and all the criminal charges and prosecutions in the aforementioned four criminal cases, which are grounded on the patently illegal and unlawful actions of the said first and second respondents;
- d. An order of prohibition, to prohibit the third and fourth respondents from hearing, or in any other way, determining all or any of the aforesaid criminal cases and or charges;
- e. An order for the immediate release of the Applicants from custody and for the restoration of their passports, unused air tickets (Maputo-Nairobi), Kenya identity cards, international certificates of vaccination, ATM cards, frequent flyer cards, US \$29,047, KSh 28,000, four mobile phones, three golden rings, wrist watches and shoes; and
- f. Any other order the Court may deem fit and just to grant.

16. At the same time, the Respondent State filed Criminal Appeal No. 276 of 2006, against the High Court decision in Misc. Criminal Application No. 007 of 2006, which granted leave to the Applicants to file for orders of *certiorari* and prohibition. Proceedings in Criminal Application No. 16 of 2006 were therefore stayed pending the results of the Respondent State's appeal.

17. On 20 November 2007, the Court of Appeal struck out the Respondent's Criminal Appeal No. 276 of 2006. This decision enabled Criminal Application No. 16 of 2006 to proceed.

18. On 26 September 2008, the High Court dismissed in its totality Criminal Application No. 16 of 2006. On 26 November 2008, the Applicants appealed this decision of the High Court to the Court of Appeal in Criminal Appeal No. 353 of 2008, and on 14 February 2011, the appeal was struck out for being incompetent as the Appellants had not obtained leave to appeal. They then filed a fresh appeal to the Court of Appeal in Criminal Appeal No. 27 of 2011; the Court of Appeal allowed the Appeal on 19 March 2013, on the basis that the trial High Court judge erred in deciding the case on the merits without ruling on the preliminary points of law raised by the Respondent. The case was therefore remitted back to the High Court for a decision on the preliminary points of law.

19. The Applicants aver that thereafter, they filed an Application before this Court, arguing that they have exhausted local remedies as: “(a) On the criminal charges, there has been an inordinate delay of seven years before their case has been brought to trial; and (b) On the violation of their rights, their Application has gone up to the Court of Appeal”.

20. The Applicants also point out that their Applications have proceeded all the way to the Court of Appeal twice, both times without success. To that extent, they argue that within the judicial system of the Respondent, they have exhausted all local remedies. Furthermore, they allege that the Court of Appeal of the Respondent “ought to have treated the repeated Applications with the objective of obtaining substantive justice in the matter without undue regard to technicalities of the law, especially of the procedural law”.

21. In conclusion, the Applicants maintain that they only brought the Application to this Court after they realised that the Respondent was taking too long to initiate the proceedings directed by the Court of Appeal in Case 79 of 2011.

22. The case file before this Court reveals that, at the time the Applicants seized this Court on 23 July 2013, Criminal Case 2 of 2006, Criminal Case 10 of 2006 and Criminal Application 16 of 2006 were still pending before the Respondent’s Courts.

23. This Court’s attention was also drawn to the fact that in December 2006, the Respondent conducted a similar trial on the same facts, same offences, by the same Court (the Resident Magistrate Court at Moshi), by the same prosecution, on a completely different set of suspects. Some of the suspects in this case were sentenced to 30 years imprisonment with 12 strokes of the cane, while others were sentenced to 3 years imprisonment. When this matter was raised by the Applicants, the Respondent did not respond to it. The Applicants also did not show this Court the relationship between the two cases, save for drawing those similarities.

IV. Alleged violations

24. In their Application, the Applicants allege the following:

- a. That, our rights of properties were violated by the Respondent State;
- b. That our rights of freedom were violated by the Respondent State;
- c. That our rights of work were violated by the Respondent State; and
- d. That our rights to be tried within a reasonable time by the Courts were violated by the Respondent State”.

V. Procedure before the Court

25. The Application was filed at the Court on 23 July 2013.

26. On 30 July 2013, the Registry sought clarification from the Applicants on whether they had been in touch with their counsel and had remitted their Application back to the High Court for a ruling on the preliminary points of law as directed by the Court of Appeal in its judgment of 19 March 2013.

27. In a letter dated 12 August 2013, the Applicants informed the Court that, for four months since the Court of Appeal's directive of 19 March 2013, they had not heard from their counsel, Mr Loomu Ojare, from Arusha.

28. On 27 August 2013, the Registry sought clarification from the Applicants on whether their counsel was appointed by the Respondent, and whether they had instructed counsel to set their matter down for hearing by the High Court as directed by the Court of Appeal or whether they themselves had requested the High Court to re-hear their case in accordance with the order of the Court of Appeal.

29. On 26 September 2013, the Applicants informed the Court that their counsel was hired by their relatives. They further stated that in an effort to push the matter before the High Court, they wrote and attempted to communicate with their counsel in vain, so they wrote a letter to the High Court on 16 August 2013, requesting it to set a date for the hearing of their matter as ordered by the Court of Appeal but that letter has not been responded to.

30. On 12 December 2013, in conformity with Rule 35(2)(a) of the Rules, the Registrar served the Application on the Respondent and invited it to indicate the names and addresses of its representatives within 30 days and respond to the Application within 60 days, from the date of receipt of the notification. On the same date, the Chairperson of the African Union Commission and through the latter, the Executive Council of the African Union and all States Parties to the Protocol, were notified of the Application, in conformity with Rule 35(3) of the Rules.

31. The Respondent filed its Response to the Application on 26 February 2014.

32. On 31 March 2014, the Applicants replied to the Respondent's Response.

33. On 8 April 2014, the Registry, in conformity with Rule 35(2)(b) of the Rules, transmitted the Application to the Republic of Kenya, being the State Party whose citizens are the Applicants, drawing its attention to the fact that it was entitled to intervene in the proceedings, if it so wished.

34. On 9 April 2014, the Registry, pursuant to Rule 31 of the Rules, requested the Applicants to inform the Court whether they were still facing challenges with respect to legal representation, and if so, advised them to contact the Pan African Lawyers' Union (PALU) on the possibility of the latter providing them legal assistance.

35. On 2 June 2014, the Registry enquired from PALU whether it could consider providing legal aid to the Applicants, and by letter dated 11 August 2014, PALU expressed its willingness to represent the Applicants in the matter. On the same date, the Registry informed the Respondent that the Applicants would be represented before the Court by PALU.

36. By letter of 4 November 2014, the Parties were informed that the Application was set down for public hearings on 12 and 13 March 2015.

37. On 19 December 2014, the Respondent requested the Court to adjourn the hearings of the Application to June 2015, citing reasons of “limited manpower and other matters of equal national importance”.

38. On 19 January 2015, the Registry forwarded the Respondent’s request for adjournment to the Applicants, and the latter responded on 22 January 2015, indicating that they had no objection to the adjournment.

39. On 9 February 2015, the Court notified both Parties that it had adjourned the hearing to its 37th ordinary session and that the hearing would be on preliminary objections, admissibility and merits of the case.

40. On 13 May 2015, the Applicants requested the Court to facilitate their attendance at the hearing, and sought an Order from the Court to direct the Respondent to transfer them from Ukonga Prison (Dar-es-Salaam) to Karanga Prison (Moshi).

41. On 18 May 2015, the Court, after having examined the Applicants’ request, decided that given the circumstances of the case, their presence was not necessary.

42. On 20 May 2015, both Parties submitted bundles of documents which included trial proceedings from the trial courts and lists of authorities for consideration, whilst seeking the Court’s leave to submit additional evidence after the closure of proceedings, under Rule 50.

43. On 21 May 2015, public hearing took place at the seat of the Court in Arusha, during which the Parties made oral submissions and responded to questions put by the Court.

VI. Prayers of the Parties

A. Applicants’ prayers

44. In their Application of 23 July 2013, the Applicants “pray(ed) to the African Court on Human and Peoples’ Rights to regain these rights which were violated by the Respondent State”. They also prayed for:

- (a) Restoration of their rights which were violated with regard to the allegations made in this Application; and
- (b) An Order for reparation to remedy the violations with regard to the allegations made in the Application.

45. In their reply of 31 March 2014, to the Respondent’s Response to the Application, the Applicants emphasized that their main complaint is the delay by the Respondent in dealing with the matters they are facing within the national justice system, being Criminal case No. 2 of 2006 and Criminal Application No. 16 of 2006. They state that even though they have made a number of Applications to stay proceedings against them, none of these Applications was granted, it is therefore not an excuse for the Respondent to delay their trial on the basis of Applications they made, because no stay was ever granted in their Applications.

46. At the public hearing of 21 May 2015, the Applicants prayed the Court for:

1. a declaration that the Respondent State has violated their rights to be tried within a reasonable time as is required by Article 7 of the Charter and indeed by Section 192 of the Respondent State's Criminal Procedure Act.
2. a declaration that the Respondent State has violated their rights to be afforded legal aid and representation for the entire duration of the trial.
3. an order of this Court that the pending Case be concluded within a reasonable time as the Court may determine.
4. a further order that the Court Orders that the Respondent State provides legal aid and representation to the Applicants for the remainder of the Appeal within the National Courts.
5. reparation, should follow a decision of this Court pursuant to the present proceedings if it goes in their favour.
6. any other declaration and/or orders that this honourable Court may deem fit in the circumstances.

B. Respondent's prayers

47. In its Response to the Application, the Respondent raised preliminary objections with regard to the jurisdiction of the Court and on the admissibility of the Application. It also submitted on the merits of the Application.

48. In its Response, the Respondent prayed the Court to grant the following orders with respect to the admissibility of the Application:

- i. That the Application has not evoked the jurisdiction of the honourable Court.
- ii. That the Applicants have no locus standi to file the Application before the Court and hence should be denied access to the Court as per Articles 34(6) and 5(3) of the Protocol.
- iii. That the Application has not met the admissibility requirements stipulated under Rule 50(2)(5) and (6) of the Rules nor Article 56 and Article 6(2) of the Protocol.
- iv. That the Application has not met the mandatory procedural requirement stipulated in Rule 34(1) of the Rules of Court.
- v. That the Application be dismissed in accordance to Rule 38 of the Rules of Court.
- vi. That the cost of this Application be borne by the Applicants.

49. With respect to the merits of the Application, the Respondent prayed the Court to grant the following orders:

- i. That the Tanzanian Police did not forcefully kidnap and abduct the Applicants in collusion with Mozambican and Kenyan Police Officers.
- ii. That the Respondent complied with the mandatory requirements of section 13(1)(a)(b)(c) of the CPA [Cap 20 RE 2002].
- iii. That the Government of the United Republic of Tanzania has not violated the Applicants' right to own property.
- iv. That the Government of the United Republic of Tanzania has not violated the Applicants' right to freedom.
- v. That the Government of the United Republic of Tanzania has not violated the Applicants' right to work.
- vi. That the Government of the United Republic of Tanzania has not violated the Applicants' right to be tried within a reasonable time.

vii. That the Applicants not be awarded any reparations with regard to claims and allegations made in this Application against the United Republic of Tanzania.

viii. That the cost of this Application be borne by the Applicants.

50. At the public hearing, the Respondent made the following prayers:

1. a declaration that the Respondent State has not caused an inordinate delay in the matters facing the Applicants in Criminal Case No 2/2006 and 16/2;
2. an order of not awarding reparations;
3. the Application be dismissed.

51. Pursuant to Rule 39(1) of the Rules, the Court will deal with the questions of its jurisdiction and admissibility of the Application; if the case arises, the Court will then examine the merits of the matter.

VII. Jurisdiction of the Court

A. Jurisdiction *ratione materiae*

52. According to the Respondent, the jurisdiction of the Court, as elaborated in Article 3(1) of the Protocol and Rules 26 and 40(2) of the Rules, has not been invoked by the Applicants. The Respondent avers that the Applicants have merely cited ongoing cases against them within the national judicial system and have made no attempt to even mention the Protocol, the African Charter on Human and Peoples' Rights (hereinafter referred to as the "Charter"), or any other relevant human rights instruments ratified by the Respondent, neither have they complied with the Constitutive Act of the African Union.

53. The Respondent further states that the allegations in the Application include allegations against Kenya and Mozambique, States Parties to the Protocol which have not made the declaration accepting the jurisdiction of the Court to receive Applications, pursuant to Articles 5(3) and 34(6) of the Protocol. The Respondent adds that the Applicants have alleged that there was a conspiracy between the Police Forces in Kenya, Mozambique and Tanzania in kidnapping and abducting them, and although two of these States have not been joined in the Application, they are inadvertently involved due to the nature of the allegations of conspiracy which have been raised.

54. The Respondent concludes by praying that "the Applicants should be denied access to the Court and the Application should be duly dismissed for having failed to invoke the jurisdiction of the Court".

55. In their Reply to the Respondent's preliminary objection on the jurisdiction of the Court, the Applicants maintained that the jurisdiction of this Court has been invoked, adding that they have "complied with the Rules and Protocol of the Court in Article 3(1), Rule 26 and Rule 40(2)".

56. The Applicants submit further that their allegations against States Parties which have not made the declaration accepting the jurisdiction of the Court to receive Applications as per Articles 5(3) and 34(6) of the Protocol were wrongly cited, noting that in their Application

to the Court, they “just gave a brief history of how we came to be in the Respondent State”, and

“never intended to involve any member states in this Application, as our Application is of inordinate delay in the matters that are facing us in Criminal Case No. 2 of 2006 and Criminal Application No. 16 of 2006. This delay having been caused by the Respondent state (Tanzania) which is one of the states which have made a Declaration accepting the competence of the Court to receive cases as per Article 5(3) and 34(6) of the Protocol”

57. The Court overrules the Respondent’s objection that its jurisdiction has not been invoked simply because the Applicants have only cited ongoing cases against them within the national judicial system and have not mentioned the Protocol, the Charter, or any other relevant human rights instruments ratified by the Respondent. The Court has held in previous cases involving the same Respondent, that is, *Application 003/2012, Peter Chacha v United Republic of Tanzania* delivered on 28 March 2014 and *Application 001/2013, David Frank Omary v United Republic of Tanzania* delivered on 28 March 2014, that as long as the rights alleged to have been violated are protected by the Charter or any other human rights instrument ratified by the State concerned, the Court will have jurisdiction over the matter.

58. In the instant case, the Applicants allege violations of a number of rights (see paragraph 24 above). It is not necessary that specific provisions of the Charter be mentioned in the Application; it suffices that the rights allegedly violated are guaranteed by the Charter or any other instrument to which the Respondent is party.

59. This position is similar to the one held by the African Commission on Human and Peoples’ Rights (hereinafter referred as the “Commission”) in a Communication filed against the same Respondent. In *Communication 333/06 - Southern Africa Human Rights NGO Network and Others v Tanzania*,¹ the Commission held that:

“one of its primary considerations under Article 56(2) is whether there has been *prima facie* violation of human rights guaranteed by the African Charter. ... The Commission is only concerned with whether there is preliminary proof that a violation occurred. Therefore, in principle, it is not mandatory for the Complainant to mention specific provisions of the African Charter that have been violated.”²

60. The Court therefore, holds that it has jurisdiction *ratione materiae* to deal with the Application.

B. Jurisdiction *ratione personae*

61. The Court will now examine the Respondent’s objection that it lacks jurisdiction because the Application contains “allegations against Kenya and Mozambique, States Parties which have not made the declaration accepting the competence of the Court to receive cases as per Articles 5(3) and 34(6) of the Protocol”.

1 28th Activity Report, November 2009 – May 2010.

2 As above, para 51.

62. The Court notes that in their Reply to the Respondent's objection, the Applicants made it clear that they never intended to involve any other Member State in the Application, as their Application and contention is about inordinate delay in the matters that are facing them in Criminal Case 2 of 2006 and Criminal Application 16 of 2006, before the Courts of the Respondent, this delay having been orchestrated by the Respondent, which has made a declaration accepting the jurisdiction of this Court. This position was reiterated by the Applicants during their oral submissions at the public hearings.

63. The Court further notes that the Applicants are Kenyan nationals; they bring the Application against a State Party to the Protocol which on 29 March 2010, made the declaration in terms of Article 34(6) of the Protocol, accepting the jurisdiction of this Court to receive cases from individuals. The Court therefore finds that it has jurisdiction *ratione personae* to receive the Application.

C. Jurisdiction *ratione temporis*

64. The Court's jurisdiction *ratione temporis* has not been challenged. The Court has held in its judgment of 28 March 2014 in *Application 013/2011 – the Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo & the Burkinabe Movement on Human and Peoples' Rights v Burkina Faso*, that the relevant dates regarding its *ratione temporis* jurisdiction are those of the entry into force of the Charter, the Protocol as well as that of the deposit of the declaration accepting the jurisdiction of the Court to receive Applications from individuals.

65. In the instant case, the Respondent ratified the Charter on 18 February 1984, the Protocol on 7 February 2006 and deposited the declaration required under Article 34(6) of the Protocol on 29 March 2010.

66. As far as the Court is concerned, the violations alleged by the Applicants in the instant case do not constitute instantaneous but continuous violations of the international obligations of the Respondent, and as such gives the Court jurisdiction to hear the matter: While the alleged violations occurred before the filing of the special declaration by the Respondent, i.e. 29 March 2010, they were continuing after this date. Indeed, the Applicants are still in detention, and some of the cases brought against them are still pending before the Respondent's Courts and they have not been provided with legal aid to pursue the pending cases.

D. Jurisdiction *ratione loci*

67. With respect to jurisdiction *ratione loci*, which has also not been challenged, the Court is of the view that since the alleged violation occurred within the territory of the Respondent, the Court has jurisdiction.

68. Having established that it has jurisdiction to examine the Application, the Court will now proceed to consider the Respondent's preliminary objections on the admissibility of this Application.

VIII. Admissibility of the Application

69. In its Response to the Application, the Respondent avers that, “in the alternative but without prejudice to ...” its preliminary objections on the jurisdiction of the Court, it was objecting to the admissibility of the Application on four (4) grounds, namely:

- i. That the Application is incompatible with the Charter of the Organization of African Unity (OAU) or with the present Charter as per Rule 40(2) of the Rules of the Court,
- ii. That the Applicants failed to exhaust local remedies as per Rule 40 (5) of the Rules;
- iii. That the Application was not submitted within a reasonable time from the time local remedies were exhausted as per Rule 40 (6) of the Rules; and
- iv. That the Application does not comply with Rule 34(1) of the Rules as it is not signed by the Applicant or his/her representatives.

70. The Respondent argues in this regard that “... the general maxim is that for an Application to be considered admissible, all the conditions for admissibility should be met. The Respondent submits that as the conditions of admissibility prescribed in Rule 40(2), (5) and (6) have not been met, compounded with non-compliance with Rule 34(1) of the Rules of Court, this Application before the honourable Court should be deemed inadmissible and dismissed with costs.”

A. Objection on compliance with Rule 34(1) of the Rules of Court

71. Although this is not an admissibility requirement in terms of Article 56 of the Charter and Rule 40 of the Court Rules, the Respondent cited this as one of the grounds to declare the Application inadmissible. Indeed, according to the Respondent, the Application does not comply with Rule 34(1) of the Rules because the Application was not signed by the Applicants or their representatives as required by the Rule. The Respondent submits that not signing an Application renders it invalid for want of ownership and verification, stressing that the fact that this basic requirement was not met, renders the Application null and void and incurably defective, thus the Application is not admissible before the Court.

72. In their Reply, the Applicants submit that “... the Respondent did not study our Application well because we believe that the Court would not have received our Application if it was not signed ...”. They add that “...the Application before the Court was made in prison and was and is a necessary step of signing any document being sent from prison so as to show that the maker was not forced to do so as he is restrained”.

73. The Court finds the Respondent’s objection immaterial and irrelevant, in light of the fact that the main Application is supported by the attachments which are signed and referred to in the Application. The cover letter from the Central Prison forwarding the Application is duly signed by the Officer-in Charge of the Prison. The attachments to the Application depicting the *Evidence of inordinate delay of local remedies* and the *Request for Reparation in the Application* are all

marked with the ten (10) Applicants' thumbprints. Both documents are referred to in the main Application. The Court therefore finds the Respondent's objection on this point to be baseless and lacking in merit, and hereby dismisses the same.

74. The Court will now turn to the other objections on the admissibility of the Application raised by the Respondent.

75. The Court recalls that Rule 40 of its Rules provides that "Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, Applications to the Court shall comply with the following conditions:

1. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
2. comply with the Constitutive Act of the Union and the Charter;
3. not contain any disparaging or insulting language;
4. not be based exclusively on news disseminated through the mass media;
5. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
7. not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union".

B. Compatibility of the Application with the Constitutive Act of the African Union

76. According to the Respondent, the Application is not compatible with the Constitutive Act of the African Union, noting that the Application has been brought merely by making reference to cases the Applicants are facing before domestic courts. The Respondent states further that throughout the Application, the Applicants have failed to cite any provision of the African Charter that has been violated, noting that the Application seeks for the Court to deliberate and subsequently adjudicate on matters/actions carried out by the Police Forces of Kenya and Mozambique, being States Parties which have not recognized the jurisdiction of the Court by depositing the declaration. The Respondent cites the Court's decisions in *Application No. 005/2011, Daniel Amare and Mulugeta Amare v Republic of Mozambique and Mozambique Airlines* and *Application 002/011, Sofiane Abadou v People's Democratic Republic of Algeria*, in support of its argument.

77. The Respondent concludes that, based on the foregoing, the Application has not satisfied the admissibility requirement under Rule 40(2) of the Rules and should therefore be dismissed.

78. In their Reply to the above objection, the Applicants state as follows:

“(we) refute the claims of the Respondent State which states that we want the Court to deliberate and subsequently adjudicate on matters/actions carried out by the police of Kenya and Mozambique. It is our submission that the matter concerning the forceful kidnapping and abduction by the Tanzanian police in collusion with the Kenyan and Mozambican police, is a matter which has not been fully determined as it is still pending in the High Court of Tanzania in Moshi. The matter in Application 16 of 2006 which is in the High Court concerning the wrongful kidnapping and abduction has been dragging in court for the last 8 years and going. This matter has been unduly prolonged”.

79. The Court notes that the Constitutive Act of the African Union which replaced the Charter of the OAU provides that one of the objectives of the African Union shall be to promote and protect human and peoples’ rights in accordance with the Charter and other relevant human rights instruments. Therefore, the present Application is in line with the objectives of the African Union as it requires the Court, as an organ of the African Union, to consider whether or not human and peoples’ rights are being protected by the Respondent, in line with the African Charter and other instruments ratified by the Respondent. The Court has already ruled on this matter in its Judgment in *Application 003/2012, Peter Joseph Chacha v United Republic of Tanzania*, delivered on 28 March 2014, where it held that, so long as an Application states facts which revealed a *prima facie* violation of rights, the Application will be admissible (*paragraphs 114 to 124 of the Judgment*).

80. Having examined the arguments of both Parties and considering its finding on jurisdiction above, the Court hereby rejects the Respondent’s objection on this ground.

C. Exhaustion of local remedies

81. The Respondent avers that it is premature for the Applicants to have instituted this matter before this Court, as they have ongoing cases before the national courts which are yet to be finalised. The Respondent adds that the Applicants have the right to appeal any of the cases against them if they feel aggrieved by the decisions of the Courts, but the cases have to come to finality in order for the Applicants to exercise their right to appeal. According to the Respondent, the Applicants have the additional remedy of instituting a Constitutional Petition regarding the alleged violations of rights, vide the *Basic Rights and Duties Enforcement Act*, and, if the Applicants are aggrieved with the Court of Appeal’s decision, they have at their disposal, the remedy of instituting a Review of such decision, as provided in Part 111 B-Section 66 of the Tanzania Court of Appeal Rules, 2009.

82. With regard to the pending cases before the High Court, the Respondent submits that cases are heard on a first-come-first-heard basis, and unfortunately, there is a backlog of cases pending at the national Courts. The Respondent adds that it has every intention of ensuring that matters before the Courts are dispensed with in a timely manner as it is cognizant of the fact that justice delayed is justice denied and wishes no unwarranted delays to anyone.

83. The Respondent submits in conclusion that from the foregoing, the Applicants are yet to exhaust the available local remedies, adding that as the exhaustion of local remedies is a fundamental principle prior to filing a matter before the Court, “the Application has not passed the test of admissibility, as it has not met the requirements of Rule 40(5) of the Rules of Court”. The Respondent cites the African Commission’s Communication 333/2006 *Sharingo and Others v Tanzania* and Communication No 275/2003, *Article 19 v Eritrea*, to support its argument.

84. In their Reply to the Respondent’s argument of failure to exhaust local remedies, the Applicants state that “we, the Applicants in the Application have not exhausted the local remedies as alleged by the Respondent. Our complaint in the matter is about the unduly prolonged period that has taken us to be in prison from 2006 up to date”. They add that they “let go of the chance for review as this was the second time the Court of Appeal was remitting back the Application to the High Court, so our defence counsels advised us against going for a review so that we can on the onset shed more light into the Application”.

85. The Court first notes that the Applicants themselves have conceded that they have not exhausted local remedies. This position is stated in their reply to this preliminary objection, and reiterated during their oral submissions at the public hearings, in which they stressed that their contention “is not about having to exhaust local legal remedies at their disposal but rather that the matter has been unduly prolonged since 2006 when they were incarcerated to date”.

86. The question for the Court is to determine whether the reasons given by the Applicants for not exhausting local remedies fall within the permissible scope of the exception as envisaged under Article 56(5) of the Charter and reflected under Rule 40(5) of the Rules of Court.

87. Rule 40(5) which is drawn from Article 56(5) of the Charter, provides that Applications to the Court shall, *inter alia* “be filed after exhausting local remedies, if any, unless it is *obvious* that this procedure (local remedies) is *unduly* prolonged”. (emphasis added).

88. There is no dispute as to the availability of local remedies, as even the Applicants themselves acknowledge that remedies are available, but only that they have been unduly prolonged in their case. Rule 40(5) of the Rules, as interpreted by the Court, provides a test for the credibility of any local remedy. It does not only require the remedy to be available, but requires it to also be effective and sufficient.

89. In *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo and the Burkinabè Movement for Human and Peoples’ Rights v Burkina Faso*, (*supra*) this Court indeed ruled that an effective remedy refers to “that which produces the expected result and therefore the effectiveness of a remedy as such is measured in terms of its ability to solve the problem raised by the complainant”.³ This position is shared by the African

3 African Court on Human and Peoples’ Rights, Application 013/2011, Judgment of 28 March 2014, page 24, paragraph 68.

Commission, which held in *Communication 147/95-149/96, Dawda Jawara v The Gambia*, that “a remedy is available if it can be pursued by the Applicant without any impediment, it is deemed effective if it offers prospects of success, is found satisfactory by the complainant or is capable of redressing the complaint”.⁴

90. The exception under Rule 40(5) requires that the procedure must not only be prolonged but must have been done so “unduly”. This presupposes that resort to the exception will not stand if it is demonstrated by the Respondent that the procedure was ‘duly prolonged’.

91. According to the Black’s Law Dictionary, unduly means, “excessively” or “unjustifiably”. Thus, if there is a justifiable reason for prolonging a case, it cannot be termed “undue”, for example, where a country is caught in a civil strife or war, which may impact on the functioning of the judiciary, or where the delay is partly caused by the victim, his family or his representatives.

92. In *Communication 293/04, Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa v Zimbabwe*, the African Commission noted that while it has not developed a standard for determining what is “unduly prolonged”, it can be guided by the circumstances of each case and by the common law doctrine of a “reasonable man’s test”. Under this test, the Commission sought to find out, given the nature and circumstances of a particular case, how any reasonable man would decide.

93. Considering the circumstances of this Application, the question is whether the procedure has been unduly prolonged.

94. Taking all the factors into account, the Court answers the question posed in paragraph 93 in the affirmative. Since the Applicants were arrested and charged before the Respondent’s Courts in 2006 until they seized this Court in 2013, and to date, almost ten years since proceedings started, the Respondent’s courts have failed to bring finality to the matter. The Respondent’s arguments that the delay has been occasioned by Applications made by the Applicants for stay of proceedings cannot stand, as it behoves the Courts of the Respondent to bring finality to the matter. Besides, there is no indication that the Respondent’s courts granted any of the Applications to stay proceedings in the matters.

95. Furthermore, the Respondent’s arguments that the Applicants should have instituted a Constitutional Petition or a Review is unacceptable, because this Court has established that these are extraordinary remedies that the Applicants need not resort to, as it was held by this Court in its Judgment delivered on 20 November 2015, in Application 005 of 2013, *Alex Thomas v United Republic of Tanzania* (see Alex Thomas, *supra*, paragraph 64).

4 African Commission on Human and Peoples’ Rights, *Sir Dawda K. Jawara v The Gambia*, Communication 147/95-149/96, paragraph 31; African Commission on Human and Peoples’ Rights, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe*, Communication 284/03, paragraph 116.

96. Given the Applicants' situation, compounded by the delay in providing them with Court records and the absence of legal counsel at the later stage of the proceedings, this Court holds that the Respondent's objection relating to non-exhaustion of local remedies is unfounded, and hereby dismisses the same.

D. Filing of the Application within a reasonable time

97. In its Response to the Application, the Respondent submits that the requirement of reasonableness of time has not been met, as the Applicants have not exhausted all available local remedies as per Rule 40(5) of the Rules. Therefore, according to the Respondent, it cannot be said that the Application has been filed within a reasonable time from when local remedies were exhausted, as local remedies are yet to be exhausted.

98. The Respondent avers that in the alternative and without prejudice to what has been stated above, should the Court find that local remedies have been exhausted, it is its contention that the Application has not been filed within a reasonable time from when the local remedies were exhausted. It avers further that although Rule 40(6) of the Rules does not prescribe, define or quantify a period of reasonable time, there are developments in international human rights jurisprudence, which have established a period of six (6) months as reasonable time. The Respondent adds that being in remand prison is not a bar for the Applicants to access the Court, as they in fact have been able to do so, and indeed the Applicants have let a reasonable time elapse from the time they felt aggrieved in 2006 and from the time the decision was delivered in the Court of Appeal, in Criminal Appeal 353 of 2008, to the time they brought the Application before this Court.

99. The Respondent concludes on this point that the Application should be declared inadmissible because of the unreasonable time that has lapsed, in accordance with the provision of Rule 40(6) of the Rules. The Respondent refers to the African Commission's *Communication 308/2005 Majuru v Zimbabwe* to support its argument.

100. The Applicants for their part submit that "we continue to contend strongly and refute the claims of the Respondent State that we had not exhausted the local and legal remedies because in our Application we insist on the time taken by the court to adjudicate our matter". They add that "the Application No 006 of 2013 was formally written on 20 June 2013 and sent to the Court on Human and Peoples' Rights registrar. The time period from when the ruling was made by the Court of Appeal sitting at Arusha on 19 March 2013 looking at the time frame, it is within the required six-month period. Although we, the Applicants still insist that our main complaint in Application No. 006 of 2013 is of the unduly prolonged period in dispensing of justice".

101. The Court has already held in paragraph 96 above, that the objection on exhaustion of local remedies is unfounded, as the bone of contention in this Application is the alleged undue delay in hearing the Applicants' cases. Besides, the Court has deduced from the pleadings that the last Ruling of the Court of Appeal on this matter was on 20 March 2013, and the Application was filed before the African Court on

23 July 2013. In all estimation, a period of four months is a reasonable period of time.

102. The Court therefore holds that the Application was filed within reasonable time, and thus overrules the Respondent's objection on this ground.

103. From the foregoing, the Court is satisfied that the Application before it satisfies all the conditions of admissibility under Article 56 of the Charter and Rule 40 of the Rules, and therefore declares the Application admissible.

IX. MERITS

A. Applicants' submissions on the Merits

104. In their Application dated 23 July 2013, the Applicants allege that the Respondent has violated their right to own property, right to freedom, right to work⁵ and right to be tried within a reasonable time by the national courts.

105. In their Reply of 31 March 2014 to the Respondent's Response of 26 February 2014, the Applicants further allege as follows:

- i. That, the Respondent did not study the Application properly in Application No. 006 of 2013. Since in the Application all Applicants are Kenyans;
- ii. That, we the Applicants are facing charges in the Resident Magistrates Court in Criminal Case No.2 of 2006, and among the Applicants, only eight (8) are facing this charge;
- iii. In the High Court in murder session No. 10 of 2006 only seven (7) of the Applicants are facing that charge;
- iv. That, the Application on No. 006 of 2013 before the Court does not have a Tanzanian Applicant as claimed by the Respondent;
- v. That, the Applicants were flown from Mozambique aboard an army plane and claims made by the Respondent that they were flown to Tanzania and arrested at Mwalimu Julius Nyerere International Airport are strongly refuted although there is a case pending in the High Court No 16 of 2006 on the same matter;
- vi. That, we the Applicants, on 24th of April 2006 and 3rd March 2006, had charges of Criminal Cases No. 811 of 2005 and No. 647 of 2005 dropped. This is refuted because the said charges were dropped on 3rd September 2007, this being No. 811 of 2005 and 16th of January 2009 Criminal Case No. 647 of 2005; and
- vii. That, the Respondent did not comply with Section 13(1)(a), (b) and (c)...of the Criminal Procedure Act.

106. During the public hearing, the Applicants reiterated these allegations.

⁵ See paragraph 24 *supra*. The Applicant did not pursue these three allegations in its subsequent pleadings, be it in its Reply to the Respondent's Response or during the public hearing; the Court will therefore not examine these allegations in this judgment.

B. Respondent's submission on the Merits

107. For its part, in its Response of 26 February 2014, the Respondent contests the allegations made by the Applicants, stating in particular that:

- i. With respect to the alleged forceful kidnap and abduction of the Applicant, the Respondent states that the arrest of the Applicants was lawful and in compliance to the law, and that the allegations were baseless and without merit and should be duly dismissed.
- ii. On the allegation that the Respondent did not comply with the mandatory requirements of section 13(1)(a)(b)(c) of the Criminal Procedure Act [Cap 20 RE 2002], the Respondent states that the Criminal Procedure Act caters for occasions where a warrant of arrest is not necessary such as circumstances of an emergency situation and situations duly elaborated in Section 14 of the Criminal Procedure Act [Cap 20 RE 2002]. Accordingly, the Respondent avers that 'this allegation is misconceived, lacks merit and should be dismissed'.
- iii. On the allegation that the Applicant's Application has been pending in the High Court of Moshi unattended since January 2006, the Respondent avers that 'it was the Applicants themselves who, soon after [being] charged, filed Applications for prerogative Orders against their trials which were only just concluded by the Court of Appeal of Tanzania in a decision delivered on 19th March 2013, remitting the Applications back to the High Court for consideration of preliminary objections'. The Respondent submits therefore that 'this allegation is frivolous and vexatious and should be dismissed'.
- iv. On the allegation that the Applicants' right to own property has been violated, the Respondent states that Article 24(1) of the 1977 Constitution of the United Republic of Tanzania guarantees the right to own property. The Court added that 'any properties found to be lawfully owned by the Applicants shall be duly returned to them upon finalization of their cases.
- v. On the alleged violation of the Applicants' right to freedom, the Respondent states that the right to personal freedom is guaranteed in Article 15(1) of the Constitution, adding that the detention is lawful and the Applicants are facing unailable offences and have ongoing cases within the local jurisdiction.
- vi. On the alleged violation on the right to work, the Respondent states that the right to work is guaranteed in Article 22(1) of the Constitution, and added that this being the case, 'the allegations are misconceived, without merit and should be duly dismissed'.
- vii. On the alleged violation of the Applicants' right to be tried within a reasonable time, the Respondent submits that 'there is no specific time frame for the completion of trials in the United Republic of Tanzania, [and] that any delay in the cases against the Applicants has been of their own doing as they opened various Applications, including Criminal Application 16 of 2006 ...and Criminal Appeal No. 79 of 2011...'
- viii. On the Applicants' request to be awarded reparations with regard to claims and allegations made in the Application, the Respondent prays the Court to dismiss this in its entirety".

In conclusion, the Respondent prayed the Court as per paragraphs 48 and 49 *supra*.

108. During the public hearing of 21 May 2015, the Respondent restated its position and refuted the Applicants' allegations, by stating that the Applicants "...upon receiving leave to file for prerogative orders, proceeded to do so and filed Miscellaneous Case No. 16/2006 at the High Court of Tanzania at Moshi on 19 June 2006. This was an Application for Orders of *certiorari* and prohibition in the matter of forceful kidnapping and abduction of the Applicants from the Republic of Mozambique by the Tanzanian Police in collusion with Kenyan and Mozambique Police". The Respondent adds that: "this was not an Application for a fair trial. What the Applicants were seeking was ...

- i. "An Order to stay the Criminal Proceedings in Moshi District Court;
- ii. An Order of *certiorari* to quash any other Orders in respect of the murder Case;
- iii. An Order of *certiorari* to quash action to the 1st and 2nd Respondent's with regards to their Criminal Cases;
- iv. An Order of prohibition to prohibit the 3rd and 4th Respondent's from hearing or in any other way determining any of the Cases against them;
- v. An Order for the immediate release of the Applicants".

109. According to the Respondent, "it was not an Application for fair trial but rather it was seeking to be released so that the cases/charges against them would not proceed within the local jurisdiction. There were no human rights issues raised in this Application."

110. The Respondent avers further that the Applicants never raised issues of delay when they were seeking these remedies, thus refuting "the allegations that the Respondent caused any delay in Criminal Application 16 of 2006, which actually ceased to exist on 19 March 2013, after being quashed by the Court of Appeal"

111. The Respondent argues that the Applicants never complained about the progress of Application 16/2006 as they themselves were vigorously pursuing their rights and seeking local remedies within the national jurisdiction through this Application, and that throughout the trials, the Applicants were able to afford defence counsel and were represented.

C. The Court's Findings on the Merits of the Application

112. The Court takes cognizance of the fact that in their Application, the Applicants allege that the Tanzanian Police "forcefully kidnapped and abducted [them] in collusion with Mozambican and Kenyan Police Officers", and illegally handed them over to Tanzanian authorities, and that they have challenged their alleged forceful kidnap and abduction in the High Court of Tanzania at Moshi, and this case "has been delayed since January 2006".

113. However, it is the Court's understanding that what the Applicants have actually brought before this Court is the alleged prolonged and undue delay in finalising this case of alleged forcefully kidnapped and abduction, which is Criminal Application 16 of 2006, still pending before the High Court of Tanzania at Moshi, together with Criminal Case 2 of 2006 and Criminal Case 10 of 2006. The Court is therefore not called

upon to investigate the circumstances under which the Applicants were brought into Tanzania, a matter that was raised only before the domestic courts and not before this court.

114. Although not mentioned in their Application or in their reply, at the public hearing, the Applicants also state that they were not provided with legal aid.

115. It is to these two allegations that the Court will now turn.

116. These two allegations fall within the scope of the rights guaranteed under Article 7 of the African Charter, which provides, *inter alia*, that:

“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; and (d) the right to be tried *within a reasonable time* by an impartial court or tribunal”. (emphasis added).

i. Alleged violation of Article 7 of the African Charter on account of alleged prolonged and undue delay in finalising cases at the national courts

117. The Applicants have stressed in both their written and oral submissions that their Application to the present Court is based on the prolonged and undue delay in hearing the pending criminal cases by the national courts, specifically Criminal Case 2 of 2006 (conspiracy and armed robbery) and Criminal Application 16 of 2006, (where they are challenging their alleged forceful abduction and kidnap from Mozambique).

118. They allege in this regard that their right to be tried within a reasonable time has been infringed, as these matters have been pending since 2006.

119. This is clearly expressed in their Application dated 23 July 2013, where they stated that “our rights to be tried within a reasonable time by the Courts were violated by the Respondent State”. In their Reply dated 25 March 2014, they reiterated that “the contention in the Application is only on allegations of delay by the Respondent State in the matters they are facing within the national justice system, being Criminal Case 2 of 2006 and Criminal Application 16 of 2006”. During the public hearing of 21 May 2015, they elucidated that “in Misc Criminal Application No. 16 of 2006 at the High Court concerning the kidnapping and abduction of the Applicants, the proceedings were unduly prolonged...”.

120. To elaborate, they submit that when they filed the Application in the High Court of Tanzania on 19 June 2006, it was dismissed on 16 September 2008. The Application took about two years and three months to be finalized. They then appealed before the Court of Appeal in a Notice dated 30 September 2008 and the Court of Appeal delivered its ruling on 14 February 2011. This took another period of two years and five months from the time the Application was dismissed by the High Court to the time the Court of Appeal delivered its Ruling.

121. The Applicants then proceeded to seek leave for extension of time to file their Appeal before the Court of Appeal, at which point the

Respondent filed a preliminary objection to the effect that the Court ruled strictly on the merits and did not take into consideration the Respondent's preliminary objections. When the Respondent filed an appeal, the Applicants raised a preliminary objection that the appeal was based on an interlocutory order that cannot be appealed.

122. The Applicants' appeal was dismissed, and the matter was remitted back to the High Court and then progressed again to the Court of Appeal, which also held that indeed the trial court decided on the merits of the case without taking into consideration the preliminary objections raised by the Respondent, and again referred the case back to the High Court, at which point the Applicants decided to file this Application before the present Court.

123. In its Response dated 26 February 2014, the Respondent "strongly refutes the allegations that it caused delay in Criminal case 16 of 2006, which [according to the Respondent], actually ceased to exist on 19 March 2013, after being quashed by the Court of Appeal". Respondent contends that "the Applicants never complained about the progression of the Application as they themselves were vigorously pursuing their rights and seeking local remedies within their national jurisdiction through this Application". The Respondent concluded by stating that the Applicants "...are the authors of their own destiny".

124. During the public hearing, the Respondent submitted that there are "... many reasons for (*sic*) why a case would take a long period of time. First of all, there is the issue of complexity and seriousness of the case. There were ten accused people, therefore a substantial case beyond reasonable doubt had to be built and proven against each Applicant. Indeed, it took a period of nearly two years from when the Applicants were arraigned in Court on 25 January 2006, to when the prosecution presented their first witness on 5 August 2008. However, the position was that there were other suspects and accused persons who were facing extradition trials in Kenya and we felt it prudent that all accused persons should be present at once and then commence with Criminal Proceedings".

125. The Respondent argues further that "what happened in effect was that as charges were being substituted and accused persons were being charged in their individual capacity, it was delaying cases, they had to remit *ab initio* and start again. ... Unfortunately, the cases in Kenya went up to the Court of Appeal and they were never released, so we decided to just proceed with the cases against the accused persons".

126. In its closing submission, the Respondent noted that "we would also like to point out that delays in the case were not strictly by prosecution, they were instances when Defence Counsel did not make appearance, there were instances when Defence Counsel was sick, there were instances when Defence Counsel was appearing before the Court of Appeal, Superior Courts, and what happens when you attend a Superior Court, naturally you do not attend the lower Court. So these allegations of delay were not by the Respondent ...".

127. Concerning the alleged violation of Article 7 on account of prolonged and undue delay, the Court would like to emphasize the

importance of a speedy judicial process, especially in criminal matters. *Justice delayed is justice denied*, is a maxim that is often used in this regard. If society sees that judicial settlement of disputes is too slow, it may lose confidence in the judicial institutions and in the peaceful settlement of disputes. In criminal matters, the deterrence of criminal law will only be effective if society sees that perpetrators are tried, and if found guilty, sentenced within a reasonable time, while innocent suspects, undeniably have a huge interest in a speedy determination of their innocence.

128. Article 7(1)(d) of the African 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* by an impartial court or tribunal” (emphasis added).

129. In the instant case, the Applicants submit that they filed the case in the High Court of Tanzania on 19 June 2006, and as at the time they filed the Application before this Court, that is, 23 July 2013, the matter was still pending before the domestic Courts of the Respondent.

130. Although the Respondent claims that Misc. Criminal Application 16 of 2006 “actually ceased to exist on 19 March 2013, after being quashed by the Court of Appeal”, the Applicants reiterated during the public hearing that “in Misc. Criminal Application 16 of 2006 at the High Court concerning the kidnapping and abduction of the Applicants, the case has been unduly prolonged and dragging in court for the last nine (9) years to date. There has been no stay, and therefore no reason for trial to take nine (9) years”, emphasizing that the matter was still pending before the Courts of the Respondent. The Court notes in this regard that the Respondent did not tender evidence to support its assertion that the matter has been disposed of.

131. Be that as it may, if the Court were to limit the computation of time from when the matter was instituted, that is, 19 June 2006, to when the Respondent claims the matter was quashed by the Court of Appeal, that is, 19 March 2013, it will be a period of six (6) years and two-hundred and seventy-three (273) days.

132. In the alternative, if one calculates from the time the case was instituted on 19 June 2006 and when the Applicants seized this Court, that is, 23 July 2013, it will be over seven (7) years, and if the Court considers the Applicants’ contention that, to date, the matter is still pending in the High Court of Tanzania at Moshi, (which the Court is minded to do), the period will be more than nine (9) years.

133. Whatever time computation the Court adopts, it is clear that the matter brought before this Court has been pending in the courts of the Respondent for at least six (6) years.

134. Having determined the length of time the matter has been pending at domestic level, the Court will now proceed to determine whether this time is reasonable within the meaning of Article 7(1)(d) of the Charter.

135. The Court notes from the onset that there is no standard period that is considered “as reasonable” for a court to dispose of a matter. In

determining whether time is reasonable or not, each case must be treated on its own merits.

136. As the jurisprudence of the European Court of Human Rights reveals, several criteria may be used to determine whether time is reasonable or not, including *inter alia*: (i) the complexity of the case; (ii) the behaviour of the Applicant; (iii) the behaviour of the national judicial authorities].⁶

137. This Court will therefore use these criteria for its assessment of whether or not the duration of the proceedings in the instant case was reasonable.

ii. Complexity of the case

138. To determine the complexity of a case, all aspects of the case must be considered, as the complexity may concern questions of fact as well as of law.

139. In the case-law of the European Court of Human Rights, complexity can be, among other factors, due to: (i) the nature of the facts that are to be established, (ii) the number of accused persons and witnesses, (iii) international elements, (iv) the joinder of the case to other cases, (v) the intervention of other persons in the procedure. Therefore, a more complex case may justify longer proceedings.⁷ The European Court however indicated that even in very complex cases unreasonable delays may still occur.⁸

140. In *Petrov v Bulgaria*,⁹ the Applicant and a certain Mr S.V. were arrested in Sofia on suspicion of having stolen a car in 1990. They were charged and placed in pre-trial detention. In the beginning of 1991, Mr S.V. managed to escape during a transfer from one detention facility to another. In May 1991, the Applicant was released on bail. On 24 July 1991, the Applicant was arrested in Gabrovo on charges of theft. The case was joined to other cases pending against Mr S.V., some of which also concerned the Applicant. On 5 February 1993, the proceedings were stayed as Mr S.V.'s whereabouts were unknown. According to the Applicant, Mr S.V. had settled in Greece, but during the following years had come back to Bulgaria every summer without ever having been stopped or bothered by the authorities, and had even renewed his identity documents. The Court concluded that it took altogether about 9 years for the matter to be disposed of.

141. In determining whether or not the time was reasonable, the European Court held that "... the case was factually complex, as it

6 Application 12919/1987 (*Boddaert v Belgium*, Application No 11681 of 1985 (*Union Alimentaria Sanders Sa v Spain* and Application 32771/1996 (*Cuscani v United Kingdom*)).

7 See *Boddaert v Belgium* (Application 12919/87) in which a period of six years and three months was not considered unreasonable by the Court since it concerned a difficult murder enquiry and the parallel progression of two cases.

8 See *Ferantelli and Santangelo v Italy* (Application 19874/92) concerning a murder trial that took sixteen years.

9 Application 15197/02.

concerned numerous offences committed in different places. However, it does not appear that this was the principal reason for the delays in the investigation. Nor does it seem that the Applicant contributed in any way to the protraction of the proceedings, which was apparently mainly the result of the authorities' inability to track down and summon his co-accused, Mr S.V. The absence of a co-accused cannot justify a period of inactivity as long as the one obtaining in the present case, where almost no investigative actions were carried out for a period of about nine years, especially since, in view of the delay, the authorities could have envisaged separating the cases against the Applicant and Mr S.V".

142. In the instant case, Respondent avers that the delay in finalising the matter could be attributed to the complexity of the case. The Respondent argues further that "what happened in effect was that as charges were being substituted and accused people were being charged in their individual capacity, it was delaying cases, they had to remit *ab initio* and start again. Unfortunately, the cases in Kenya went up to the Court of Appeal and they were never released, so we decided to just proceed with the Cases against the accused people".

143. The Respondent thus advances two main elements to justify the complexity of the case: one, the fact that there were ten accused persons and because of that it took a period of nearly two years from when the Applicants were arraigned to when the prosecution presented their first witness; and second, that there were other suspects and accused persons who were facing extradition trials in Kenya and the Respondent felt it prudent that all accused persons should be present before commencing proceedings.

144. First, this Court does not believe that simply because the accused persons are many a matter before a court is automatically complex. Besides, by linking the prosecutions of the Applicants to other cases pending before another Court whose proceedings were outside the control of the Respondent means putting the rights and personal liberty of the Applicants at the mercy of a foreign jurisdiction. This was a gamble and one which ended up badly, because in the end, the so-called "other suspects", facing extradition from Kenya never appeared. The fact that the Respondent finally decided to proceed with the trial of the Applicants after failing to secure the extradition of the 'other suspects' from Kenya, demonstrates that it was possible to separate the cases and prosecute them *ab initio*. The delay had therefore nothing to do with the complexity of the case and was as such unjustified.

iii. Conduct of the Applicants

145. During the public hearing, Respondent claimed that "... delays in the cases were not strictly by prosecution, they were instances when the Defence Counsel did not make appearance, there were instances when Defence Counsel was sick, there were instances when Defence Counsel was appearing before the Court of Appeal, Superior Courts, and what happens when you attend a Superior Court, naturally you do

not attend the lower Court. So these allegations of delay were not by the Respondent ...”.

146. The Court will therefore examine the extent to which the Applicants contributed to the delay.

147. The Applicants admit that they filed Applications for stay of criminal proceedings against them. However, the Applications for stay were dismissed, and the appeal against that dismissal has been pending. The Applicants cannot be blamed for using procedural avenues that are available to them to secure their freedom.

148. In *Unión Alimentaria Sanders SA v Spain*, the European Court of Human Rights held that the Applicant’s duty is only to “show diligence in carrying out the procedural steps relevant to him, to refrain from using delaying tactics and to avail himself of the scope afforded by domestic law for shortening the proceedings”.¹⁰

149. The Court takes note of the Respondent’s arguments that defence counsel may have played a part in the delays, in that they were sick, did not appear or preferred to appear before superior courts in other cases, but does not demonstrate the extent to which this action of defence counsel delayed the proceedings or whether they deliberately wanted to delay proceedings. There is no evidence before this Court to indicate that any of the action of the defence as narrated by the Respondent, was aimed at stalling the process.

150. The Court therefore dismisses Respondent’s argument according to which the Applicants were partly responsible for the delay.

iv. Conduct of the domestic judicial authorities

151. During the public hearing, the Applicants allege that at the Resident Magistrate’s Court in Moshi, “there were over 55 adjournments in the life of the Case, adding that in the first four years of the case, only one witness testified, and throughout the cases, “the Applicants constantly questioned the very length of the trials ... , up to a year after they had been charged, the most frequent reason for seeking adjournment was that they were still constituting the Police file, that investigations were still ongoing”. The Respondent did not challenge this assertion of the Applicants.

152. The Applicants further state that in an effort to push the matter before the High Court, they wrote and attempted to communicate with their counsel in vain, so they wrote a letter to the High Court on 16 August 2013, requesting it to set a date for the hearing of their matter as ordered by the Court of Appeal but that letter has not been responded to.

153. Even assuming that the defence counsel were trying to delay the process, there rests a special duty upon the authorities of domestic courts to ensure that all those who play a role in the proceedings do their utmost to avoid any unnecessary delay. Judges also have the right, as well as the duty, to actively monitor and ensure that judicial

¹⁰ Judgment of 7 July 1989, Application 11681/85, para 35.

proceedings before them comply with the reasonable time requirement. The European Court of Human Rights has held, in *Cuscani v the United Kingdom*, for example that “the trial judge is the ultimate guardian of fairness”,¹¹ and expects a more pro-active attitude of the trial judge.¹²

154. Therefore, looking at the European Court’s case-law, delays that have been attributed to the State in criminal cases include the transfer of cases between courts, the hearing of cases against two or more accused together, the communication of judgment to the accused and the making and hearing of appeals.¹³

155. On the basis of the above, this Court concludes that the time was unreasonable not because of the complexity of the case, nor the action of the Applicants, but more so because of the lack of due diligence on the part of the national judicial authorities. The Court cannot condone the Respondent’s action of putting the case on ice for a period of almost two years on the ground that the authorities were still investigating the matter or because they were waiting for the extradition of co-accused from another foreign jurisdiction. The Court thus finds the Respondent in breach of Article 7(1)(d) of the African Charter, which guarantees the right to be tried within a reasonable time.

v. Alleged violation of Article 7 on account of alleged failure to provide Applicants with legal aid

156. In their Application dated 23 July 2013 and their Reply of 31 March 2014, the Applicants were silent on the question of legal aid. However, during the Public Hearings, they raised the issue and stated that they need not have applied for legal aid for it to be granted, but rather, the trial magistrate and Appellate Judges had an obligation to enquire into whether or not they qualified for legal aid, according to the criteria set out in Section 3 of the Legal Aid (Criminal Proceedings) Act.

157. During the public hearing, the Respondent refuted the Applicants’ allegations and argued that “throughout the trials, the Applicants had Defence Counsel, they were able to afford Defence Counsel. This is documented in the proceedings, there was a Mr Ojare and a Mr Mwale and Judgments that we have produced will also show that they were suitably and adequately represented by seasoned Defence Counsel.”

158. The Respondent avers further that “the Applicants have always had legal representation, they have never requested for legal aid vide the Legal Aid Criminal Proceedings Act [Cap 21 RE 2002], and are yet to request and apply for legal aid vide the provisions of Cap 21, therefore, it will be unfair for the Court to issue such a declaration, as the Applicants have not even made it known to the Respondent that they require legal aid and legal representation”.

11 (Appl. No. 32771/96) ECtHR 24 September 2002.

12 *Ibid.*

13 N. Mole and C. Harby, *The Right to a Fair Trial*, Human Rights Handbooks No. 3, pp. 27 - 28.

159. It would appear from the facts before this Court that Applicants have been represented all along by counsel which they or their relatives engaged. It is not clear whether if they had not engaged counsel, the Respondent would have provided them with counsel. What is important however is that they had counsel, at least up to when their counsel deserted them. It is also clear from the pleadings that the Applicants are not claiming that the Respondent should have provided them with counsel throughout the trial, and it is not correct to expect the Respondent to provide legal aid to Applicants who already had counsel of their choice.

160. However, in its Response during the public hearing, the Respondent confirmed that it was “aware that Counsel withdrew himself in Criminal Case No. 2 of 2006. However, as the Applicants did not complain that they were aggrieved by their Advocates’ departure and required legal assistance, the Respondent did not take any action. We reiterate that there was no attempt by the Applicants to apply for legal assistance vide the Legal Aid Criminal Proceedings Act [Cap 21 RE 2002]”.

161. It should be noted that when Applicants filed this Application before this Court, they had been deserted by their counsel and still had cases pending against them in the Respondent’s Courts. The Respondent was aware of the situation.

162. In determining whether or not the Respondent has violated the Applicants’ right to fair trial by not providing legal aid, the Court will have recourse to the elements of the right to fair trial guaranteed under the African Charter and other international human rights instruments ratified by the Respondent.

163. The relevant provision of the African Charter in this regard is Article 7(1)(c) of the Charter. It provides that:

“Every individual shall have the right to have his cause heard. This comprises:

- (a) ...
- (b) ...
- (c) the right to defense, including the right to be defended by counsel of his choice;”

164. Article 7 of the Protocol provides that: “The Court shall apply the provision of the Charter and any other relevant human rights instruments ratified by the State concerned.”

165. In view of the fact that the Respondent ratified the International Covenant on Civil and Political Rights (ICCPR) on 11 June 1976, in accordance with Article 7 of the Protocol, the Court can not only interpret Article 7(1)(c) of the Charter in light of the provisions of Article 14(3)(d) of the ICCPR but also apply the latter provisions.

The Court notes that Article 14(3)(d) of the ICCPR is more elaborate than Article 7(1)(c) of the Charter; it reads as follows:

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) ...

- (b) ...
- (c) ...
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.”

166. Article 14(3)(d) of the ICCPR contains three distinct guarantees. First, the provision stipulates that accused persons are entitled to be present during their trial. Second, the provision refers to the right of the accused to defend himself or herself, whether in person or through legal assistance of their own choosing. Third, the provision guarantees the right to have legal assistance assigned to accused persons whenever the interests of justice so require, and without payment by them in any such case, if they do not have sufficient means to pay for it.

167. Given the serious nature of the offence that the Applicants had been charged with, the Court is of the view that all necessary measures should have been taken by the Respondent, in the interest of justice, to ensure that the Applicants were afforded legal assistance.

168. The Court is fortified in its reasoning by the decisions of the African Commission, the United Nations Human Rights Committee, the European Court of Human Rights and the Inter-American Court of Human Rights, which are courts of similar jurisdiction. Declarations and Guidelines of the African Commission on the right to legal aid are equally instructive in this matter.

169. In its case law, the Commission has indeed emphasized the importance of legal assistance. In Communication 231/99, *Avocats Sans Frontières (on behalf of Gaëtan Bwampanye) v Burundi*, “the Commission emphatically recalls that the right to legal assistance is a fundamental element of the right to fair trial. More so, where the interests of justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case”.¹⁴

170. This Court also draws inspiration from the jurisprudence of the Human Rights Committee on the interpretation and Application of Article 14(3)(d) of the ICCPR. This is with respect to Communication No. 377/89, *Anthony Currie v Jamaica*, whose circumstances are similar to those of the Applicants in the case before this Court, as both raised issues of compliance with constitutional guarantees of their rights to fair trial in their criminal trials and appeals. In its observations relating to this communication, the Human Rights Committee held that:

“The author has claimed that the absence of legal aid for the purpose of filing a constitutional motion itself constitutes a violation of the Covenant.

¹⁴ See also African Commission on Human and Peoples’ Rights *The Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa* (2003); *The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice in Africa* (2006).

The Committee notes that the Covenant does not contain an express obligation as such for a State to provide legal aid for individuals in all cases but only, in accordance with Article 14(3)(d), in the determination of a criminal charge where the interests of justice so require.”

171. This Court may further refer to the case law of the European Court. Article 6(3)(c) of the European Convention of Human Rights indeed contains two minimum distinct guarantees for a person charged with a criminal offence. First, right to defend himself in person or through legal assistance of his choosing. Second, the provision guarantees the right to have legal assistance assigned to accused persons whenever the interests of justice so require, and without payment by them in any such case if they do not have sufficient means to pay for it.

172. In its case law, the European Court has held that a violation of Article 6(3)(c) had occurred because the domestic court did not act despite being aware of the Applicant’s problems with the appointed lawyer.

173. In *Artico v Italy*,¹⁵ the Applicant had been granted legal aid for his appeal to the Court of Cassation. The lawyer who had been assigned to the Applicant did not in effect act for him at all and requested to be replaced, claiming other work commitments and ill-health. The court did not respond to that request, and the Applicant’s numerous subsequent requests to the court for substitute counsel were denied on the grounds that the Applicant already had a lawyer appointed to represent him and was as a result forced to represent himself at the hearing.

174. Recalling that the Convention was intended to guarantee not rights that are theoretical and illusory, but rights that are practical and effective, particularly so for the rights of the defence in view of the prominent place held in a democratic society by the right to fair trial from which they derive, the Court found that the right to free legal assistance in Article 6(3)(c) is not satisfied simply by the formal appointment of a lawyer, but requires that legal assistance must be effective. It added that the state must take “positive action” to ensure that the Applicant effectively enjoys his or her right to free legal assistance.¹⁶

175. While a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes, it is for the competent authorities to take steps to ensure that the Applicant effectively enjoys the right in any particular circumstance.¹⁷

176. In its case-law, the European Court has identified four factors that should be taken into account, either severally or jointly, when determining if the “interest of justice” necessitates free legal aid, namely:

- a. The seriousness of the offence;
- b. The severity of the potential sentence;
- c. The complexity of the case and;

15 Judgment of May 13, 1980

16 *Artico* case, paragraphs 33-35

17 *Ibid*, paragraph 36.

d. The social and personal situation of the defendant.

177. In *Benham v The United Kingdom*,¹⁸ the Applicant had been charged with non-payment of a debt and faced a maximum penalty of three (3) months in prison. The European Court held that this potential sentence was severe enough that the interests of justice demanded that the Applicant ought to have benefited from legal aid. In *Salduz v Turkey*, the same Court held that legal aid should be available for people accused or suspected of a crime, irrespective of the nature of the particular crime and that legal assistance is particularly crucial for people suspected of serious crimes.¹⁹

178. In a similar vein, the Inter-American Court of Human Rights has found violations of Article 8 of the American Convention on Human Rights which provides for the right to a fair trial, similar to the provisions of Article 7 of the Charter. Of note is the *Case of Suárez-Rosero v Ecuador* where the Inter-American Court of Human Rights affirmed the minimum guarantees to which every person is entitled under Article 8(2)(c), (d) and (e) of the American Convention on Human Rights, with full equality.²⁰

179. This Court also notes that legal aid is specifically guaranteed in the legal system of the Respondent State, including the Constitution and other legislation, and that various judgments of the High Court and Court of Appeal have emphasized the need for legal aid.²¹

180. Given the serious nature of the charges against the Applicants, this Court is of the opinion that the Respondent was under an obligation to provide them with legal aid or at least inform them of their right to legal aid, when it became clear that they were no longer represented. It does not matter whether the case is at pre-trial, trial or appeals stage. The Applicants are entitled to legal aid at all stages of the proceedings.

181. The Court does not accept Respondent's argument that the Applicants did not complain that they were aggrieved by their Advocates departure and required legal assistance. Legal aid is a right and must be enjoyed whether requested by the accused or not. The essence of providing legal aid is to ensure a fair judicial process and avoid the possibility of miscarriage of justice. Where the Applicant is not informed of this right or does not invoke this right, the onus is on the judicial authorities to activate the right. The Applicants were under no

18 Application 19380/92, Judgment of 10 June 1996 (Grand Chamber).

19 Application No. 36391/02, *Salduz v Turkey*, Judgment of 27 November 2008 (Grand Chamber) paragraph 54.

20 Judgment of 12 November, 1997 (Merits) paragraph 82. These guarantees include "[a]dequate time and means for the preparation of his defense; [t]he right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; [and] the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law..."

21 [See for example Article 13(6) and 15(2) of Tanzania, Section 310 of the Criminal Procedure Act of Tanzania, Section 3 of the Legal Aid (Criminal Procedure Act), the Court of Appeal judgment in *Moses Muhagama Laurance v Government of Zanzibar* and the High Court Judgment in *Alimasi Kalumbeta v R* 1982 TLR 329.

obligation to apply for legal aid to the Respondent to provide the same, but the Respondent was under an obligation to ensure they were represented. See Judgment on Application 005 of 2013 *Alex Thomas v United Republic of Tanzania* delivered on 20 November 2015.

182. In light of all the above, the Court concludes that the Applicants were entitled to legal aid and need not have requested for it. The Court notes that even though the Respondent was aware that the Applicants' Counsel had abandoned them, the Respondent proceeded with the case against them and eventually convicted them without counsel.

183. Having considered all these circumstances, the Court finds that it was incumbent upon the trial magistrate and Appellate Judges to ensure that, the Applicants were provided with legal aid. Therefore, the Respondent failed to comply with its obligations under the African Charter to provide the Applicants with legal representation in respect of Criminal Case 002 of 2006 for which some of them were eventually convicted and sentenced to 30 years.

X. Reparations

184. In their Application, the Applicants request reparations for the violations alleged, should the Court rule in their favour.

185. The Respondent on the other hand, in its oral submissions at the public hearings prayed that the "Applicants should not be awarded any reparations with regard to claims and allegations made in this Application against the United Republic of Tanzania".

186. The Respondent further states that "the Applicants have never sought reparations before the municipal Courts of the Respondent State, therefore this legal redress cannot now be sought from the African Court, adding that, the Respondent has not violated the provisions of the African Charter on Human and Peoples' Rights to warrant an order for reparations, and that the Applicants have to move the Court through a formal request for Reparations, and in this regard seeking reparations through the Application is premature".

187. Article 27(1) of the Protocol gives the Court powers to make orders for reparations. It reads as follows: "if the Court finds there has been violation of human or peoples' rights, it shall make appropriate orders to remedy the violation including the payment of fair compensation or reparation".

188. In this regard, Rule 63 of the Rules specifies that "the Court shall rule on the request for reparations submitted in accordance with Rule 34(5) of the Rules, by the same decision establishing the violation of human and peoples' rights or, if the circumstance so require, by a separate decision".

189. The Court will provide for some kinds of reparation in the operative part of the present judgment and will decide on the other forms of reparation in a further judgment, taking into consideration the further submissions of the Parties in this matter.

XI. Costs

190. Both Parties to the present case prayed for costs to be borne by the other party. The Court notes that Rule 30 of the Rules states that “Unless otherwise decided by the Court, each party shall bear its own costs.”

191. The Court will rule on this issue in its judgment on the other forms of reparation.

For these reasons:

The Court unanimously:

- i. Dismisses the Respondent’s preliminary objections on the jurisdiction *ratione materiae* and *ratione personae* of the Court to hear the Application;
- ii. Decides that it has jurisdiction to examine the Application;
- iii. Dismisses the Respondent’s preliminary objection based on the fact that the Application does not comply with the requirement of Rule 34(1) of the Rules of Court;
- iv. Dismisses the Respondent’s preliminary objection on the admissibility of the Application on the ground that it is incompatible with the African Charter and the Constitutive Act of the African Union;
- v. Dismisses the Respondent’s preliminary objection on the admissibility of the Application on the ground that Applicants have failed to exhaust local remedies;
- vi. Dismisses the Respondent’s preliminary objection on the admissibility of the Application on the ground that Application was not filed within a reasonable time.
- vii. Decides that the Application is admissible;
- viii. Holds that there has been a violation of Article 7(1)(c) and (d) of the Charter by the Respondent;
- ix. Orders the Respondent to provide legal aid to the Applicants for the proceedings pending against them in the domestic courts.
- x. Orders the Respondent to take all necessary measures within a reasonable time to expedite and finalise all criminal appeals by or against the Applicants in the domestic courts.
- xi. Orders the Respondent to inform the Court of the measures taken within six months of this judgment.
- xii. In accordance with Rule 63 of the Rules of Court, the Court directs the Applicant to file submissions on the request for other forms of reparation within thirty (30) days thereof and the Respondent to reply thereto within thirty (30) days of the receipt of the Applicant’s submissions.

Ingabire Victoire Umuhoza v Rwanda (order) (2016) 1 AfCLR 540

Ingabire Victoire Umuhoza v The Republic of Rwanda

Order, 18 March 2016. Done in English and French, the English text being authoritative.

Judges: RAMADHANI, THOMPSON, NIYUNGEKO, OUGUERGOUZ, TAMBALA, ORE, GUISSÉ, KIOKO, BEN ACHOUR, BOSSA and MATUSSE

Public hearing (non-appearance of Respondent at hearing, 17)

Separate opinion: OUGUERGOUZ

Admissibility (preliminary objection, 18-19)

Public hearing (purpose, 20-22; court siding with Respondent, 31, 33; deferral despite absence of Respondent State at hearing, 32)

Separate opinion: BEN ACHOUR

Public hearing (non-appearance of Respondent at hearing, 6)

Law of treaties (effect of withdrawal of declaration under Article 34(6))

I. Subject matter of the Application

1. The Court received, on 3 October 2014, an Application by Ingabire Victoire Umuhoza, (hereinafter referred to as “the Applicant”), instituting proceedings against the Republic of Rwanda (hereinafter referred to as “the Respondent”).

2. The Applicant is a Rwandan citizen and leader of the opposition party *Forces Démocratiques Unifiées*, (FDU Inkingi).

3. The Applicant alleges, *inter alia*:

- a. That in 2010, after spending nearly 17 years abroad, she decided to return to Rwanda to contribute in nation-building, and among her priorities was the registration of the political party, FDU Inkingi.
- b. That she did not attain this objective because as from 10 February 2010, charges were brought against her by the judicial police, the Prosecutor and Courts and Tribunals of the Respondent.
- c. That she was charged with spreading the ideology of genocide, aiding and abetting terrorism, sectarianism and divisionism, undermining the internal security of a state, spreading rumours which may incite the population against political authorities, establishment of an armed branch of a rebel movement and attempted recourse to terrorism.

4. On 30 October 2012 and 13 December 2013, the Applicant was successively sentenced to 8 and later 15 years imprisonment by the High Court and the Supreme Court of Rwanda, respectively.

II. Procedure

5. By letter dated 23 January 2015, the Respondent filed its Response to the Application and by letter dated 14 April 2015 the Applicant filed her Reply to the Respondent's Response to the Application.

6. By letter dated 4 January 2016, the Court notified Parties that the Application had been set down for public hearing on 4 March 2016.

7. By letters dated 10 February 2015, 26 January 2016 and 1 March 2016, respectively, Advocate Gatera Gashabana, the representative of the Applicant, wrote to the Court inquiring whether the Applicant could physically attend the public hearing and whether video conferencing technology could be used to allow the Applicant to follow the proceedings of the Court in the Application. By letters dated 26 January 2016 and 2 March 2016, the Registry of the Court informed the Applicant that the Court did not deem the presence of the Applicant at the public hearing necessary and that it did not have the capacity to facilitate the use of video conferencing technology, respectively.

8. By letter dated 29 February 2016, Advocate Gatera Gashabana, the representative of the Applicant wrote to the Registry of the Court requesting an adjournment of the public hearing.

9. By letter dated 1 March 2016, Dr. Caroline Buisman, the representative of the Applicant reiterated the Applicant's request for adjournment of the public hearing, adding however that the representatives of the Applicant were willing to discuss procedural matters.

10. By letter dated 1 March 2016 received on 2 March 2016, the Respondent notified the Court of its deposition of an instrument of withdrawal of its Declaration made under Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol"). The letter further stated:

"The Republic of Rwanda requests that after deposition of the same, the Court suspends hearings involving the Republic of Rwanda including the case referred above until review is made to the Declaration and the Court is notified in due course."

11. By letter dated 2 March 2016, the Registry of the Court served on the Applicant the Respondent's letter dated 1 March 2016, and served on the Respondent the Applicant's letters dated 29 February and 1 March 2016 respectively. The Registry of the Court further informed the Parties that the public hearing scheduled for 4 March 2016 would proceed as earlier indicated.

12. By letter dated 3 March 2016, the Office of Legal Counsel and Directorate of Legal Affairs of the African Union Commission notified the Court of the submission of the Respondent's instrument of withdrawal of its Declaration made under Article 34(6) of the Protocol,

which was received at the African Union Commission on 29 February 2016.

13. By letter dated 3 March 2016, the Respondent acknowledged receipt of the Court's letter of 2 March 2016. The letter further stated:

"Without prejudice to the foregoing, I respectfully request the Hon. Court, if not granting the Respondent's request made on 2nd March 2016, to allow the Respondent being heard on its request before a Court Order can be made."

14. At the public hearing on 4 March 2016, the Applicant was represented by Advocate Gatera Gashabana and Dr. Caroline Buisman. The Respondent did not appear.

15. The Court heard the representatives of the Applicant on procedural matters in which they requested the Court to:

- i. Reject the *amicus curiae* brief submitted by the National Commission for the Fight Against Genocide.
- ii. Order the Respondent to facilitate access to the Applicant for her representatives.
- iii. Order the Respondent to facilitate access to video conferencing technology for the Applicant to follow the proceedings of the Court on this matter.
- iv. Order the Respondent to comply with the Court's Order of 7 October 2015 to file pertinent documents.

16. The representatives of the Applicant also expressed their willingness to submit arguments on the issue of the Respondent's withdrawal of its Declaration made under Article 34(6) of the Protocol.

III. Decision of the Court

17. The Court expresses regret that the Respondent did not appear before it at the public hearing to put forward its arguments.

18. The Court notes that both Parties have requested to be heard on the issue of the effect of the Respondent's withdrawal of its Declaration made under Article 34(6) of the Protocol.

19. The Court also notes that the Applicant at the public hearing requested the Court to issue Orders on the procedural matters stated in paragraph 15 above.

For these reasons, the Court by majority of nine to two, Justices Fatsah Ouguerouz and Rafea Ben Achour dissenting:

20. Orders that the Parties file written submissions on the effect of the Respondent's withdrawal of its Declaration made under Article 34(6) of the Protocol, within fifteen (15) days of receipt of this Order.

21. Decides that its ruling on the effect of the Respondent's withdrawal of its Declaration under Article 34(6) of the Protocol shall be handed down at a date to be duly notified to the Parties.

22. Orders the Applicant to file written submissions on the procedural matters stated in paragraph 15 above, within fifteen (15) days of receipt of this Order.

Separate opinion: OUGUERGOUZ

1. I voted against the adoption of this Order because I consider that it was not justified and the three measures ordered by the Court (paragraphs 20-22) are jeopardizing the integrity of the judicial function and authority of the Court. The Court has indeed acted as if it has sided with the Respondent State, thereby breaking with the principle of equality of the parties.

2. In my view, the Court was duty bound to draw the legal consequences from the non-appearance of the Respondent State at the hearing. I also believe that it behoved the Court to pronounce itself on the legal effects, for the examination of the instant case, of the Respondent State's withdrawal of its declaration without having to organize a procedural phase for the purpose of consulting the Parties on this matter. I believe further that it is pointless to order the Applicant to submit written observations on the four "procedural matters" mentioned in paragraph 15 of the Order, whereas Counsels for the Applicant had already made ample submissions on all the said matters at the public hearing and on two of these procedural matters in their previous correspondence. The Court should then have made a ruling on these four procedural matters in this Order as requested by the Applicant (see paragraph 19 of the Order).

3. Lastly, but no less important, the Order robs the public hearing of 4 March 2016 of its very objective, thus making it totally needless.

4. Since the Court has not yet ruled on the question of the legal effects of the Respondent State's withdrawal of its declaration for the examination of the instant case, it does not seem to me desirable to express my opinion on this question in the context of this dissenting opinion.

5. Before expatiating on the reasons for my dissent, it seems to me necessary to briefly provide an update on the exchange of correspondence between the Parties and the Court during the past two months.

6. I would start by recalling that, at its 37th Ordinary Session (18 May/ 5 June 2015), the Court decided that, given the circumstances of the case and pursuant to Rule 27 of its Rules, it was necessary to organize an oral phase to hear the pleadings of the Parties on the totality of the case. It was against this backdrop that the principle of a public hearing was agreed and the date thereof set for 4 March 2016.

7. By letter dated 4 January 2016, the Registrar of the Court accordingly notified the Parties of the holding of a public hearing on 4 March 2016 for the purpose of hearing the Parties' pleadings on the preliminary objections raised by the Respondent State as well as on the merits of the case. ¹

1 "Take notice that this Application has been set down for Public Hearing (of legal arguments on the preliminary objections and the merits) on Friday the 4th day of March 2016 at 09.00 hours". *Application No. 003/14 Ingabire Victoire Umuhoza v Republic of Rwanda, Notice of Public Hearing (Rule 42)*; a copy of this letter was

8. By letter dated 26 January 2016, Counsel for the Applicant, *inter alia*, requested the Court to grant his client leave to physically attend the public hearing. By letter of the same day, the Registrar, in reply to the Counsel for the Applicant, indicated that the Court had decided that the presence of his client at the hearing was not necessary and that his Application had consequently been rejected.

9. Counsel for the Applicant subsequently transmitted to the Court's Registry copy of a letter dated 15 February 2016 which he had addressed to the President of the Rwanda Bar Association drawing his attention to the difficulties he was facing in the exercise of his right to visit his client. He indicated in particular that:

"The public hearing before the African Court on Human and Peoples' Rights will be held in three weeks and under such conditions, it is difficult for us to prepare our defence without prior consultation with the client".

10. By letter dated 26 February 2016, Counsel for the Applicant informed the Registrar of the Court, *inter alia*, that he has "up to now been deprived of any contact with his client" and that none of the documents which the Registry recently transmitted to him could be brought to the attention of his client; Counsel for the Applicant also informed the Registrar that his client decided to appoint a second Counsel and that "discussion between members of the defence team and, above all, their contact with the client was absolutely necessary to harmonize the defence strategy". Counsel for the Applicant therefore requested adjournment of the public hearing to a future date.

11. By letter dated 1 March 2016, the Applicant's second Counsel informed the Registrar that she was yet to obtain a visa to travel to Rwanda and that it would therefore be difficult to meet with her client before the public hearing set down for 4 March 2016. The second Counsel therefore reiterated the request to adjourn the public hearing indicating that both Counsels were ready to discuss "procedural matters" on 4 March but requested adjournment of any discussion on "the merits" of the case to a future date, that is, after having had an opportunity of speaking with their client".²

12. By letter dated 1 March 2016, the Respondent State, for its part, notified the President of the Court of the withdrawal of the optional declaration it made under Article 34(6) of the Protocol and, at the same time, requested suspension of the consideration of cases filed against it, including the matter instituted by Ingabire Victoire Uhumuza (see paragraph 10 of the Order).

13. By letter dated 3 March 2016, the Respondent State acknowledged receipt of the letter from the Registrar dated 2 March 2016 notifying the two Parties that the Court had decided to proceed with the public

also addressed to the representative of the *amicus curiae* (*Executive Secretary of the National Commission for the Fight Against Genocide*), the African Commission on Human and Peoples' Rights, the Chairperson of the African Union Commission and to all the States Parties to the Protocol establishing the Court.

2 "We are willing to discuss procedural matters on 4th March but request that you adjourn any discussion on the substance to a date when we have had an opportunity to speak with Mrs Ingabire"

hearing set down for 4 March; the Respondent State also took note of the request for postponement of the public hearing presented by the Applicant, and indicated that it had no objection to the request. The Respondent State further requested to be heard in relation to its request submitted on 1 March 2016,³ for suspension of consideration of cases instituted against it before the Court takes a decision on the matter (see paragraph 13 of the Order).

14. Also on 3 March 2016, the Registrar received a letter from the Legal Counsel of the African Union notifying him of the Respondent State's withdrawal of its optional declaration recognizing the compulsory jurisdiction of the Court; the Legal Counsel deemed it necessary to specify that, if at all valid, such a withdrawal would not affect consideration of cases already instituted before the Court before 29 February 2016.⁴

15. Essentially, the aforementioned exchanges of correspondence show that:

- 1) The Court set a public hearing for 4 March 2016 for the purpose of hearing the observations of the Parties on the preliminary objections and on the merits of the matter;
- 2) Each Party, for different reasons, requested postponement of the date of the public hearing;
- 3) The Court received official notification of Rwanda's withdrawal of its declaration;
- 4) The Court decided not to accept the request for postponement of the public hearing submitted by the Parties and maintained the hearing for the date initially set.

16. I would now expatiate on the reasons as to why I regard the adoption of this Order as not justified and even dangerous for the integrity of the judicial function and authority of the Court.

17. In its Response to the Application filed on 23 January 2015, the Respondent State raised objections of inadmissibility of the Application (in particular the non-exhaustion of local remedies) and made submissions on the merits of the case. It however did not raise any objection on lack of jurisdiction.

18. On this score, it seems to me important to point out that, going by its formulation, the request made by the Respondent State on 1 March 2016 (see paragraph 10 of the Order) cannot in any way be perceived as preliminary objection for lack of jurisdiction. The Respondent State indeed requested the suspension of consideration of the cases involving it, including the case instituted by Ungabire Victoire Umuhoza, until it has reviewed its declaration.

19. Even if this request could be considered as a genuine preliminary objection regarding lack of jurisdiction, it would be inadmissible on the

³ The Respondent State mentions 2 March 2016 in error.

⁴ "The Office of the Legal Counsel (OLC), which performs depositary functions regarding all treaties of the African Union on behalf of the Chairperson of the Commission, wishes to advise that the withdrawal, if at all valid, does not affect the hearing of any Applications already filed with the Court before 29 February 2016"

grounds of having been submitted out of time. Rule 52(2) of the Rules of Court indeed provides that “preliminary objections shall be raised at the latest before the date fixed by the Court for the filing of the first set of pleadings to be submitted by the Party who intends to raise the objections”. This timeline however expired over one year ago; indeed, the Respondent State submitted its Response on 23 January 2015 and had not as at that date raised any objection on lack of jurisdiction.

20. In any case, the public hearing of 4 March 2016, which was intended to hear the pleadings of the Parties both on preliminary objections and on the merits of the case, was maintained and, if the Court so desired, could have afforded the Parties the opportunity to also present their oral observations on the question of the possible legal effects on the consideration of the instant case by the Court, of the Respondent State’s withdrawal of its declaration.

21. Having decided not to postpone the public hearing, the Court should have exhibited consistency and heard the pleadings of the Parties on the entirety of the case and possibly also on the question of its jurisdiction.

22. On 4 March 2016, the Respondent State was not represented at the public hearing even though it had expressed the wish to be heard (see paragraph 13 of the Order). The Respondent State therefore chose not to present its arguments on the issues debated at that hearing, and thus took the risk of seeing the Court accept the Applicant’s submissions on the said issues.⁵

23. The Applicant, for her part, was represented at the hearing, and her Counsels had the opportunity to present their observations on the four procedural matters. However, they were refused the opportunity to express their views on the question of the legal consequences of the Respondent State’s withdrawal of its optional declaration recognizing as compulsory the jurisdiction of the Court.

24. Indeed, at the hearing, the President of the Court instantly asked the Counsels for the Applicant to limit their pleadings to the presentation of observations on only the procedural matters which they had expressed the wish to address in their letter dated 1 March 2016.⁶ Thus, when the second Counsel for the Applicant wanted to speak on the issue of the Respondent State’s withdrawal of its declaration, the President did not allow her to do so, justifying the refusal by saying that the issue could not be regarded as one of the “procedural matters” which the Counsel had requested to speak about in her letter of 1

⁵ The non-appearance of the Respondent State at the hearing cannot, on its own, trigger the proceedings in default prescribed by Rule 55 of the Rules of Court.

⁶ “We received your communication in which you said that you were going to address us on procedural matters. We did not understand what those are here. So if you could tell us what these procedural matters are and then we shall make our decision”. Public Hearing of 4 March 2016, *Verbatim Records* (Original English), p. 3, lines 16-18.

March 2016, since the withdrawal of the declaration was brought to the latter's notice only after the aforementioned date.⁷

25. The same Counsel insisted, saying that she had understood that the President would allow her to speak on that particular issue even though the said issue was new.⁸ The President responded that he had perhaps actually given that impression at the meeting they had held in his office prior to the public hearing, but that immediately afterwards, the Court decided, in a private session, to hear the Counsels for the Applicant only on matters of procedure about which the latter had expressed the wish to speak as at the time they wrote their letter of 1 March 2016.⁹ Counsel for the Applicant then expressed the hope that the opportunity would arise in future to pronounce herself in writing or orally on this issue which she considers important.¹⁰

26. I find it regrettable that the Court did not allow the Counsels for the Applicant to present their observations on this issue, on grounds which I consider as purely that of formality (see paragraphs 24 and 25 above). By so doing, the Court deprived the public hearing to which it had invited the Parties, of every purpose; it did not also draw any legal consequences from the Respondent State's non-appearance at that public hearing, contenting itself with simply expressing "regret" on this issue (see paragraph 17 of this Order).¹¹

27. In the Order, the Court "orders that the Parties file written submissions on the effect of the Respondent's withdrawal of its Declaration made under Article 34(6) of the Protocol" within fifteen (15) days of receipt of this Order (paragraph 20); it also decided that "its ruling on the effects of the Respondent's withdrawal of its Declaration under Article 34(6) of the Protocol shall be handled down at a date to be duly notified to the Parties" (paragraph 21).

7 "Excuse me Doctor, all that we wanted to hear today, this morning is what you had requested us and that is to discuss procedural matters on the 4th of March. Some of these things which you are dealing with are matters which have come to your knowledge after you had written to us". Public Hearing of 4th March 2016, *Verbatim Records* (Original English), p. 8, lines 15-18.

8 "Mr President, I had understood from earlier on, maybe just my mistake, that we could also address you on this particular issue even if it is new. I thought we could address you on that". Public Hearing of 4th March 2016, *Verbatim Records* (Original English), p. 8, line 22-24.

9 "Well, I might have given you that feeling when I was briefing you but when we Judges discussed the matter just before we came into the Court, we thought that no; we just hear you on the procedural matters as you had asked for". Public Hearing of 4th March 2016, *Verbatim Records* (Original English), p. 8 lines 26-29.

10 "I am guided Mr President, I hope at some point that in writing or orally before you, I hope we will have an opportunity to address you on it because it is very important to this case". Public Hearing of 4th March 2016, *Verbatim Records* (Original English), p. 9, lines 1- 3.

11 The Inter-American Court of Human Rights, for its part, held the view that the non-appearance of the Respondent State at a public hearing tantamount to a violation of its international obligations under the American Convention on Human Rights, see paragraph 13 of its Order on Provisional Measures dated 29 August 1998, in the matter of *James and Others v Republic of Trinidad*, (<http://www.corteidh.or.cr/docs/medidas/james se06ing.pdf>).

28. Having decided to consult the Parties, the Court should have been more precise in its demand and should have ordered the latter to address it on the “legal effects” of the Respondent’s withdrawal of its declaration “on the instant case” The question of the legal effects of the said withdrawal on the ongoing procedure is the only relevant one in the instant case; it should be distinguished from the more general question of the legal validity of the said withdrawal and its effects for the future.

29. By ordering the two measures mentioned in paragraph 27 above, the Court somehow decided to enter into debates on the request made by the Respondent in its letter of 1 March 2016 (suspension of the consideration of cases filed against it) and, *de facto*, decided to accord to that request a treatment similar to that meant for a preliminary objection. The Court indeed asked the Parties to present written observations on the effects of the Respondent’s withdrawal of its declaration, implicitly suspending the procedure on the merits of the case, thereby using its prerogatives under paragraphs 3 and 5 of Rule 52 of its Rules.

30. The Court which under Article 3(2) of the Protocol is empowered to decide on its own jurisdiction (“*competence-competence*” principle),¹² thus seems to have lost control of the procedure in favour of one of the Parties which, despite everything, did not appear at the public hearing. This also deprives the public hearing of 4 March 2016 of its very objective, the holding of which had been decided for the purpose of hearing the Parties both on the preliminary objections and merits of the case.

31. Duly represented at the hearing, the Applicant found herself doubly penalized. The Court did not allow her Counsels to address the question of the legal effects of the Respondent’s withdrawal of the optional declaration (Jurisdiction of the Court) and did not also make any ruling on their request regarding the four procedural matters raised at the hearing¹³ and, in particular, the issues relating to the organization of the hearing by video conference and the transmission of certain documents by the Respondent State, requests which had already been the subject of an exchange of correspondence between the Parties and the Court.¹⁴ As indicated by the Court in paragraph 19 of its Order, the Applicant had however “requested the Court to issue Order on the procedural matters stated in paragraph 15 above”.

¹² See in this regard the interpretation of this principle by the Inter-American Court of Human Rights in its judgement in the matter brought by Ivcher Bronstein against the Republic of Peru, a State which had withdrawn its declaration accepting the jurisdiction of the Court during an ongoing procedure, *Ivcher Bronstein Case*, Jurisdiction, Judgement of 24 September 1999, Series C, No. 54 (1999), paras 32 et seq. (<http://www.corteidh.or.cr/docs/casos/articulos/seriec54ing.pdf>).

¹³ See the report of the Ruling of the Public Hearing of 4 March 2016, *Verbatim Records* (Original English), 11 pages.

¹⁴ As regards the transmission of a number of documents by the Respondent State, see for example the letter dated 7 October 2015 addressed to the latter by the Registrar of the Court (Ref: AFCHPR/Reg./APPL.003/20 14/0 14), the reminder note dated 14 December 2015 (Ref: AFCHPR/Reg./APPL.003/2014/017) and the Respondent State’s letter in reply dated 17 December 2015, forwarded under cover of a *Note Verbale* of the same date (No. 2564.09.01/CAB/PSILA/15) received at the Registry on 23 December 2015.

32. For its part, the Respondent State obtained from the Court a suspension of the consideration of the admissibility of the Application and the merits of the case, without making an appearance at the hearing or presenting any form of pleadings whatsoever. Having solicited written observations from the Applicant on the four procedural matters raised above, the Court decided to defer its decision on the aforesaid matters, apparently with intent to safeguard the adversarial principle in favour of the Respondent State; the only apparent reason for this deferral would indeed be to offer the Respondent State a possible right of response to the Applicant's written observations.

33. Therefore, the Court appears to have sided with the Respondent State which has made the deliberate choice not to appear at the hearing. By giving preferential treatment to one of the Parties to the detriment of the other, the Court breaks with the principle of equality of the parties which should prevail in the exercise of its judicial function.

34. In conclusion, it is my opinion that the adoption of this Order was not justified. This Order is also dangerous for the integrity of the judicial function and authority of the Court. Furthermore, it needlessly prolongs the procedure in a matter whereby, lest we forget, the Applicant is currently serving a term of imprisonment and is challenging the legality of that sentence before this Court.

35. Lastly, I would like to observe that the Order was signed by only the President of the Court (and countersigned by the Registrar), whereas it was adopted at a session of the Court and put to vote by all the members of the Court in attendance. Like all other Orders adopted during sessions of the Court, as well as all judgements and advisory opinions, the Order should have been signed by all the Judges in attendance. A greater degree of consistency should therefore be observed in the practice of the Court, except considering that Court Orders carry with them different authority depending on whether they are signed by only the President or by all members of the Court.

36. In the Inter-American Court of Human Rights, for example, there are two types of Order: Orders issued by the Court and signed by all the Judges that participated in their adoption,¹⁵ and Orders issued by the President of the Court and signed only by the latter;¹⁶ judgments¹⁷ and advisory opinions¹⁸ are also signed by all members of the Court. In the International Court of Justice, there are similarly two types of Order: Orders issued by the Court, the introductory part of which bears the names of all the Judges who participated in their adoption,¹⁹ and Orders issued by only the President of the Court in which the names of the other Judges are not mentioned;²⁰ these two types of Order, just like judgments and advisory opinions, are signed by only the President of the Court (and countersigned by the Registrar).

15 For example, see: <http://www.corteidh.or.cr/docs/medidas/fleuryse03fr.pdf>.

16 For example, see: <http://www.corteidh.or.cr/docs/asuntos/solicitud210515fr.pdf>.

17 For example, see: <http://www.corteidh.or.cr/docs/cacos/articulos/seriec309ing.pdf>.

18 For example, see: <http://www.corteidh.or.cr/docs/opiniones/seriea21end.pdf>.

19 For example, see: <http://www.icj-cij.org/docket/tiles/161/1888l.pdf>.

20 For example, see: <http://www.icj-cij.org/docket/tiles/161/18383.pdf>.

Separate opinion: BEN ACHOUR

1. I do not subscribe to the Order issued by the Court in Application 003/2014 (Victoire Ingabire Umuhzo). I indeed believe, on the one hand, that the Court was not obliged to make an Order at this stage of the proceedings and, on the other, that the reasons advanced by the Court do not, in my view, seem to be relevant, even assuming that the Order is well grounded and appropriate.

2. It should be recalled that the said Application was filed before the Court on 3 October 2014 by Ms Victoire Ingabire Umuhzo, relying on Articles 5(3) and Article 34(6) of the Protocol and on the declaration made by Rwanda on 22 January 2013, accepting the competence of the Court.

3. It goes without saying that a State making such a declaration has the discretionary competence to make or not to make such a declaration, or to make a declaration accompanied with temporal, material and territorial¹ reservations.

4. Rwanda's declaration did not come with any reservation, consequently, at the time of submission of the Application, there was no limit to the acceptance of the Court's competence with respect to Applications from individuals. In this matter, Rwanda even submitted a response to the Application, and this, on 23 January 2015. In its response, Rwanda did not challenge the competence of the Court. Subsequently, and considering the facts of the case, the Court decided to hold a public hearing. Both parties were notified on 4 January 2016 that the Court would hold the said public hearing on 4 March 2016.

5. A few days prior to the public hearing, that is, on 1 March 2016, Rwanda notified the Court of the withdrawal of the declaration. On the eve of the public hearing, the Legal Counsel of the African Union officially notified the Court² accordingly. In the said notification, Rwanda maintained that the withdrawal of its declaration had the effect of suspending all matters affecting it and pending before the Court. It also requested a hearing on the issue of its withdrawal before the Court, before the Court makes a ruling on the case filed before it. Despite this notification, the Court rightly held the public hearing as previously decided. It heard the Applicant's representative, whereas the Respondent State did not appear.

6. At this point, the Court should have taken notice of this failure to appear and continued with the procedure. As noted by the ICJ: "A State which does not appear must accept the consequences of its decisions, the first of which is that the case will continue without its participation."

1 C/. GHARBI (Fakhri): "The status of declarations of acceptance of the compulsory jurisdiction of the International Court of Justice" I *Les Cahiers du Droit*, vol.43, 0°2, 2002, p. 213 ~ 274. Available on : <http://Jid.erudit.org/iderudit/043707ar>.

2 Strictly speaking, notification of the withdrawal should have been addressed to AU Commission, and this by virtue of the parallelism of the forms, because under Article 34 (7) of the Protocol : "Declarations made under sub-Article 6 above shall be deposited with the Secretary-General, who shall transmit copies thereof to the State Parties"

For its part, the Institute of International Law in its resolution on “non-appearance before the ICJ” indicated in the same vein that: “A State’s non-appearance before the Court is, in itself, no obstacle to the exercise by the Court of its functions under Article 41 of the Statute”³ But such was not the attitude of this Court. It did not go into deliberation on the matter after the public hearing and decided to issue an Order partly acceding to the Respondent State’s prayer by ordering “the Parties to file written submissions on the effect of the Respondent’s withdrawal of its declaration made under Article 34 (6) of the Protocol.” In that Order, the Court has included the Applicant in an exclusive relation between her and the Respondent State. The Applicant has nothing to do with the declaration.

7. It is necessary at this juncture to dwell a little on the nature of Rwanda’s declaration. It is unanimously accepted in jurisprudence and in doctrine, that the declaration of acceptance of jurisdiction is a unilateral act of a State, and which falls within its discretionary competence.⁴ In terms of international, and indeed, unilateral commitment, this is subject to the general principle “*pacta sunt servanda*” as codified in the Vienna Convention on the Law of Treaties of 1966.⁵ In this regard, the Court should have continued with the proceedings, taken note of the non-appearance of the Respondent State and set forth the necessary consequences in case of non-appearance. Even if the Applicant’s representatives expressed the wish to make a submission on the withdrawal of Rwanda’s declaration, the Court should not have allowed this, should not have required both parties to submit written observations on the issue and should not have deferred the matter to its 41st session.⁶

8. Similarly, in its Order, the Court “decides that the decision on the effects of withdrawal of the Respondent will be made at its 41st ordinary session.”

9. In my view, the Court did not have to take a specific decision on the withdrawal. It should do so in its final decision, just as the ICJ did in its judgments in the cases: Corfu Channel,⁷ nuclear tests⁸ and military and paramilitary⁹ activities.

3 1.0.1. Matter of non-appearance before the ICJ, Art. 5, Basle session, *Yearbook*, 1991, val. 64, t. II, page 378.

4 “A discretionary act by which a State subscribes to an obligatory jurisdiction commitment, unilaterally conferring competence to a court for categories of cases defined in advance, Entry:” Optional declaration of obligatory jurisdiction” In, SALMON (Jean), (Dir), *Dictionary of International Public Law*, Bruylant, 2001, p. 303) (Registry translation).

5 In its preamble, the Vienna Convention on the Law of Treaties notes that “the principles of free consent and of good faith and the *pacta sunt servada* rule are universally recognized” This principle is codified in Article 26 of the said Convention.

6 Regarding the legal effect in time, of the withdrawal of the declaration, I refrain from commenting thereon for now. I will make my comments possibly when the Court takes decision on the matter at its 41st session.

7 *Corfu Channel case*, Judgment of 15 December 1949, *Rec*, 1949, pp. 4 et s.

8 *Nuclear Tests Case (Australia v France and New Zealand v France)*, Judgements of 20 December 1974, *Rec*, 1974), pp. 253 et sand 457 et s.

9 Case already cited *supra*.

10. For all the aforesaid reasons, I believe that the Order was not necessary and that the reasons advanced by the Court are not founded in law.

Ingabire Victoire Umuhoza v Rwanda (procedure) (2016) 1 AfCLR 553

Ingabire Victoire Umuhoza v The Republic of Rwanda

Order on procedure, 3 June 2016. Done in English and French, the English text being authoritative.

Judges: RAMADHANI, THOMPSON, NIYUNGEKO, OUGUERGOUZ, TAMBALA, ORE, GUISSÉ, KIOKO, BEN ACHOUR, BOSSA and MATUSSE

Amicus curiae (admission of *amicus*, discretion of the Court, 38-39)

Fair trial (right to freely communicate with legal representative, 47-50)

Evidence (technology for obtaining evidence by video conferencing not available and not included in Court's Rules, 57; documentation of national proceedings should be public, 66)

I. Subject of the Application

1. The Court received, on 3 October 2014, an Application by Ingabire Victoire Umuhoza, (hereinafter referred to as “the Applicant”), instituting proceedings against the Republic of Rwanda (hereinafter referred to as “the Respondent”).
2. The Applicant is a Rwandan citizen and leader of the opposition party Forces Démocratiques Unifiées, (FDU Inkingi).
3. The Application is brought against the Attorney General of the Republic of Rwanda as the representative of the Respondent.
4. The Applicant prays the Court for the following orders and remedies:
 - i) Find violations of Articles 1, 7, 10 and 11, 18 and 19 of the Universal Declaration of Human Rights; Articles 7, 3, 9 and 15 of the African Charter on Human and Peoples' Rights (hereinafter referred to as “the Charter”); and Articles 7, 14, 15, 18 and 19 of the International Covenant on Civil and Political Rights.
 - ii) Repeal with retroactive effect sections 116 and 463 of Organic Law No 01/2012 of 2 May 2012 relating to the Penal Code as well as that of Law N° 84/2013 of 28 October 2013 relating to the punishment of the crimes of the ideology of the Genocide; iii) Review of the Case; iv) Annul all the decisions that had been taken since the preliminary investigation up till the pronouncement of the last judgment; v) Release on parole; and vi) Grant her costs and reparations.

II. Summary of the facts

5. The Applicant contends that when the genocide in Rwanda started in April 1994, she was in the Netherlands to further her university education in economics and business administration.

6. The Applicant avers that in 2000, she became the Leader of a Political Party known as the “Rassemblement républicain pour la démocratie au Rwanda” That Applicant states that she had been a member of the party since 1998.

7. According to the Applicant, sometime later the party merged with two other political parties to form the “Force démocratique Unifies” (FDU) headed by the Applicant.

8. The Applicant contends that in 2010, after spending nearly 17 years abroad, she decided to return to Rwanda to contribute to nation-building, and among her priorities was the registration of the political party, FDU Inkingi.

9. The Applicant adds that she did not attain this objective because as from 10 February 2010, charges were brought against her by the judicial police, the Prosecutor and Courts and Tribunals of the Respondent. The Applicant alleges that she was charged with spreading the ideology of genocide, aiding and abetting terrorism, sectarianism and divisionism, undermining the internal security of a state, spreading rumours which may incite the population against political authorities, establishment of an armed branch of a rebel movement and attempted recourse to terrorism.

10. On 30 October 2012 and 13 December 2013, the Applicant was sentenced to 8 and later 15 years imprisonment by the High Court and the Supreme Court of Rwanda.

11. The Applicant submits that all local remedies have been exhausted.

III. Procedure

12. By a letter dated 3 October 2014, Counsel for the Applicant seized the Court with the Application and by letter dated 19 November 2014, the Registry of the Court served the Application on the Respondent.

13. By a letter dated 6 February 2015, the Registry transmitted the Application to all States Parties to the Protocol, the Chairperson of the African Union Commission (hereinafter referred to as “the AUC”) and the Executive Council of the African Union.

14. By a letter dated 23 January 2015, the Respondent filed its Response to the Application and by letter dated 14 April 2015 the Applicant filed her Reply to the Respondent’s Response to the Application.

15. By a letter dated 4 January 2016, the Court notified the Parties that the Application had been set down for public hearing on 4 March 2016.

16. By letters dated 10 February 2015, 26 January 2016 and 1 March 2016, Advocate Gatera Gashabana, the representative of the Applicant, wrote to the Court inquiring whether the Applicant could physically attend the public hearing and testify as a witness and

whether video conferencing technology could be used to allow the Applicant to follow the proceedings of the Court in the Application. By letters dated 26 January 2016 and 2 March 2016, the Registry of the Court informed the Applicant that the Court did not deem the presence of the Applicant at the public hearing necessary and declined the Applicant's request to be heard as a witness and that it did not have the capacity to facilitate the use of video conferencing technology.

17. By letters dated 29 February 2016 and 1 March 2016, representatives of the Applicant wrote to the Registry of the Court requesting an adjournment of the public hearing. In the letter of 1 March 2016, the representative of the Applicant however requested to be heard on procedural matters.

18. By a letter dated 1 March 2016 received on 2 March 2016, the Respondent notified the Court of its deposition of an instrument of withdrawal of its declaration made under Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol"). The letter further stated:

"The Republic of Rwanda requests that after deposition of the same, the Court suspends hearings involving the Republic of Rwanda including the case referred above until review is made to the Declaration and the Court is notified in due course."

19. By a letter dated 2 March 2016, the Registry confirmed receipt of the Applicant's letters of 29 February 2016 and 1 March 2016. It informed the Applicant that the public hearing would proceed as scheduled for 4 March 2016 and that the Court did not have the capacity to allow the participation of the Applicant by video-conferencing technology. It further served on the Applicant the Respondent's letter dated 1 March 2016.

20. By a letter dated 2 March 2016, the Registry confirmed receipt of the Respondent's letter of 1 March 2016. It informed that Respondent that the public hearing would proceed as scheduled for 4 March 2016. It further served on the Respondent the Applicant's letters dated 29 February 2016 and 1 March 2016.

21. By a letter dated 3 March 2016, the Office of Legal Counsel and Directorate of Legal Affairs of the AUC notified the Court of the submission of the Respondent's instrument of withdrawal of its declaration made under Article 34(6) of the Protocol, which was received at the AUC on 29 February 2016

22. By a letter dated 3 March 2016, the Respondent acknowledged receipt of the Court's letter of 2 March 2016. The Respondent stated that it found the Applicant's reasons to request adjournment of the public hearing compelling. The Respondent further requested to be allowed to be heard on its request of 2 March 2016 to suspend pending cases before the court involving the Respondent.

23. At the public hearing on 4 March 2016, the Applicant was represented by Advocate Gatera Gashabana and Dr. Caroline Buisman. The Respondent did not appear.

24. At the request of the Applicant, the Court heard the representatives of the Applicant on procedural matters in which they requested the Court to take the following measures:

- i. Reject the *amicus curiae* brief submitted by the National Commission for the Fight Against Genocide.
- ii. Order the Respondent to facilitate access to the Applicant for her representatives.
- iii. Order the Respondent to facilitate access to video conferencing technology for the Applicant to follow the proceedings of the Court on this matter.
- iv. Order the Respondent to comply with the Court's Order of 7 October 2015 to file pertinent documents.

25. Following the public hearing, on 18 March 2016, the Court issued an Order as follows:

- i. Orders that the Parties file written submissions on the effect of the Respondent's withdrawal of its Declaration made under Article 34(6) of the Protocol, within fifteen (15) days of receipt of this Order ii. Decides that its ruling on the effect of the Respondent's withdrawal of its Declaration under Article 34(6) of the Protocol shall be handed down at a date to be duly notified to the Parties. iii. Orders the Applicant to file written submissions on the procedural matters stated in paragraph 15 above, within fifteen (15) days of receipt of this Order.

26. By a letter dated 29 March 2016, the Court notified the Parties of the Court's Order of 18 March 2016.

27. By a letter dated 13 April 2016, the Respondent submitted its observations on the Court's Order of 18 March 2016.

28. By a letter dated 15 April 2016 and received on 18 April 2016, the Applicant submitted its observations on the Court's Order of 18 March 2016.

29. By a letter dated 4 May 2016, the Registry served the observations of the Respondent on the Court's Order of 18 March 2016 on the Applicant, and requested her to submit her observations if any, within 15 days.

30. By a letter dated 4 May 2016, the Registry served the observations of the Applicant on the Court's Order of 18 March 2016 on the Respondent, and requested the Respondent to submit its observations if any, within 15 days.

31. This Order is with respect to the procedural matters raised by the Applicant as alluded to in paragraph 24 above.

Issue 1: The Applicant's request to reject the *amicus curiae* brief submitted by the National Commission for the Fight Against Genocide.

32. At the public hearing, the Applicant made an oral Application subsequently supported by written submissions requesting the Court to deny the National Commission for the Fight Against Genocide (hereinafter "NCFAG") *amicus curiae* status and requesting it not to receive their observations.

33. The Applicant contests the neutrality of NCFAG, on the basis that it has no independent status from the Respondent, as it is an official organ responsible to the President whose policies and orientation are determined by the Consultative Council which acts under the orders of the President of the Respondent .

34. The Applicant further argues that NCFAG is instrumental in implementing genocide laws which are vague and subject to criticism. The Applicant also argues that the Executive Secretary of NCFAG has already expressed public criticism of the Applicant.

35. The Respondent did not submit observations on this issue.

36. In deciding this matter, the Court is guided by Rule 45 of its Rules which provides:

“The Court may, of its own accord, or at the request of a party, or the representatives of the Commission, where applicable, *obtain any evidence which in its opinion may provide clarification of the facts of a case*. The Court may, inter alia, decide to hear as a witness or expert or in any other capacity any person whose evidence, assertions or statements it deems likely to assist it in carrying out its task.”(Emphasis added).

37. Rule 45 of the Court’s Rules entitles the Court in its discretion to receive any evidence from any person, which in its view would assist it in the determination of a case.

38. The role of *amicus curiae* in proceedings is to provide the Court with arguments or views which may serve to assist the Court in its consideration of legal issues under consideration by the Court.¹ The determination of whether an entity is entitled to be admitted as *amicus curiae* in a proceeding is a matter of the discretion of the Court. In exercising this discretion, the Court entitled the NCFAG to be admitted as *amicus curiae* in these proceedings on 10 July 2015. Further, on the substance of the admission of the *amicus curiae*, the Court also has the discretion to take what it considers relevant and non-partisan from the *amicus curiae*. Therefore, the ultimate control over who the Court admits as *amicus curiae* and what the Court considers in substance from the *amicus curiae* is the Court itself.

39. It is on this basis that the Court rejects the Applicant’s request and upholds its decision of 10 July 2015 admitting NCFAG as *amicus curiae* in these proceedings.

Issue 2: The Applicant’s request to Order the Respondent to facilitate access to the Applicant by her Representatives.

40. The Applicant alleges that Respondent has intimidated the Applicant’s representatives by subjecting Advocate Gatera Gashabana to a “full search” when visiting the Applicant in prison, in contravention of the law and regulations relating to the profession of counsel and concept of attorney-client privilege. The Applicant states that this is in violation of Article 48, 50 and 54 to 57 of Law 83/2013 dated

1 See IACtHR (Judgment) 2 May 2008, *Kimel v Argentina*, para. 16.

11 September 2013 pertaining to the creation, organization and operation of the Rwandan Bar Association.

41. Further, the Applicant argues that co-counsel Dr. Caroline Buisman continues to have difficulties in obtaining a visa to enter the Republic of Rwanda despite her travel to the Republic of Rwanda on many occasions prior to her involvement in the Applicant's case. The Applicant avers that Dr. Caroline Buisman's visa status has continuously remained "pending".

42. The Applicant avers that the restrictions on her representatives frustrate the Applicant's right to file a complaint before the Court and undermine her right to an effective remedy.

43. In support of these allegations, the Applicant has relied on various letters decrying the alleged acts of intimidation that were previously filed with the Court. In the letter of 15 February 2016 written to the President of the Rwandan Bar Association, Advocate Gatera Gashabana, representative of the Applicant, alleges that on a visit to the Applicant on 5 February 2016, the prison department of the Respondent informed him that prior to his visit, all documents in his possession were to be searched, failing which he would not be allowed to see the [Applicant].

44. The Respondent did not submit observations on this issue.

45. Rule 28 of the Court's Rules provides that "Every party to a case shall be entitled to be represented or to be assisted by legal counsel and/or by any other person of the party's choice." Further, Rule 32 enjoins States to cooperate with the Court,

46. Rule 28 recognizes the right of Parties in a case before the Court to represent themselves or to be represented by legal counsel of their choice. Rule 32 recognizes the obligation of States to ensure they cooperate with the Court to facilitate proceedings before the Court. From a reading of these two Rules, the Respondent is enjoined to assist the Applicant and her representatives in order to facilitate proceedings before this Court.

47. The Court is of the view that a physical search of the Applicant's representative in conformity with normal security practices to access the prison would not infringe on the rights of the Applicant or that of her representatives. However, any search of the documents of the Applicant's Representative would be in contravention of international human rights norms before this Court.

48. In dealing with the question of the search of a lawyer's documents, the European Court of Human Rights in the case of *André and Another v France* (Application 18603/03) held:

"The Court considers that searches and seizures at the premises of a lawyer undoubtedly breach professional secrecy, which is the basis of the relationship of trust existing between a lawyer and his client. Furthermore, the safeguarding of professional secrecy is in particular the corollary of the right of a lawyer's client not to incriminate himself, which presupposes that the authorities seek to prove their case without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the 'person charged'."

49. In addition to accepted standards under international law, the Court further notes that the Respondent's own national laws namely Articles 50, 54, 56 and 57 of Law 83/2013 dated 11 September 2013 pertaining to the creation, organization and operation of the Rwandan Bar Association, recognize and guarantee the right of lawyers to communicate with detained clients, professional secrecy and provide for procedures of search of an advocate's office.

50. The Court therefore holds that the Respondent is under an obligation to take necessary measures to facilitate access to the Applicant by her representatives. Further, that the Respondent should refrain from taking any measures that would infringe on the Applicant's representative's rights to professional secrecy and to communicate freely with the Applicant.

Issue 3: The Applicant's request to order the Respondent to facilitate access to video conferencing technology for the Applicant to follow the proceedings of the Court on this matter.

51. The Applicant requests the Court to order the Respondent to make available video conferencing facilities to allow the Applicant to follow proceedings before the Court and provide evidence before the Court. The Applicant argues that the Respondent has video conferencing facilities which have previously been used in the context of proceedings before the International Criminal Tribunal of Rwanda.

52. The Applicant argues that the physical presence of an accused is a basic and common principle of a fair trial and that while the proceedings before the Court are not criminal in nature, they relate to the Applicant's criminal process in national courts of the Respondent, which she alleges were conducted unfairly.

53. The Applicant further argues that preventing her from participating via videolink means that she would not address the Court directly and that she would be completely cut off from the proceedings and that this would undermine her right to an effective remedy.

54. The Respondent did not submit observations on this issue.

55. The Court notes that the importance of the personal presence of an Applicant as a procedural requirement is materially distinct from the protection of an Applicant's participatory right. While the presence of an Applicant at proceedings is protected by the right to access to the Court, the participatory right is safeguarded by the right to represent oneself personally or through a legal counsel. In the instant case, the Applicant's participation in proceedings is through her duly appointed representatives.

56. The Court further notes that pursuant to Rule 27(1), the procedure before the Court shall consist of written, and if necessary, oral proceedings. Further, pursuant to Rule 45, the Court may call witnesses if it deems that they are likely to assist it in carrying out its task. It is therefore up to the discretion of the Court to determine whether it shall hold oral proceedings and whether at those proceedings it shall choose to hear witnesses. The Court recalls its

decision of 26 January 2016 in which it did not deem the presence of the Applicant necessary and rejected the Applicant's request to appear before the Court as a witness.

57. The Court also notes that proceedings before it are guided by its Rules and its Rules currently do not provide for the modalities of taking of evidence by use of video conferencing technology. The modalities of taking of evidence by video conferencing technology would require the installation of necessary equipment and software, the deployment of Registry staff to the witness' location and conclusion of cooperation agreements between the Court and the state in which the witness is located. To this end, the Court recalls its decision of 2 March 2016 in which it informed the representative of the Applicant that the Court did not have the capacity to facilitate the participation of the Applicant in proceedings by video conferencing technology.

58. In the absence of Rules guiding the taking of evidence by video conferencing technology, the Court holds that it cannot compel the Respondent to provide access to video conferencing technology to allow the Applicant participate or follow proceedings before the Court and declines the Applicant's request.

Issue 4: Applicant's request to Order the Respondent to comply with the Court's Decision of 7 October 2015 to file pertinent documents.

59. The Applicant requests the Court to order the Respondent to comply with the Court's Decision of 7 October 2015 to file national laws, charge sheets and proceedings from the national courts related to the cases the Applicant was charged with before the national courts of the Respondent. The Applicant prays that in the event the Respondent fails to comply with the Court's Decision, the Court attach all legal consequences it deems necessary.

60. The Respondent did not submit observations on this issue. The Court however recalls that in response to the Court's Decision of 7 October 2015, the Respondent on 23 December 2015 filed observations in which it expressed difficulties in complying with the Court's decision. The Respondent argued that the materials requested by the Court were not in its possession, but were with the Applicant and the Supreme Court of Rwanda and that it had no automatic right to possession of the materials requested.

61. The Respondent further argued that in complying with the Court's request, the Respondent would have to file an Application to the Supreme Court of Rwanda based on an Order of the Court and would have to prove why it would require such materials.

62. The Respondent contended that it is the Applicant who has relied on the materials and that pursuant to Rule 34(1), it is incumbent on the Applicant to file with the Court all evidence intended to be relied on.

63. The Respondent further contended that even if the Supreme Court of Rwanda ordered the Respondent be given access to make copies of the materials, the cost would be prohibitive considering the volume of those documents. The Respondent averred that it was not sufficiently

resourced and equipped to be able to foot the bills of the Applicant or those of the Court.

64. In determining this issue, the Court is guided by Rule 41 of its Rules which states:

“The Court may, before the commencement of or during the course of the proceedings, call upon the parties to file any pertinent document or to provide any relevant explanation. The Court shall formally note any refusal to comply.”

65. The above Rule entitles the Court to request from any party any document which in its view it deems as pertinent.

66. By the Respondent’s own admission, the materials sought are in the exclusive possession of the Supreme Court of Rwanda. The Court is of the view that the materials sought are official state documents which are in the primary custody of the Respondent. These materials are public documents or part of national court proceedings which should be public in nature.

67. The Court finds the reasons adduced by the Respondent to explain the noncompliance with its Decision of 7 October 2015 insufficient. The Court similarly finds no prejudice shall be occasioned to the Respondent in filing these documents with the Court.

68. For these reasons,

THE COURT, Unanimously:

- i. Declines the Applicant’s request to reject the *amicus curiae* brief of the National Commission for the Fight Against Genocide.
- ii. Orders the Respondent to facilitate access to the Applicant for her representatives and to refrain from taking any measures that would infringe on the Applicant’s right to access her representatives and the Applicant’s representative’s rights to professional secrecy and to communicate freely with the Applicant.
- iii. Declines the Applicant’s request to order the Respondent to facilitate access to video conferencing technology for the Applicant to follow and participate in the proceedings before the Court.
- iv. Orders the Respondent to file with the Registry of the Court copies of the documents stated in its Decision of 7 October 2015.

Ingabire Victoire Umuhoza v Rwanda (jurisdiction) (2016) 1 AfCLR 562

Ingabire Victoire Umuhoza v The Republic of Rwanda

Ruling on the effects of the withdrawal of the Declaration under Article 34(6) of the Protocol, 3 June 2016 (incorporating corrigendum to ruling, 5 September 2016). Done in English, French, Portuguese and Arabic, the English text being authoritative.

Judges: RAMADHANI, THOMPSON, NIYUNGEKO, OUGUERGOUZ, TAMBALA, ORE, GUISSÉ, KIOKO, BEN ACHOUR, BOSSA and MATUSSE

The case concerned the jurisdiction of the African Court to continue hearing a case given that the Respondent State had submitted a notice of withdrawal of its Declaration made under Article 34(6) of the Court Protocol allowing direct access to the Court by individuals and NGOs. The Court held that in terms of articles 3(1) and (2) of the Court Protocol it had jurisdiction to entertain all disputes relating to the Court Protocol, including the issue of withdrawal of the Article 34(6) Declaration. On the validity of the withdrawal, the Court held that even though the Vienna Convention on the Law of Treaties was not directly applicable, it could be applied by analogy. The Court further held that even though the Respondent was entitled to withdraw its Declaration, this could not be done arbitrarily as it conferred rights on “third parties, the enjoyment of which require legal certainty”. Withdrawal should, therefore, be preceded by a minimum of one year prior notice to ensure “judicial security by preventing abrupt suspension of rights which impacts on ... individuals and groups”.

Jurisdiction (withdrawal of Article 34(6) Declaration, the Court decides its jurisdiction, 52; Declaration under Article 34(6) separable from Protocol, 57; states entitled to withdraw Declaration, 58-59; discretion in relation to withdrawal not absolute, 60, notice of withdrawal necessary, 61-66)

Jurisdiction (applicability of Vienna Convention on the Law of Treaties 3, 7)

Procedure (notice period for withdrawal of Article 34(6) Declaration, 15, 20)

Separate opinion: NIYUNGEKO AND RAMADHANI

Procedure (notice period for withdrawal of Article 34(6) Declaration, 18-20)

Separate opinion: OUGUERGOUZ

Jurisdiction (applicability of Vienna Convention on the Law of Treaties, 29)

Procedure (notice period for withdrawal of Article 34(6) Declaration, 33)

Treaty law (conditions for withdrawing unilateral Declaration 30-32)

I. Subject of the Application

1. The Court received, on 3 October 2014, an Application by Ingabire Victoire Umuhoza, (hereinafter referred to as “the Applicant”), instituting proceedings against the Republic of Rwanda (hereinafter referred to as “the Respondent”).
2. The Applicant is a Rwandan citizen and leader of the opposition party Forces Democratiques Unifiees, (FDU Inkingi).
3. The Application is brought against the Attorney General of the Republic of Rwanda as the representative of the Respondent.
4. The Applicant prays the Court for the following orders and remedies;
 - i) Find violations of Articles 1, 7, 10 and 11, 18 and 19 of the Universal Declaration of Human Rights; Articles 7, 3, 9 and 15 of the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”); and Articles 7, 14, 15, 18 and 19 of the International Covenant on Civil and Political Rights.
 - ii) Repeal, with retroactive effect, sections 116 and 463 of Organic Law No 01/2012 of 2 May 2012, relating to the Penal Code, as well as that of Law No 84/2013 of 28 October 2013, relating to the punishment of the crimes of the ideology of the Genocide;
 - iii) Review of the Case;
 - iv) Annul all the decisions that had been taken since the preliminary investigation up till the pronouncement of the last judgment;
 - v) Release on parole; and
 - vi) Grant her costs and reparations.

II. Summary of the facts

5. The Applicant contends that when the genocide in Rwanda started in April 1994, she was in the Netherlands to further her university education in economics and business administration.
6. The Applicant avers that in 2000, she became the Leader of a Political Party known as the “Rassemblement republicain pour la democratie au Rwanda”. The Applicant states that she had been a member of the party since 1998.
7. According to the Applicant, sometime later, the party merged with two other political parties, to form the “Force democratique Unifies” (FDU) headed by the Applicant.
8. The Applicant contends that in 2010, after spending nearly 17 years abroad, she decided to return to Rwanda to contribute to nation-building, and among her priorities was the registration of the political party, FDU Inkingi.

9. The Applicant adds that she did not attain this objective because as from 10 February 2010, charges were brought against her by the judicial police, the Prosecutor and Courts and Tribunals of the Respondent. The Applicant alleges that she was charged with spreading the ideology of genocide, aiding and abetting terrorism, sectarianism and divisionism, undermining the internal security of a state, spreading rumours which may incite the population against political authorities, establishment of an armed branch of a rebel movement and attempted recourse to terrorism.

10. On 30 October 2012 and 13 December 2013, the Applicant was sentenced to 8 and later 15 years of imprisonment by the High Court and the Supreme Court of Rwanda.

11. The Applicant submits that all local remedies have been exhausted.

III. Procedure

12. By a letter dated 3 October 2014, Counsel for the Applicant seised the Court with the Application and by letter dated 19 November 2014, the Registry of the Court served the Application on the Respondent.

13. By a letter dated 6 February 2015, the Registry transmitted the Application to all State Parties to the Protocol, the Chairperson of the African Union Commission (hereinafter referred to as "the AUC") and the Executive Council of the African Union.

14. By a letter dated 23 January 2015, the Respondent filed its Response to the Application and by a letter dated 14 April 2015, the Applicant filed her Reply to the Respondent's Response to the Application.

15. By a letter dated 4 January 2016, the Court notified the Parties that the Application had been set down for public hearing on 4 March 2016.

16. By letters dated 10 February 2015, 26 January 2016 and 1 March 2016, Advocate Gatera Gashabana, one of the representatives of the Applicant, wrote to the Court inquiring whether the Applicant could physically attend the public hearing and testify as a witness and whether video conferencing technology could be used to allow the Applicant to follow the proceedings of the Court in the Application. By letters dated 26 January 2016 and 2 March 2016, the Registry of the Court informed the Applicant that the Court did not deem the presence of the Applicant at the public hearing necessary and declined the Applicant's request to be heard as a witness and that it did not have the capacity to facilitate the use of video conferencing technology.

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18. By a letter dated 1 March 2016, received on 2 March 2016, the Respondent notified the Court of its deposition of an instrument of withdrawal of its Declaration made under Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the

Establishment of the African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol"). The letter further stated: "The Republic of Rwanda requests that after deposition of the same, the Court suspends hearings involving the Republic of Rwanda, including the case referred above until review is made to the Declaration and the Court is notified in due course."

19. By a letter dated 2 March 2016, the Registry confirmed receipt of the Applicant's letters of 29 February 2016 and 1 March 2016. It informed the Applicant that the public hearing would proceed as scheduled for 4 March 2016, and that the Court did not have the capacity to allow the participation of the Applicant by videoconferencing technology. It further served on the Applicant, the Respondent's letter dated 1 March 2016.

20. By a letter dated 2 March 2016, the Registry confirmed receipt of the Respondent's letter of 1 March 2016. It informed that Respondent that the public hearing would proceed as scheduled for 4 March 2016. It further served on the Respondent the Applicant's letters dated 29 February 2016 and 1 March 2016.

21. By a letter dated 3 March 2016, the Office of Legal Counsel and Directorate of Legal Affairs of the AUC notified the Court of the submission of the Respondent's instrument of withdrawal of its declaration made under Article 34(6) of the Protocol, which was received at the AUG on 29 February 2016.

22. By a letter dated 3 March 2016, the Respondent acknowledged receipt of the Court's letter of 2 March 2016. The Respondent stated that it found the Applicant's reasons to request adjournment of the public hearing compelling. The Respondent further requested to be allowed to be heard on its request of 2 March 2016, to suspend pending cases before the Court involving the Respondent.

23. At the public hearing on 4 March 2016, the Applicant was represented by Advocate Gatera Gashabana and Dr. Caroline Buisman. The Respondent did not appear.

24. At the request of the Applicant, the Court heard the representatives of the Applicant on procedural matters in which they requested the Court to take the following measures:

- i. Reject the *amicus curiae* brief submitted by the National Commission for the Fight Against Genocide.
- ii. Order the Respondent to facilitate access to the Applicant by her representatives.
- iii. Order the Respondent to facilitate access to video conferencing technology for the Applicant to follow the proceedings of the Court on this matter.
- iv. Order the Respondent to comply with the Court's Order of 7 October 2015 to file pertinent documents."

25. Following the public hearing, on 18 March 2016, the Court issued an Order as follows:

- i. Orders that the Parties file written submissions on the effect of the Respondent's withdrawal of its Declaration made under Article 34(6) of the Protocol, within fifteen (15) days of receipt of this Order.

- ii. Decides that its ruling on the effect of the Respondent's withdrawal of its Declaration under Article 34(6) of the Protocol shall be handed down at a date to be duly notified to the Parties.
- iii. Orders the Applicant to file written submissions on the procedural matters stated in paragraph 15 above, within fifteen (15) days of receipt of this Order."

26. By a letter dated 29 March 2016, the Court notified the Parties of the Court's Order of 18 March 2016.

27. By a letter dated 13 April 2016, the Respondent submitted its observations on the Court's Order of 18 March 2016.

28. By a *Note Verbale* dated 4 April 2016, and with copy to the Registrar of the Court, the Office of Legal Counsel and Directorate of Legal Affairs of the AUC notified all Member States of the African Union of the submission of the Respondent's instrument of withdrawal of its Declaration made pursuant to Article 34(6) of the Protocol.

29. By a letter dated 15 April 2016 and received on 16 April 2016, the Coalition for an Effective African Court (hereinafter "the Coalition") applied to the Court to be *amicus curiae* in the Application.

30. By a letter dated 15 April 2016 and received on 18 April 2016, the Applicant submitted its observations on the Court's Order of 18 March 2016.

31. By a letter dated 4 May 2016, the Registry served the observations of the Respondent on the Court's Order of 18 March 2016 on the Applicant, and requested her observations, if to submit her observations if any, within 15 days.

32. By a letter dated 4 May 2016, the Registry served the observations of the Applicant on the Court's Order of 18 March 2016 on the Respondent, and requested the Respondent to submit its observations if any, within 15 days.

33. By a letter dated 4 May 2016, the Registry transmitted to the Coalition with copy to the Parties, the Court's Decision granting it *amicus curiae* status and requesting it to submit its observations by 13 May 2016.

34. By a letter dated 13 May 2016, the Coalition submitted its observations.

35. This Ruling is with respect to the jurisdiction of the Court in light of the Respondent's withdrawal of its declaration pursuant to Article 34(6) of the Protocol.

IV. Positions of the Parties

36. In the Respondent's written submissions of 13 April 2016, on the question of the effects of its withdrawal, the Respondent avers that by virtue of the principle of parallelism of forms, it is only the AUC that is empowered to decide on the withdrawal and its effects. The Respondent argues that the Court and Parties to the Application have nothing to do with the decision regarding the withdrawal of its declaration once it was deposited with the AUC. The Respondent further indicates that in its letter dated 3 March 2016, it was only

requesting to be heard by the Court on its request to suspend hearings and not on the question of the withdrawal.

37. The Respondent prays the Court to take judicial notice that debate regarding the withdrawal for review, was a matter within the purview of the African Union.

38. In her written submissions of 15 April 2016, the Applicant argues that in the absence of provisions for withdrawal of the declaration pursuant to Article 34(6) of the Protocol, Article 56 of the Vienna Convention on the Law of Treaties (hereinafter referred to as “the Vienna Convention”) should be applied in the interpretation of the Protocol. The Applicant further argues that prohibiting States from withdrawing from a treaty or declaration that they made voluntarily may be too radical a position and would interfere with State sovereignty. The Applicant argues however, that this should not be viewed as allowing States to withdraw at any moment or in any manner. The Applicant urges the Court to be guided by the principle of *pacta sunt servanda*, which requires parties to a treaty to perform their duties in good faith.

39. The Applicant argues further that the principle of good faith requires a reasonable time for withdrawal to serve as a cooling off period.

40. To this end, the Applicant cites the case of Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*) Jurisdiction and Admissibility, Judgment of 26 November 1984, in which the International Court of Justice held that:

“But the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity.”¹

41. The Applicant argues further that “the goal of demanding advance notice of withdrawal is to discourage opportunistic defections that may cause treaty-based cooperation to unravel.” The Applicant cites the examples of the European Convention on Human Rights and the American Convention on Human Rights which provide for notice periods of six months and one year, respectively. The Applicant requests the Court to consider these comparative treaties and apply their principles by analogy.

42. The Applicant takes the view that the Respondent’s withdrawal has no effect on pending cases based on the principle of non-retroactivity. The Applicant argues further that allowing the Respondent to withdraw from proceedings before the Court at this stage would offend the principle of legality. In support of this argument, the Applicant cites Article 70(1)(b) of the Vienna Convention which provides that the termination of a treaty, unless otherwise agreed, does not affect any pre-existing obligation or legal situation. The Applicant states that

¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* Jurisdiction and Admissibility, Judgment of 26 November 1984, ICJ Reports 1984 p 420, para 63.

complaints submitted after the withdrawal would still be admissible to the extent that they address State action during the period when the State was still bound by the convention.

V. Submission of the Coalition

43. The Coalition focused on two issues, namely: whether the Respondent was entitled to withdraw its declaration and the legal effects on pending proceedings of such withdrawal. The Coalition is of the view that in the absence of express provisions for withdrawal of declarations in the Protocol, the provisions of Article 56 of the Vienna Convention may apply. The Coalition asserts that the rules that govern treaties also apply to the acceptance of the jurisdiction of courts, and as such, the Court should interpret the Respondent's withdrawal in light of the provisions of the Vienna Convention.

44. The Coalition is also of the view that even though the declaration of acceptance of the Court's jurisdiction is a sovereign unilateral act of a State, the said declaration creates international obligations for the accepting State. The Coalition asserts that in the event the Respondent reviews its declaration to include some reservations, pursuant to Article 19(c) of the Vienna Convention, they must not be incompatible with the object and purpose of the treaty.

45. The Coalition further notes that none of the four legal instruments establishing the judicial organs of the African Union provides for denunciation and/or withdrawal,² and that the same applies to the main legal instruments governing human rights in Africa. As a result, the Coalition argues that the withdrawal does not appear to be consistent with the spirit set out in the human rights legal instruments adopted by the African Union.

46. On the second issue of the legal effects of the Respondent's withdrawal, the Coalition is of the view that the Respondent would be required to serve notice of its intention to withdraw at least twelve months in advance in compliance with Article 56(2) of the Vienna Convention.

47. Finally, the Coalition takes the view that the Respondent's request to suspend pending cases before the Court breaches the provisions of international law on treaties, the Charter and Protocol. The Coalition notes that the role of the Court is to preserve, complement and reinforce progress made in the protection of human rights by the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission") and other institutions and developments in African and international legal instruments. This specifically includes ensuring compliance with the criteria on the equality of parties to a trial, regardless of whether or not a Party is a sovereign State. The Coalition also states that the Court should aim at ensuring observance of the

2 These are the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, the Protocol of the Court of Justice of the African Union, the Protocol on the Statute of the African Court of Justice and Human Rights and Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

right of any victim to seek effective legal remedy in conformity with Article 7 of the Charter and the “Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa”³ adopted by the Commission.

VI. Decision of the Court

48. From the submissions of the Parties, three main issues emerge in relation to the Respondent’s withdrawal. First, whether the Respondent’s withdrawal is valid. Secondly, if it is valid, what are the applicable conditions for such a withdrawal? Thirdly, what are the legal effects of the withdrawal? Before considering these issues, the Court has to ascertain that it has jurisdiction to deal with the issue of withdrawal.

A. Jurisdiction of the Court to deal with the withdrawal

49. Article 3(1) of the Protocol provides that: “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.” (Emphasis added).

50. Article 34(6) of the Protocol provides that at the time of the ratification of the Protocol or anytime thereafter, the State Party shall make a declaration accepting the competence of the Court. The provision continues by stating that “The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration.”

51. The Court notes that the Respondent is a State Party to the Protocol having deposited its instrument of ratification on 6 June 2003. The Respondent also deposited its Declaration pursuant to Article 34(6) of the Protocol on 22 June 2013.

52. The Court notes that pursuant to Article 3(1) it is empowered to interpret and apply the Protocol. Further, pursuant to Article 3(2) of the Protocol, in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide. Therefore, the Court holds that it has jurisdiction in this matter regarding the withdrawal of the declaration by the Respondent

B. Whether the Respondent’s withdrawal is valid

53. It is not in dispute that the Protocol does not contain provisions for denunciation of the Protocol or withdrawal of the declaration under Article 34(6). Similarly, the Charter does not contain any provisions for denunciation. The Applicant, in her submission argues that in the absence of express provisions in the Protocol for withdrawal, the Vienna Convention applies. The Coalition shares the same opinion. The Respondent made no arguments on this.

³ Adopted by the Commission at its 33rd Session in Niamey, Niger, 29 May 2003.

54. Regarding the applicability of the Vienna Convention in the instant matter, the Court notes that while the declaration pursuant to Article 34(6) emanates from the Protocol which is subject to the law of treaties, the declaration itself is a unilateral act that is not directly subject to the law of treaties. The Court therefore holds that the Vienna Convention does not apply directly, but can be applied by analogy, and the court can draw inspiration from it when it deems it appropriate

55. In dealing with whether the Respondent's withdrawal is valid, the Court is guided by relevant rules governing declarations of recognition of jurisdiction as well as the international law principle of state sovereignty.

56. Regarding the rules governing recognition of jurisdiction of international courts, the Court notes that related declarations are generally optional in nature. This is illustrated by the provisions relating to the recognition of jurisdiction of the International Court of Justice,⁴ the European Court of Human Rights⁵ and the Inter-American Court of Human Rights.⁶

57. The Court is of the view that the declaration provided under Article 34(6) is of a similar nature to those mentioned above. This is because although the declaration emanates from the Protocol, its making is optional in its nature. As such, and being unilateral, the declaration is separable from the Protocol and is therefore subject to withdrawal independently of the Protocol.

58. The Court is also of the view that the optional nature of the declaration and its unilateral character stem from the international law principle of state sovereignty. As far as unilateral acts are concerned, state sovereignty commands that states are free to commit themselves and that they retain discretion to withdraw their commitments.

59. As a consequence, the Court holds that the Respondent is entitled to withdraw its declaration pursuant to Article 34(6) and that such withdrawal is valid under the Protocol.

C. Conditions of the withdrawal

60. In respect to conditions of withdrawal, the Court notes that even if withdrawal of the declaration under Article 34(6) is unilateral, the discretionary character of the withdrawal is not absolute. This is so particularly regarding acts that create rights to the benefit of third parties, the enjoyment of which require legal certainty.

61. In such circumstances and when they are allowed to withdraw, states should be required to give prior notice. The requirement of notice is necessary in the instant case especially as the declaration pursuant to Article 34(6) once made constitutes not only an international

4 See Article 36(2) of the Statute of the International Court of Justice.

5 See Article 46 of the European Convention on Human Rights of 1950 and before the entry into force of Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby.

6 See Article 62(1) of the American Convention on Human Rights.

commitment on the part of State, but more importantly, creates subjective rights to the benefit of individuals and groups.

62. In the view of the Court, the provision of a notice period is essential to ensure juridical security by preventing abrupt suspension of rights which inevitably impact on third parties, in this case, individuals and groups who are rightsholders.⁷ This is more so as the Protocol is an implementing instrument of the Charter that guarantees the protection and enjoyment of human and peoples' rights contained therein as well as in other relevant human rights instruments. The suddenness of a withdrawal without prior notice therefore has the potential to weaken the protection regime provided for in the Charter.

63. In a matter similar to the one at hand, the Inter-American Court of Human Rights made a determination on the basis of the principle of legal certainty by holding in the case of *Ivcher Bronstein v Peru* that:

“A unilateral action by a State cannot divest an international court of jurisdiction it has already asserted; [where] a State [is allowed to] withdraw its recognition of the Court’s contentious jurisdiction, formal notification would have to be given one year before the withdrawal could take effect, for the sake of juridical security and continuity.”⁸

64. Considering the foregoing, the Court holds that the provision of notice is compulsory in cases of withdrawal of the declaration under Article 34(6) of the Protocol.

65. Regarding the period of notice, the Court is inspired by two main practices which converge to the minimum requirement of one year. The first example is the practice of the Inter-American Court of Human Rights as provided in Article 78 of the American Convention on Human Rights and applied in the *Ivcher Bronstein* case referred to earlier. The second illustration is the notice period provided for pursuant to Article 56(2) of the Vienna Convention.

66. In light of the foregoing and in the view of the Court, a notice period of one year shall apply to the withdrawal of the Respondent’s declaration.

D. Legal effects of the withdrawal

67. The Court considers that the legal effects of the withdrawal are two-fold. On the one hand, and considering that a notice period of one year applies, the act of withdrawal will have effect only after the expiry of that period. As a consequence, the Court holds that the withdrawal of the Respondent’s declaration under Article 34(6) of the Protocol shall take effect after a period of one year, that is, from 1 March 2017.

68. On the other hand, the Parties have raised the issue of the possible effect of withdrawal on pending cases. In the view of the Court, an act of the Respondent cannot divest the Court of jurisdiction it had to hear the matter. This position is supported by the legal principle of non-

⁷ See Frans Viljoen *International Human Rights Law in Africa* (2007) Oxford at 256 and Laurence R Helfer “Terminating Treaties” in Duncan Hollis (ed) *The Oxford Guide to Treaties* Oxford University Press, 2012 at 634-649.

⁸ *Ivcher Bronstein v Peru* para 24(b).

retroactivity which stipulates that new rules apply only to future situations. The Court therefore holds that the Respondent's notification of intention of withdrawal has no legal effect on cases pending before the Court.

69. For these reasons,

THE COURT, Unanimously:

i) Rules that the Court has jurisdiction to consider the issue of withdrawal of the declaration.

ii) Rules that the Respondent's withdrawal of its declaration pursuant to Article 34(6) of the Protocol is valid. By majority of nine for and two against, Judge Augustino SL RAMADHANI and Judge Gerard NIYUNGEKO, dissenting:

iii) Rules that the Respondent's withdrawal of its declaration pursuant to Article 34(6) will take effect one year after the deposit of the notice, that is, on 1 March 2017.

Unanimously:

iv) The Respondent's withdrawal of its declaration has no effect on this Application, and the Court will thus continue with the hearing of the Application.

Dissenting opinion: NIYUNGEKO and RAMADHANI

1. We share the majority view within the Court that the latter has jurisdiction to rule on the issue of the withdrawal by the Respondent State of its declaration made under Article 34(6) of the Protocol establishing the Court; that the withdrawal in the instant case is valid; but that it has no effect on the Application under consideration. We also agree with the majority on all the references contained in the *corrigendum* attached to the judgment, with regard both to the title of the judgment, the corresponding wording of item (iv) of the operative provisions, and, with respect to paragraph 54 of the judgment.

2. We however disagree with the majority on the Court's decision stating that "...the Respondent's withdrawal of its declaration pursuant to Article 34(6) will take effect one year after the deposit of the notice, that is, on 1 March 2017" [paragraph 69] (II). Furthermore, with regard to the reasons given in the judgment, it is our opinion that despite the adjustment made in the *corrigendum* to paragraph 54 of the judgment, the majority's position on the applicability of the Vienna Convention of 23 May 1969 on the Law of Treaties remains ambiguous.

I. On the applicability of the Vienna Convention on the Law of Treaties on unilateral acts

3. In considering whether the Respondent State had the right to withdraw its declaration made under Article 34(6) of the Protocol establishing the Court, the latter rightly held in the *corrigendum*, that "...the Vienna Convention does not apply directly, but can be applied by

analogy, and [that] the Court can draw inspiration from it when it deems it appropriate” (paragraph 54). This position is in tandem with that of the International Court of Justice (ICJ), in the *Fisheries Jurisdiction Case (Spain v Canada)*. Referring to the Application of the Vienna Convention in the interpretation of declarations of acceptance of the compulsory jurisdiction of the Court, the latter held as follows:

“The Court observes that the provisions of that Convention may only apply analogously to the extent compatible with the *sui generis* character of the unilateral acceptance of the Court’s jurisdiction.”¹

4. However, deciding on the issue of the date from which the withdrawal of the declaration takes effect - an issue which we will later consider -, the majority states tersely and without any explanation, that, they are inspired, *inter alia*, by the practice of “the notice period [of one year] provided for, pursuant to Article 56(2) of the Vienna Convention” (paragraph 65).²

5. In so doing, the Court gives no indication as to the “analogical” Application which it postulates in amended paragraph 54 of the judgment. Even if it states that it is simply “inspired” by Article 56(2) of the Vienna Convention, it still gives the strong impression that the said Article applies *directly*. This is in contradiction with its principled position expressed in the amended paragraph 54 of the judgment.

6. From our point of view, in reaching its conclusion, the Court should have explained how the situation relating to the withdrawal of a declaration is analogous to that of withdrawal from an inter-State convention with regard to the period of notice, which it absolutely failed to do.

7. Therefore, the least that can be said is that the Court has not cleared all the ambiguities with regard to the applicability of the Vienna Convention on the Law of Treaties to unilateral acts of States, such as the optional declaration recognizing the jurisdiction of the Court to receive Applications from individuals and NGOs. It failed to provide the necessary clarifications on a subject on which it was supposed to establish case-law.

II. On the date of entry into force of the withdrawal of the declaration

8. The Court is of the view that the withdrawal of the declaration must be subject to a period of notice, and the majority adds that in this case the applicable period of notice shall be one year from the date of deposit of the withdrawal.

9. As regards the requirement of prior notice, the Court rightly invokes the need to ensure juridical security for the beneficiaries of the said declaration, as well as protection of the human rights system embodied in the African Charter on Human and Peoples’ Rights:

1 Judgment of 4 December 1998, Jurisdiction of the Court, ICJ Reports 1998, p 453, para 46.

2 This Article states as follows: “2. A party shall give not less than twelve months’ notice of its intention to denounce or withdraw from a treaty under paragraph 1”.

“In the view of the Court, the provision of a notice period is essential to ensure juridical security by preventing abrupt suspension of rights which inevitably impact on third parties, in this case, individuals and groups who are rights- holders... This is more so as the Protocol is an implementing instrument of the Charter that guarantees the protection and enjoyment of human and peoples’ rights contained therein as well as other relevant human rights instruments. The suddenness of withdrawal without prior notice therefore has the potential to weaken the protection regime provided for in the Charter” [paragraph. 62. See also paragraphs 60 and 61].

10. With regard to the period of notice, the majority holds that it is inspired by Article 78 of the Inter-American Convention on Human Rights, which prescribes a one year notice, and by the corresponding jurisprudence of the Inter-American Court of Human Rights, and equally -as we saw-, by Article 56(2) of the Vienna Convention on the Law of Treaties, which also provides for a one year notice (paragraphs 65 and 66).

11. Though we agree with the majority view with regard to the need for a period of notice that safeguards the rights of the beneficiaries of the Respondent State’s declaration, which rights might be affected by an abrupt interruption, it remains rather difficult to understand why the majority prescribed a one year period for that purpose.

12. In our opinion, this is an excessive deadline which does not find justification under any principle or any particular circumstance, and the reasons adduced by the Court are not convincing.

13. The conventional practice and jurisprudence of the Inter-American human rights system is, like many others, a practice from which we can indeed draw inspiration, but it cannot be applied without prior discussion at the African Court. In Europe, the Convention for the Protection of Human Rights and Fundamental Freedoms, for example, provides for a six month notice periods.³ At the universal level, the Optional Protocol to the International Covenant on Civil and Political Rights for its part provides for a three-month notice period.⁴ The Court does not explain why it prefers to be guided by the practice in the Inter-American system rather than by the practices in the United Nations system or the European system which are different.

14. As for the Vienna Convention on the Law of Treaties, it was noted above that the Court in fact applied it directly without any prior discussion on the possible analogy between the withdrawal from a convention and the withdrawal from a unilateral act [paragraph 5 *supra*].

15. Considering the silence of the applicable instruments and in particular, of the Protocol establishing the Court, on the withdrawal of the declaration and the period of notice, the Court in fact, ought to have retained the criterion of reasonable period set by the ICJ in the Case *Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, instead of the fixed deadlines that are not applicable before it, with respect to the

3 Article 58 of the Convention, 4 November 1950, as amended.

4 Article 12 of the Optional Protocol, 16 December 1966.

withdrawal of optional declarations of acceptance of the compulsory jurisdiction of the Court:

“...the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity. Since Nicaragua has in fact not manifested any intention to withdraw its own declaration, the question of what reasonable period of notice would legally be required does not need to be further examined: it need only be observed that from 6 to 9 April would not amount to a ‘reasonable time’”.⁵

16. A commentator has sustained a similar view:

“Concerning the customary status of Article 56(2) [of the Vienna Convention), it is possible to sustain, with relative certitude, that its fixed period of 12 months does not reflect customary law. Nevertheless, the latter seems to impose the obligation of advance notice to be given within a ‘reasonable time’; and this appears to be based on the principle of good faith.”⁶

17. In the instant case, the Court ought to have pondered on what could be considered as reasonable time in this situation. And in answering this question, the Court ought to have asked itself, in line with its reasoning on the need to ensure the legal protection of the beneficiaries of the declaration made by the Respondent State under Article 34(6) of the Protocol establishing the Court, which persons or entities could be aggrieved by a sudden withdrawal of the declaration..

18. In our opinion and from a pragmatic point of view, it can be considered that those who can be aggrieved by a withdrawal without notice of the declaration are individuals and NGOs that were about to submit an Application to the Court, building on the declaration to establish this Court’s *ratione personae* jurisdiction. Along the same lines, such individuals or NGOs could be those who were on the verge of exhausting or had just exhausted local remedies, or were considering invoking the abnormal prolongation of such remedies or even their ineffectiveness.

19. If we go along with this reasoning, it becomes evident that a one-year period is excessive and therefore unreasonable. Indeed, it cannot reasonably be expected that potential Applicants in the situation described above should need one year to file their Application.

20. We are of the view that a period of six months from the publication of the withdrawal should be sufficient to file an Application before the Court, since any Application will always be followed at a later stage by an exchange of more elaborate written submissions between the parties, in accordance with the provisions of the Rules of Court.

5 Judgment of 26th November 1984 (Jurisdiction of the Court and Admissibility of the Application) ICJ Reports 1984, p 420 para 63. Even if the Court makes reference to the Vienna Convention on the Law of Treaties which provides, as mentioned above, a notice of one year, it insists on and applies the criterion of “a reasonable time”.

6 Theodore Christakis “Article 56” *The Vienna Conventions on the Law of Treaties, a Commentary*, Olivier Corten & Pierre Klein, ed vol II, Oxford University Press 2011, p 1257.

21. In that regard, even the Applicant refrained from making a firm request for a one year period of notice. In the Submissions dated 15 April 2016, one of her lawyers indeed refers to a reasonable period of notice [paragraph 29] and after indicating that periods of notice in international practice have been set at one year, six months or even three months [paragraph 32], he opines that Rwanda's withdrawal should not have an immediate effect but should at least enter into force only after a certain number of months [paragraph 33]. On this point, he concludes by requesting that Rwanda's withdrawal takes effect only after "a cooling off period" [paragraph 53]. This goes to show that, even in the view of the Applicant, there should be no automatic and mechanical Application of the one year notice provided for by the Vienna Convention on the Law of Treaties.

22. In conclusion, it seems to us that, in a judgment in which it was certainly going to make case-law, the Court did not sufficiently grasp the different facets of the legal issues raised and all the implications of its position, not only with regard to the applicability of the Vienna Convention on the Law of Treaties to unilateral acts derived from treaties, but also with regard to the issue of the notice period in the event of withdrawal.

Individual opinion: OUGUERGOUZ

1. I share the Court's findings regarding its jurisdiction to make a ruling on the issue of Rwanda's withdrawal of its optional declaration on compulsory jurisdiction which it deposited under Article 34(6) of the Protocol; I also share the Court's findings regarding the validity of the withdrawal, the requirement of twelve months' notice for the entry into force of the said withdrawal and the withdrawal having no implications on the examination of the case pending before it. It is my view, however, that the grounds for the judgment are insufficient in terms of the validity of the withdrawal and the 12 months' notice requirement for the withdrawal to take effect (paragraphs 54-66).

2. I believe, in effect, that the Court should have underscored the special legal nature of the optional declaration, spelt out more clearly the conditions for the legal validity of the withdrawal of the said declaration and better explained the rationale behind the requirement of a notice period of twelve months. In my view, it is because of the special nature of the optional declaration that its withdrawal by Rwanda should take effect only at the expiry of twelve months' notice.

I. The special object of the optional declaration: the international subjectivization of individuals and non-governmental organizations

3. In paragraph 57 of the Ruling, the Court "notes that the declaration provided under Article 34(6) is of similar nature to those (relating to the recognition of the jurisdiction of the International Court of Justice, the European Court of Human Rights and the Inter- American Court of Human Rights)".

4. In my view, the optional declaration of compulsory jurisdiction provided under Article 34(6) of the Protocol is unique in itself. It is clearly different from the declarations provided under the Statute of the International Court of Justice (Article 36(4)),¹ the European Convention (Article 46) before its amendment by Protocol No 11,² and the American Convention (Article 62).³

5. The purpose of depositing the three declarations concerned is in effect to authorize a “State Party” to seize the courts in question and not an “individual” or “a non- governmental organization.” In the European system before it was reformed by Protocol No 11, the individual did not have the right to refer matters to the European Court; this right being exclusive to the defunct European Commission and, optionally, to the States Parties. The same is the case in the current inter-American system where only the Inter- American Commission and, optionally, the State Parties are entitled to bring cases before the Inter-American Court. As regards the International Court of Justice, only States may appear before it (Article 36 of the Statute).

6. In the three afore-mentioned systems, the deposit of the optional declaration by a State Party entails the mandatory recognition by the latter of the jurisdiction of the court concerned with respect to every other State Party which has made the same declaration. In the three systems, the purpose of making the declaration is to confer reciprocal rights and advantages on States Parties. The deposit of the declaration creates rights for the benefit of the State which is the author thereof and for those States which already made such a declaration; the deposit of the declaration also represents a standing offer to all the other States which are yet to make the declaration. This, for example, is what the International Court of Justice stated on several occasions concerning the declaration prescribed by Article 36(2) of its Statute.

7. According to the Court at The Hague, the declaration indeed “establishes a consensual, and opens the possibility of a jurisdictional, relationship with other States which have made a declaration” in terms

1 “The declarations referred to above may be made unconditionally or on condition of reciprocity ...”.

2 1. Each High Contracting Party may, at any time, declare having recognized as obligatory lawfully and without special agreement, the jurisdiction of the Court over all matters concerning the interpretation and Application of the present Convention. 2. The declarations mentioned above could be made outright or on conditions of reciprocity by several or some other Contracting Parties for a set period. 3. The said declarations shall be handed to the Secretary General of the Council of Europe who shall transmit copy thereof to the High Contracting Parties.

3 “1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as compulsory, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or Application of this Convention. 2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other Member States of the Organization and to the Registrar of the Court. 3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and Application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs or by a special agreement”.

of Article 36, paragraph 2, of the Statute, and constitutes “a permanent offer to the other States Parties to the Statute yet to submit declaration of acceptance.”⁴

8. In the functioning of the systems of the International Court of Justice and the two European Regional (prior to the entry into force of Protocol No. 11) and Inter-American Courts, the condition of reciprocity plays, or used to play, a fundamental role. The competence of the three courts is, or was, predicated upon its acceptance by the States Parties and only to the extent defined by the declarations of those States, that is, taking possible reservations into account.⁵

9. In the context of the Protocol establishing the African Court on Human and Peoples’ Rights, the declaration prescribed by Article 34(6) for its part, aims at authorizing individuals and non-governmental organizations, not the States Parties, to bring cases before the African Court. The condition of reciprocity is absolutely inoperative here insofar as the States Parties do not seek, by means of that declaration, to confer reciprocal rights on one another. It is only through the participation of the States in the Protocol that the States concerned confer on one another reciprocal rights in terms of referrals to the Court by any one of them against another (see Article 5(1) of the Protocol). The most eloquent testimony that reciprocity has no meaning under the Protocol is that the beneficiaries of the declaration, namely, individuals and non-governmental organizations, cannot make such a declaration.

10. The optional declaration under Article 34(6) of the Protocol thus differs from the declarations provided by the International Court of Justice, the European Court (before the entry into force of Protocol No. 11) and the Inter-American Court. On the other hand, the optional declaration is akin to the declaration provided by the Protocol establishing the Arab Court of Human Rights (Articles 19⁶ and 20). It is also similar to the declaration provided under Article 25 of the European Convention (before its amendment by Protocol No. 11) in terms of referral of cases to the defunct European Commission by individuals,⁷ and the declaration under Article 56(4) of the European Convention

4 *Fisheries Jurisdiction cases, (Spain v Canada)*, Jurisdiction of the Court, Judgement of 4 December 1998, ICJ Collection 1998, p 453, para 46.

5 See for example the following pronouncement of the International Court of Justice: ... “referrals to the Court through Application, in the system of the Statute is not automatically open to every State Party to the Statute; it is open to the extent defined by the applicable declarations”, *Nottebohm Case (Preliminary Objection)* Judgement of 18 November 1953, ICJ, Collection 1953, p 122; the jurisdiction of the Court depends on the declarations made by the Parties pursuant to Article 36, paragraph 2 of the Statute on conditions of reciprocity: ...by these declarations, competence is conferred on the Court only to the extent defined in the declaration... *Anglo-Iranian Oil Company case (Jurisdiction)*, Judgment of 22 July 1952, ICJ Collection 1952, p 103.

6 “2. State Parties can accept, when ratifying or acceding to the Statute or at any time later, that one or more NGOs that are accredited and working in the field of human rights in the State whose subject claims to be a victim of a human rights violation has access to the Court”.

7 “1. The Commission may be seized with a request addressed to the Secretary General of the Council of Europe by any natural person, non-governmental organization or group of individuals claiming to be victim of a violation, by one of the

(after its amendment by Protocol No 11) as regards the deposit of an optional declaration authorizing the European Court to receive cases from any natural person, non-governmental organization or group of individuals in respect of a territory for which the State Party conducts international relations and is covered by the Convention.⁸

11. I would recall at this juncture that Article 34(4) of the European Convention as amended by Protocol No 11 and Article 4 of Supplementary Protocol A/SP.1/01/05 of 19 January 2005 amending Protocol A/P.1/7/91 of 6 July 1991 on the Court of Justice of the Economic Community of West African States (ECOWAS) open a right of direct and automatic access for individuals to the European Court of Human Rights and ECOWAS Court of Justice, respectively.

12. By providing for an optional right of referral to the African Court for individuals and non-governmental organizations, the African human rights protection system thus lies mid-way between the Inter-American system where the individual does not have the right to seize the Inter-American Court, and the current European system in which the individual has direct and automatic access to the European Court.

13. By offering individuals and non-governmental organizations the right to bring their cases before the African Court, the deposit of the optional declaration by a State Party to the Protocol has the fundamental effect of conferring international subjectivity on the aforementioned entities. Individuals and non-governmental organizations thus have the intrinsic right of referral to the Court and hence may, internationally, directly lay claim to the rights guaranteed by the African Charter and other legal human rights instruments to which the States concerned are Parties.

14. In the protection system established by the Protocol, there is virtually no longer a State screen between the individual and the international legal order, this screen having been pierced through by the declaration under Article 34(6). From simple “objects” of international law, individuals and non-governmental organizations have become veritable “subjects” of international law, first through the African Charter which gave them the automatic right to refer cases to the African Commission, a quasi-judicial body; and through the Protocol

High Contracting Parties, of the rights recognized in this Convention, where the High Contracting Party concerned has declared that it has recognized the competence of the Commission in this matter. The High Contracting Parties having subscribed to such a declaration undertake to not impede the effective exercise of this right. 2. Such declarations may be made for a specific period of time. 3. They shall be transmitted to the Secretary General of the Council of Europe, who shall forward copies thereof to the High Contracting Parties and ensure their publication. 4. The Commission shall exercise the competence conferred on it by this Article only when at least six High Contracting Parties are bound by the Declaration in the preceding paragraphs”.

8 “4. Any State which has made a declaration in accordance with the first paragraph of that Article may at any time declare in respect of one or more of the territories referred to in that declaration that it accepts the jurisdiction of the Court to hear Applications from natural persons, non-Governmental organizations or groups of individuals, as provided under Article 34 of the Convention”

which now endows them with the optional right of referral to the African Court, a judicial body.

15. This does not, however, mean that individuals and non-governmental organizations have thereby become subjects of international law on the same footing as States. Indeed, as the International Court of Justice stated, “the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights”.⁹

16. Under the Protocol, individuals and non-governmental organizations have become derivative or secondary subjects of international law, in as much as their international subjectivity has been conferred on them by the will of African States, original or primary subjects of international law. Pure manifestation of the sovereignty of the State, the international subjectivity thus conferred on individuals and non-governmental organizations by the Protocol cannot however be regarded as immutable; what sovereign States, as primary subjects of international law, can do, they certainly can undo under certain conditions.

II. Withdrawal of the optional declaration: the requirement of reasonable notice

17. The instrument of ratification of the Protocol by Rwanda, dated 5 May 2003, was deposited on 6 May 2003. Its optional declaration, for its part, dated 22 January 2013 was notified to the Chairperson of African Union Commission on 6 February 2013. It reads as follows:

“(The Republic of Rwanda) declares that the African Court on Human and Peoples’ Rights may receive petitions involving the Republic of Rwanda, filed by Non- Governmental Organizations (NGOs) with observer status before the African Commission of Human and Peoples’ Rights and individuals, subject to the reservation that all local remedies will have been exhausted before the competent organs and jurisdictions of the Republic of Rwanda”.

18. This statement does not contain anything specific as to its limitation in time. The possibility of its withdrawal is also not envisaged by the Protocol. To identify the conditions under which the declaration may be withdrawn by Rwanda, its legal nature has to be determined.

19. The declaration prescribed by Article 34(6) of the Protocol is an optional declaration of acceptance of the compulsory¹⁰ jurisdiction of the African Court and may in my view be analyzed as a unilateral act with respect to a treaty prescription. It in effect represents a unilateral act¹¹ insofar as it is a commitment by the State, the author thereof, to unilaterally assume a legal obligation - that of recognizing the Court’s

9 *Reparation for the injuries suffered in the service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Collections 1949, p 178.

10 “A discretionary act by which a State subscribes to an undertaking of compulsory jurisdiction, unilaterally attributing jurisdiction to a court for categories of disputes defined in advance”, Jean Salmon (Dir.), *Dictionary of International Public Law*, Bruylant/AUF, Brussels, 2001, p 303.

11 “A unilateral act” may be defined as a manifestation of will attributable to a single

jurisdiction with respect to any case brought by an individual or a non-governmental organization. Furthermore, the declaration is a unilateral act with respect to a treaty prescription, because it is prescribed by a treaty, in this case, the Protocol in its Article 34(6), and the category of cases which may be brought before the Court is defined by the said treaty.

20. In that regard, the International Court of Justice had, for example, indicated that:

“Declarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements that States are absolutely free to make or not to make”.¹²

21. The World Court further indicated that the withdrawal of such declarations was possible but subject to conditions. It had in effect held as follows:

“But the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity”.¹³

22. In a judgment dated 24 September 1999, the Inter-American Court of Human Rights had, for its part, indicated that the only way for a State Party to the American Convention to withdraw its optional declaration of recognition of the Court’s jurisdiction was to denounce the Convention itself, and this, in accordance with Article 78 thereof, which provides for a time frame of one year.¹⁴ It is only in the alternative that, in order to absolutely exclude the possibility of withdrawal of the declaration with “immediate effect”, that the Inter-American Court had referred to the above-mentioned judgment of the International Court of Justice to also hold that the withdrawal of an optional declaration was

subject of international law and capable of producing legal effects in international law, *ibid*, p 31.

12 *Case concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, jurisdiction and admissibility, judgment of 26 November 1984, ICJ Collection 1984, p 418, para 59; *Fisheries Jurisdiction cases, (Spain v Canada)*, Jurisdiction of the Court, judgment of 4 December 1998, ICJ Collection 1998, p 456, para 54.

13 *Case concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, jurisdiction and admissibility, judgment of 26 November 1984, ICJ Collection 1984, p 420, para 63; *Land and Maritime Boundary between Cameroon and Nigeria, preliminary objections*, judgment of 11 June 1998, ICJ Collection 1998, p 295, para 33. A few years later, the World Court declared as follows: “The regime relating to the interpretation of declarations made under Article 36 of the Statute which are unilateral acts of State sovereignty, is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties (...) The Court notes that the provisions of the Vienna Convention may be applied only by analogy in so far as they are compatible with the nature, *sui generis*, of the unilateral acceptance of the jurisdiction of the Court”, *Fisheries Jurisdiction cases, Spain v Canada*, jurisdiction of the Court, judgment of 4 December 1998, ICJ Collection 1998, p 453, para 46.

14 *Matter of Ivcher-Bronstein v Peru*, judgment of 24 September 1999 (jurisdiction), para 40.

governed by the relevant rules of the Law of Treaties and that the said rules clearly excluded a withdrawal with immediate effect.¹⁵

23. Sharing the position of the European Court of Human Rights in this respect, as expressed in its judgment in the *Matter of Loizidou v Turkey*,¹⁶ the Inter-American Court had firmly ruled out any analogy between the practice of States in relation to the optional clause provided under Article 36(2) of the Statute of the International Court of Justice and the practice concerning the system of optional clause provided under the American Convention on Human rights, and this, for reasons of the special nature, goals and purposes of this Convention.¹⁷ The Inter-American Court had in this regard stated the following:

“In effect, international settlement of human rights cases (entrusted to tribunals like the Inter-American and European Courts of Human Rights) cannot be compared to the peaceful settlement of international disputes involving purely interstate litigation (entrusted to a tribunal like the International Court of Justice); since, as is widely accepted, the contexts are fundamentally different, States cannot expect to have the same amount of discretion in the former as they have traditionally had in the latter.”¹⁸

24. In the instant case, neither the African Charter nor the Protocol establishing the Court, contains a denunciation clause, unlike the American Convention¹⁹ and the European Convention.²⁰

25. In this connection, an examination of the African Charter preparatory work shows that a number of States (Congo, Niger, Central African Republic) had proposed to insert therein a denunciation clause;²¹ however, that proposal was rejected by the OAU Ministers' Conference at its second session in Banjul, The Gambia.

26. Given the silence of the African Charter, reference should therefore be made to the 23 May 1969 Vienna Convention on the Law of Treaties,

15 *Matter of Ivcher-Bronstein v Peru*, judgment of 24 September 1999, para 53.

16 *Matter of Loizidou v Turkey (Preliminary objections)*, judgment of 23 March 1995, paras 84 and 85.

17 *Matter of Ivcher-Bronstein v Peru*, judgment of 24 September 1999, paras 47 and 48.

18 *Ibid*, para 48.

19 Article 78.

20 Article 58.

21 “The afore-mentioned Delegations have the honor to table before of OAU Ministers Conference proposals which, while recognizing for the States, members of OAU, the right to reservation, to withdraw from the reservation and the right of denunciation, spell out the limits of the right to reservation and the procedure for denunciation. These proposals which do not call to question any of the provisions already adopted, are intended on the contrary, to complement the said provisions and remove any ambiguity. They are: Article 1 (new Article 69) 1. The Secretary General of OAU shall receive and transmit to all States which are or may become Parties to the present Charter the text of the reservations which would possibly be made at the time of accession. 2. No reservation incompatible with the object and purposes of this Charter shall be permitted. 3. The reservations may be withdrawn at any time by means of notification addressed to the Secretary General of OAU. Such notification shall take effect on the date of receipt. Article 2 (Article 70). Any State Party may denounce this Charter by means of a notification addressed to the Secretary General of OAU. The denunciation shall take effect one year after the date on which the Secretary General of OAU will have received the notification”, OAU. Doc, Amendment No. 7, 2nd session, Banjul, 7-21 January 1981 (*Registry translation*).

Article 56 of which predicates the denunciation of a treaty on very strict conditions; as a matter of fact, the Parties must have had the intention to admit the possibility of denunciation or withdrawal or that this possibility could be deduced from the nature of the treaty. It is far from evident that the States Parties wanted to admit the possibility of a denunciation of the African Charter; by rejecting the amendment for inclusion of a denunciation clause, it could be said that the States also intended to confer some sanctity on their commitment. Nothing in the nature of the African Charter allows for such a possibility to be inferred.

27. In this regard, I would like to point out that the following three Conventions adopted by African States in the field of human rights, contain a denunciation clause: the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 10 September 1969 (Article 13) which was adopted before the African Charter, the African Union Convention on Preventing and Combating Corruption of July 2013 (Article 26) and the Convention for the Protection and Assistance of Internally Displaced Persons in Africa of 23 October 2009 (Article 19), both adopted after the African Charter. In contrast, the African Charter on the Rights and Welfare of the Child of 1 July 1990, the Protocol to the African Charter on the Rights of Women in Africa of 1 July 2003, and the African Charter on Democracy, Elections and Governance of 30 January 2007 are, like the African Charter, silent on the question of denunciation. It may therefore be inferred from this silence the States Parties' intention to not allow denunciation of the Conventions concerned. This solution was also advocated with respect to the International Covenant on Civil and Political Rights of 1966 which also does not contain a denunciation clause.²²

28. Given that the Protocol does not contain a denunciation clause, a State Party cannot therefore be indefinitely bound by its optional declaration with no possibility of withdrawing the same.²³ It is therefore my view that the declaration under Article 34(6) is "separable" from the Protocol and can be withdrawn by its author (see paragraph 57 of the judgment).

29. I believe also that, to determine the conditions under which a declaration may be withdrawn, reference should be made "by analogy"

²² On this point, see the very firm position of the Committee on Human Rights, *General Comment No. 26 General comment on issues relating to the continuity of obligations to the International Covenant on Civil and Political Rights*, United Nations, Doc. CCPR/C/21/Rev.1/Add.8/Rev.1, 8 December 1997, p 2. See also the aide-memoire of the Secretary General of the United Nations dated 23 September 1997 addressed to the People's Democratic Republic of Korea following notice of denunciation of the Covenant; the Secretary General, in his capacity as the depository, held that in the absence of a denunciation clause in the Covenant, the consent of all the States Parties was necessary for the denunciation to take effect, see United Nations, Doc. CN/1997/CN.467.1997.

²³ As regards the declaration provided under Article of the European Convention before it was amended by Protocol No. 11 (individual right of referral to the European Commission), it has been argued that the way to terminate it was to denounce the Convention, see Ronny Abraham, "Article", in Louis-Edmond Pettiti, Emmanuel Decaux & Pierre-Henry Imbert (Dir), *La Convention EDH-Commentaire Article par Article (European Commission on Human Rights - Article by Article comments)* Paris, Economica, 1995, p 581.

to the Law of Treaties (see paragraphs 54 and 65 of the judgment), as codified by the 1969 Vienna Convention, the Law of Treaties.²⁴ The Republic of Rwanda being a Party to this Convention (the country acceded thereto on 3 January 1980), the Convention's procedural prescriptions are in effect applicable²⁵ to the country. However, I do not consider as relevant the reference made in paragraph 65 of the judgment to the "practice" of the Inter-American Court as reflected in the Matter of *Ivcher-Bronstein v Peru*. As I have shown (see paragraph 22 above), the position of the Inter-American Court is in fact more qualified.²⁶

30. Finally, I would note that in its comments on the *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations adopted in 2006*,²⁷ the United Nations International Law Commission stated that "there can be no doubt that unilateral acts may be revoked or amended in certain specific circumstances". The Commission identified the following criteria to be considered in determining whether or not a revocation is a unilateral act:

"A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to:

- (i) Any specific terms of the declaration relating to revocation;
- (ii) The extent to which those to whom the obligations are owed have relied on such obligations;
- (iii) The extent to which there has been a fundamental change in the circumstances".

31. In the instant case, Rwanda's declaration contains no reference to its possible withdrawal and there is clearly no fundamental change of circumstances within the meaning of Article 62 of the Vienna Convention on the Law of Treaties. There remains the issue as to the prejudice which Rwanda's withdrawal of its declaration could possibly cause the beneficiaries of the declaration, namely: individuals and non-governmental organizations.

32. In this regard, Rwanda's withdrawal of its declaration outrightly deprives individuals and non-governmental organizations of the right they hitherto had to bring

24 Paragraph 2 of Article 56 of the Convention, titled "Denunciation or withdrawal in case a treaty does not contain provisions for its extinction, denunciation or withdrawal" provides that: "a Party shall give at least twelve months advance notice of its intention to denounce a treaty or to withdrawal therefrom in accordance with the provisions of paragraph 1".

25 The twelve months timeframe is a procedural condition which is not laid down by customary law.

26 I would note in particular that paragraph 24(b) of the judgment in the Matter of *Ivcher-Bronstein v Peru*, to which the Court makes reference in paragraph 63 of the instant judgment does not reflect the position of the Inter-American Court but rather that of the Inter-American Commission.

27 Text adopted by the International Law Commission at its Fifty-Eight Session in 2006, and submitted to the General Assembly as part of the Commission's report covering the work of that session (A/61/10). The report, which also contains commentaries on the draft articles is reproduced in the Yearbook of the International Law Commission, 2006, Vol. II (2).

before the African Court a case against that State, and hence of their international subjectivity, as set out in the first part of this opinion. This is a significant consequence for individuals and non-governmental organizations, essential stakeholders, so to say, of the human rights judicial protection system established by the Protocol; reason for which Rwanda's revocation of its declaration would be arbitrary, if it were to take immediate effect: it would in short take by surprise the individuals and non-governmental organizations on the point of instituting a case against Rwanda.

33. In order not to be seen as arbitrary, the revocation of the declaration must therefore be subject to a reasonable period of notice, as, for example, the International Court of Justice indicated in regard to withdrawal of the optional declaration under Article 36(2) of its Statute.²⁸ The definition of "reasonable" draws mainly from the concepts of "just", "equitable" or "necessary".²⁹ In the instant case, the twelve-month period of notice prescribed by Article 56(2) of the Vienna Convention and indicated by the Court appears to me to be just, equitable and necessary in view of the significant negative impact that the withdrawal would have on the rights of individuals and non-governmental organizations under the system established by the Protocol.

34. The Protocol, which strengthens the system of collective guarantee for the rights of the individual established by the African Charter, must be seen as a centerpiece of this system because of the judicial nature of the procedures it provides, and the individual right of referral, in particular. The Court must therefore, as much as possible, safeguard the integrity and effectiveness of this individual redress mechanism by maintaining a fair balance between the interests of States Parties, on the one hand, and those of individuals and non-governmental organizations, on the other. To this end, the Court must keep in view the object and purposes of the African Charter and the Protocol, as well as the predominant place which the Pan-African Organization currently accords the protection of the individual as evidenced by the several provisions of Article 4 of the Constitutive Act of the African Union.

35. In conclusion, it is my hope that the instant judgment will not have the effect of dissuading from doing so, the very many States which have not yet deposited the optional declaration prescribed by Article 34(6) of the Protocol. States Parties to the Protocol which are still hesitant about depositing the declaration may wish to consider including a temporary reservation in their declaration as allowed, for example, by the European Convention (before it was amended by Protocol 11) with

28 See *supra*, para 21.

29 On the definition of "reasonable", see Olivier Corten, *L'utilisation du "raisonnable" par le juge international – Discours juridique, raison et contradictions*, (The use of "reasonable" by the international judge : legal discourse, reason and contradictions) Editions Bruylant – Editions de l'Université de Bruxelles, Bruxelles, 1997, pp 495-526 (paras 439-463).

respect to referrals to the European Commission by individuals (Article 25)³⁰ and referrals to the Court by the States (Article 46)³¹ or as permitted by the American Convention with respect to referrals to the Inter-American Court by States (Article 62).³² Although such temporary reservations are not really desirable, they represent a lesser evil in relation to the current unsatisfactory situation whereby a little less than a quarter of the 30 States Parties to the Protocol have deposited the declaration.

30 See footnote 7.

31 See footnote 2.

32 See footnote 3.

Armand Guehi v Tanzania (provisional measures) (2016) 1 AfCLR 587

Armand Guehi v The United Republic of Tanzania

Order (provisional measures), 18 March 2016. Done in English, French Portuguese and Arabic, the English text being authoritative.

Judges: THOMPSON, NIYUNGEKO, OUGUERGOUZ, TAMBALA, GUISSÉ, KIOKO, BEN ACHOUR and MATUSSE

Recused under Article 22: RAMADHANI and ORE

Did not participate: BOSSA

The Applicant alleged violation of fair trial rights in proceedings that led to the imposition of the death penalty. The Court held that provisional measures were necessary to avoid irreparable harm despite the moratorium adopted by the Respondent State and the fact that no execution had been carried out in a long time.

Provisional measures (death penalty, 19-21)

I. Subject of the Application

1. The Court received on 6 January, 2015, an Application by Armand Guehi, a citizen of Cote d'Ivoire (herein after referred to as "the Applicant"), Instituting proceedings against the United Republic of Tanzania, (hereinafter referred to as "the Respondent"), alleging that the Respondent has violated his rights contained in International Human Rights Treaties.
2. The Applicant, who is in Ukonga Central Prison, Dar es Salaam, Tanzania, was sentenced to death by the High Court of Tanzania at Moshi on 30 March, 2010 for murder. That death sentence was confirmed by the Court of Appeal, which is the Highest Court in Tanzania, on 28 February, 2014.
3. The Applicant alleges, *inter alia*, that:
 - (a) His conviction cannot be said to have been fair and just, adding that his right to fair trial was prejudiced, and several of his rights were violated in the process.
 - (b) Save for the trial in 2010, the Respondent did not provide him with language assistance at critical stages of the case, such as when he was interviewed and recorded his statements at the Police Station, while at the time of his arrest he could only speak and understand the French language. In addition, he alleges that the Respondent never facilitated consular assistance for him.

- (c) After his arrest, the Respondent failed to secure his properties in his house in Arusha and as a result the said properties were arbitrarily disposed of.

II. Procedure before the Court

4. The Application was received at the Registry of the Court on 6 January 2015.
5. Pursuant to Rule 35(2)(b) and 35(4)(b) of the Rules of Court, on 21 January 2015, the Registry forwarded copies of the Application to the Republic of Cote d'Ivoire, in accordance with Article 5(2) of the Protocol and drew the attention of Cote d'Ivoire to the provisions on intervention set out in Rule 53(1) of the Rules of Court.
6. By Note Verbale dated 1 April, 2015, the Republic of Cote d'Ivoire notified the Registry of its intention to intervene in the matter.
7. By letter dated 5 January 2016, the Respondent submitted its Response to the Application.
8. On 2 March 2016, the Registry received Cote d'Ivoire's Application to intervene in the matter.

III. Jurisdiction

9. In dealing with an Application, the Court has to ascertain that it has jurisdiction on the merits of the case under Articles 3 and 5 of the Protocol.
10. However, in ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction.¹
11. Article 3(1) of the Protocol provides that "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned".
12. The Respondent ratified the African Charter on Human and Peoples' Rights on 9 March 1984 and the Protocol on 10 February 2006, and is party to both instruments; it equally deposited, on 29 March 2010, a declaration accepting the competence of the Court to receive cases from individuals and Non- Governmental Organizations, within the meaning of Article 34(6) of the Protocol read together with Article 5(3) of the Protocol.
13. The alleged violations the Applicant is complaining about are guaranteed under Article 7 of the Charter and Article 14 of the International Covenant on Civil and Political Rights ("hereinafter referred to as ICCPR"), and the Court therefore has *prima facie*

¹ See Application 002/2013 *African Commission on Human and Peoples Rights v Libya* (Order for Provisional Measures dated 15 March 2013) and Application 006/2012 *African Commission on Human and Peoples' Rights v Kenya* (Order for Provisional Measures dated 15 March 2013); Application 004/2011 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures dated 25 March 2011).

jurisdiction *ratione materiae* over the Application. The Respondent acceded to the International Covenant on Civil and Political Rights (ICCPR) on 11 June 1976 and deposited its instrument of accession on the same date.

14. In light of the foregoing, the Court has satisfied itself that, *prima facie*, it has jurisdiction to deal with the Application.

IV. On the provisional measures sought

15. In his Application, the Applicant did not request the Court to order provisional measures.

16. Under Article 27(2) of the Protocol and Rule 51(1) of the Rules, the Court is empowered to order provisional measures *proprio motu* “in cases of extreme gravity and when necessary to avoid irreparable harm to persons”, and “which it deems necessary to adopt in the interest of the parties or of justice”.

17. It is for the Court to decide in each situation if, in the light of the particular circumstances, it should make use of the power provided for by the aforementioned provisions.

18. The Applicant is on death row and it appears from this Application that there exists a situation of extreme gravity, as well as a risk of irreparable harm to the Applicant.

19. Given the particular circumstances of the case, where there is risk of execution of the death penalty which will jeopardise the enjoyment of the rights guaranteed under Article 7 of the Charter and Article 14 of the ICCPR, the Court has decided to invoke its powers under Article 27(2) of the Protocol.

20. The Court finds that the situation raised in the present Application is of extreme gravity and represents a risk of irreparable harm to the rights of the Applicant as protected by Article 7 of the Charter and Article 14 of the ICCPR, if the death sentence were to be carried out.

21. Consequently, the Court concludes that the circumstances require an Order for provisional measures, in accordance with Article 27(2) of the Protocol and Rule 51 of its Rules, to preserve the *status quo ante*, pending the determination of the main Application.

22. For the avoidance of doubt, this Order shall not in any way prejudice any final findings the Court shall make regarding its jurisdiction, the admissibility and the merits of the Application.

For these reasons,

23. The Court, unanimously, orders the Respondent:

- a) To refrain from executing the death penalty against the Applicant pending the determination of the Application.
- b) To report to the Court within thirty (30) days from the date of receipt of this Order, on the measures taken to implement the Order.

**Ally Rajabu and Others v Tanzania (provisional measures)
(2016) 1 AfCLR 590**

Ally Rajabu and Others v The United Republic of Tanzania

Order (provisional measures), 18 March 2016, Done in English and French, the English text being authoritative.

Judges: THOMPSON, NIYUNGEKO, TAMBALA, ORE, GUISSÉ, BEN ACHOUR, BOSSA and MATUSSE

Recused under Article 22: RAMADHANI

The Applicant alleged violation of fair trial rights in proceedings that led to the imposition of the death penalty. The Court held that provisional measures were necessary to avoid irreparable harm despite the moratorium adopted by the Respondent State and the fact that no execution had been carried out in a long time.

Provisional measures (death penalty, 17-19)

I. Subject of the Application

1. The Court received, on 26 March 2015, an Application by Ally Rajabu Angaja Kazem *alias* Ona, Geoffrey Stanley *alias* Babu, Emmanuel Michael *alias* Atuu and Julius Michael, Citizens of Tanzania, (hereinafter referred to as 'the Applicants'), instituting proceedings against the United Republic of Tanzania (hereinafter referred to as 'the Respondent'), for alleged violations of human rights.

2. The Applicants, who are at the Arusha Central Prison, were sentenced to death by the High Court of Tanzania at Moshi on 25 November, 2011, for murder. That death sentence was confirmed by the Court of Appeal, which is the highest Court in Tanzania on 25 March, 2013.

3. The Applicants allege that:

- i. The decision against them was based on manifest errors on the record, to the extent that the evidence regarding their identification at the scene of the crime was not satisfactorily established due to the discrepancies among the prosecution witnesses
- ii. During their trial, there was non-compliance with some of the procedures, such as the procedure on Preliminary hearing as provided under section 192(5) of the Criminal Procedure Act.
- iii. The Prosecution failed to call important witnesses

II. Procedure before the Court

4. The Application dated 10 December, 2014, was received at the Registry of the Court on 26 March, 2015.

5. In accordance with Rule 35(2) and 35(4) of the Rules of the Court, the Registry forwarded the Application to the Respondent on 25 September 2015; and invited the latter to respond to the Application within sixty (60) days and to indicate within thirty (30) days of receipt of the Application, the names and addresses of its representatives.

6. By letter dated 6 November 2015, the Respondent submitted the list of the names and addresses of its representatives.

7. By letter dated 3 February 2016, the Registry reminded the Respondent to respond to the Application in accordance with Rule 37 of the Rules of the Court.

III. Jurisdiction

8. In dealing with an Application, the Court has to ascertain that it has Jurisdiction on the merits of the case under Articles 3 and 5 of the Protocol.

9. However, in ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction.¹

10. Article 3(1) of the Protocol provides that "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned".

11. The Respondent ratified the African Charter on Human and Peoples' Rights on 9 March 1984 and the Protocol on 10 February 2006, and is party to both instruments; it equally deposited, on 29 March 2010, a declaration accepting the competence of the Court to receive cases from individuals and Non-Governmental Organizations, within the meaning of Article 34(6) of the Protocol read together with Article 5(3) of the Protocol.

12. The alleged violations the Applicants is complaining about are guaranteed under the scope of Article 7 of the Charter and Article 14 of the International Covenant on Civil and Political Rights ("hereinafter referred to as ICCPR"), and the Court therefore has *prima facie* jurisdiction *ratione materiae* over the Application. The Respondent acceded to the International Covenant on Civil and Political Rights (ICCPR) on 11 June 1976 and deposited its instrument of accession on the same date.

1 See Application 002/2013 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures dated 15 March 2013) and Application 006/2012 *African Commission on Human and Peoples' Rights v Kenya* (Order for Provisional Measures dated 15 March 2013). Application 004/2011 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures dated 25 March 2011).

13. In light of the foregoing, the Court has satisfied itself that, *prima facie*, it has jurisdiction to deal with the Application.

IV. On the provisional measures sought

14. In their Application, the Applicants did not request the Court to order provisional measures,

15. Under Article 27(2) of the Protocol and Rule 51(1) of the Rules, the Court is empowered to order provisional measures *proprio motu* in cases of extreme gravity and when necessary to avoid irreparable harm to persons, and which it deems necessary to adopt in the interest of the parties or of justice

16. It is for the Court to decide in each situation if, in the light of the particular circumstances, it should make use of the power provided for by the aforementioned provisions.

17. The Applicant is on death row and it appears from this Application that there exists a situation of extreme gravity, as well as a risk of irreparable harm to the Applicant:

18. Given the particular circumstances of the case, where there is a risk of the execution of the death sentence, which may jeopardise the enjoyment of the rights guaranteed under Articles 7 of the Charter and 14 of the ICCPR, the Court has decided to invoke its powers under Article 27(2) aforesaid,

19. The Court finds that the situation raised in the present Application is of extreme gravity, and represents a risk of irreparable harm to the rights of the Applicants as protected by Article 7 of the Charter and 14 of the ICCPR, if the death sentence were to be carried out.

20. Consequently, the Court concludes that the circumstances require an Order for provisional measures, in accordance with Article 27(2) of the Protocol and Rule 51 of its Rules, to preserve the *status quo ante*, pending the determination of the main Application.

21. For the avoidance of doubt, this Order shall not in any way prejudice any final findings the Court shall make regarding its jurisdiction, the admissibility and the merits of the Application.

For these reasons,

22. The Court, unanimously, orders the Respondent:

- a) To refrain from executing the death penalty against the Applicants pending the determination of the main Application.
- b) To report to the Court within thirty (30) days from the date of receipt of this Order, on the measures taken to implement the Order.

John Lazaro v Tanzania (provisional measures) (2016) 1 AfCLR 593

John Lazaro v The United Republic of Tanzania

Order (provisional measures), 18 March 2016. Done in English, French, Portuguese and Arabic, the English text being authoritative.

Judges: THOMPSON, NIYUNGEKO, OUGUERGOUZ, ORE, GUISSÉ, KIOKO, BEN ACHOUR, BOSSA and MATUSSE

Recused under Article 22: RAMADHANI

The Applicant alleged violation of fair trial rights in proceedings that led to the imposition of the death penalty. The Court held that provisional measures were necessary to avoid irreparable harm despite the moratorium adopted by the Respondent State and the fact that no execution had been carried out in a long time.

Provisional measures (death penalty, 16-18)

I. Subject of the Application

1. The Court received, on 4 January 2016, an Application by John Lazaro (hereinafter referred to as “the Applicant”), instituting proceedings against the United Republic of Tanzania (hereinafter referred to as “the Respondent”) for alleged violations of human rights.

2. The Applicant, who is at Butimba Central Prison, was sentenced to death by the High Court of Tanzania at Bukoba on 6 August 2010. That death sentence was confirmed by the Court of Appeal, which is the highest Court in Tanzania on 28 November 2011. The Applicant then made an Application to the Court of Appeal for Review of its judgement in 2012, and was registered as Number 08/2012 (sic).

3. The Applicant alleges, *inter alia*, that:

- (a) He had no legal representation for his Application for Review at the Court of Appeal and thus he was deprived of his right to be heard contrary to Article 3(2) of the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”).
- (b) His conviction had been totally based on visual identification by a single witness and that it was not supported by all elementary factors.
- (c) The Court of Appeal supported the finding of the High Court despite non-citation of specific legal provisions.
- (d) The Court of Appeal seriously misdirected itself on points of law including satisfying itself that the prosecution evidence was beyond reasonable doubt.
- (e) The Application for Review despite being registered in 2012 has not been heard or listed to date. Further, that the Court of Appeal is

prejudiced against him since subsequent Applications for Review have been heard.

II. Procedure before the Court

4. The Application was received at the Registry of the Court on 4 January 2016.

5. Pursuant to Rule 36 of the Rules of Court, on 25 January 2016, the Registry served the Application on the United Republic of Tanzania.

III. Jurisdiction

6. In dealing with an Application, the Court has to ascertain that it has jurisdiction on the merits of the case under Articles 3 and 5 of the Protocol.

7. However, in ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction.¹

8. Article 3(1) of the Protocol provides that “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”.

9. The Respondent ratified the Charter on 9 March 1984 and the Protocol on 10 February 2006, and is party to both instruments; it equally deposited, on 29 March 2010, a declaration accepting the competence of the Court to receive cases from individuals and Non-Governmental Organizations, within the meaning of Article 34(6) of the Protocol read together with Article 5(3) of the Protocol.

10. The alleged violations the Applicants are complaining about are guaranteed under the scope of Article 7 of the Charter and Article 14 of the International Covenant on Civil and Political Rights (“hereinafter referred to as ICCPR”), and the Court therefore has *prima facie* jurisdiction *ratione materiae* over the Application. The Respondent acceded to the ICCPR on 11 June 1976 and deposited its instrument of accession on the same date.

11. In light of the foregoing, the Court has satisfied itself that, *prima facie*, it has jurisdiction to deal with the Application.

IV. On the provisional measures sought

12. In his Application, the Applicant did not request the Court to order provisional measures.

¹ See Application 002/2013 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures dated 15 March 2013) and Application 006/2012 *African Commission on Human and Peoples' Rights v Kenya* (Order for Provisional Measures dated 15 March 2013), Application 004/2011 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures dated 25 March 2011).

13. Under Article 27(2) of the Protocol and Rule 51(1) of the Rules, the Court is empowered to order provisional measures *proprio motu* in cases of extreme gravity and “when necessary to avoid irreparable harm to persons”, and “which it deems necessary to adopt in the interest of the parties or of justice.”

14. It is for the Court to decide in each situation if, in the light of the particular circumstances, it should make use of the power provided for by the aforementioned provisions.

15. The Applicant is on death row and it appears from this Application that there exists a situation of extreme gravity, as well as a risk of irreparable harm to the Applicant.

16. Given the particular circumstances of the case, where there is a risk of execution of the death penalty which may jeopardise the enjoyment of the rights guaranteed under Article 3 and 7(1) of the Charter, the Court has decided to invoke its powers under Article 27(2) of the Protocol.

17. The Court finds that the situation raised in the present Application is of extreme gravity and represents a risk of irreparable harm to the rights of the Applicant as protected by Article 3 and 7(1) of the Charter, if the death sentence were to be carried out.

18. Consequently, the Court concludes that the circumstances require an Order for provisional measures, in accordance with Article 27(2) of the Protocol and Rule 51 of its Rules, to preserve the *status quo ante*, pending the determination of the main Application.

19. For the avoidance of doubt, this Order shall not in any way prejudice any findings the Court shall make regarding its jurisdiction, the admissibility and the merits of the Application.

For these reasons,

20. The Court unanimously, orders the Respondent:

- a) To refrain from executing the death penalty against the Applicant pending the determination of the Application.
- b) To report to the Court within thirty (30) days from the date of receipt of this Order, on the measures taken to implement the Order.

**Evodius Rutechura v Tanzania (provisional measures) (2016)
1 AfCLR 596**

Evodius Rutechura v The United Republic of Tanzania

Order (provisional measures), 18 March 2016. Done in English, French, Portuguese and Arabic, the English text being authoritative.

Judges: THOMPSON, NIYUNGEKO, OUGUERGOUZ, TAMBALA, ORE, GUISSSE, KIOKO, BEN ACHOUR, BOSSA and MATUSSE

Recused under Article 22: RAMADHANI

The Applicant alleged violation of fair trial rights in proceedings that led to the imposition of the death penalty. The Court held that provisional measures were necessary to avoid irreparable harm despite the moratorium adopted by the Respondent State and the fact that no execution had been carried out in a long time.

Provisional measures (death penalty, 16-18)

I Subject of the Application

1. On 13 January 2016, the Court received, an Application by Evodius Rutechura (hereinafter referred to as the “Applicant”), instituting proceedings against the United Republic of Tanzania (hereinafter referred to as the “Respondent”), for alleged violations of human rights.

2. The Applicant, who is at Butimba Central Prison in Mwanza, was sentenced to death by the High Court of Tanzania at Moshi on 19 November, 2009 for murder. The death sentence was confirmed by the Court of Appeal, which is the highest Court in Tanzania on 13 September, 2012.

3. The Applicant alleges that:

- i. The decision against him was based on manifest errors on the record, to the extent that the evidence regarding their identification at the scene of the crime was not satisfactorily established due to the discrepancies among the prosecution witnesses.
- ii. During his trial there was non-compliance with some of the procedures, such as the procedure on Preliminary hearing as provided under Section 192(5) of the Criminal Procedure Act.
- iii. The Prosecution failed to call important witnesses.

II. Procedure before the Court

4. The Application dated 29 December 2015 was received at the Registry of the Court on 13 January 2016.

5. In accordance with Rule 35(2) and 35(4) of the Rules of the Court, the Registry forwarded the Application to the United Republic of Tanzania on 18 February 2016 and invited them to respond to the Application within sixty (60) days and to indicate within thirty (30) days of receipt of the Application, the names and addresses of its representatives.

III. Jurisdiction

6. In dealing with an Application, the Court has to ascertain that it has jurisdiction on the merits of the case under Articles 3 and 5 of the Protocol.

7. However, in ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction.¹

8. Article 3(1) of the Protocol provides that the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned.

9. The Respondent ratified the African Charter on Human and Peoples' Rights on 9 March 1984 and the Protocol on 10 February 2006, and is party to both instruments. On 29 March 2010, the Respondent made a declaration accepting the competence of the Court to receive cases from individuals and Non-Governmental Organizations, within the meaning of Article 34(6) of the Protocol read together with Article 5(3) of the Protocol.

10. The Applicant is complaining about violations of rights guaranteed under Article 7 of the Charter and Article 14 of the International Covenant on Civil and Political Rights ("hereinafter referred to as ICCPR") and the Court therefore has *prima facie* jurisdiction *ratione materiae* over the Application. The Respondent acceded to the International Covenant on Civil and Political Rights (ICCPR) on 11 June 1976 and deposited its instrument of accession on the same date.

11. In light of the foregoing, the Court is satisfied that, *prima facie*, it has jurisdiction to deal with the Application.

IV. Provisional measures

12. In his Application, the Applicant did not request the Court to order provisional measures.

13. Under Article 27(2) of the Protocol and Rule 51(1) of the Rules, the Court is empowered to order provisional measures *proprio motu* in cases of extreme gravity and when necessary to avoid irreparable harm

¹ See Application 002/2013 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures dated 15 March 2013) and Application 006/2012 *African Commission on Human and Peoples' Rights v Kenya* (Order for Provisional Measures dated 15 March 2013), Application 004/2011 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures dated 25 March 2011).

to persons”, and “which it deems necessary to adopt in the interest of the parties or of justice”.

14. It is for the Court to decide in each situation if, in the light of the particular circumstances, it should make use of the power provided for under Article 27(2) of the Rules of the Court.

15. The Applicant is on death row and it appears from this Application that there exists a risk of irreparable harm to the Applicant.

16. Given the particular circumstances of the case, where there is risk of execution of the death penalty, which may jeopardize the enjoyment of the rights guaranteed under Article 7 of the Charter and Article 14 of the ICCPR, the Court has decided to invoke its powers under Article 27(2) aforesaid.

17. The Court finds that the situation raised in the present Application is of extreme gravity, and represents a risk of irreparable harm to the rights of the Applicant as protected by Article 7 of the Charter and Article 14 of the ICCPR, if the death sentence were to be carried out.

18. Consequently, the Court concludes that the circumstances require an Order for provisional measures, in accordance with Article 27(2) of the Protocol and Rule 51 of its Rules, to preserve the status quo ante, pending the determination of the main Application.

19. For the avoidance of doubt, this Order shall not in any way prejudice any findings the Court shall make regarding its jurisdiction, the admissibility and the merits of the Application.

For these reasons,

20. The Court, unanimously, orders the Respondent:

a) To refrain from executing the death penalty against the Applicant pending the determination of the Application.

b) To report to the Court within thirty (30) days from the date of receipt of this Order, on the measures taken to implement the Order.

Mohamed Abubakari v Tanzania (merits) (2016) 1 AfCLR 599

Mohamed Abubakari v The United Republic of Tanzania

Judgment, 3 June 2016. Done in English and French, the French text being authoritative.

Judges: THOMPSON, NIYUNGEKO, OUGUERGOUZ, TAMBALA, ORÉ, KIOKO, BEN ACHOUR, BOSSA, MATUSSE

Recused under Article 22: RAMADHANI

The Applicant had been sentenced to 30 years' imprisonment for armed robbery. The Court held that the failure by the Tanzanian authorities to investigate the allegation of bias on the part of the prosecutor and its failure to provide legal aid amounted to a violation of the Applicant's right to a fair trial. The Court refused the Applicant's request for an order to be released from prison, holding that it would only do so under 'special and compelling circumstances'.

Admissibility (compatibility with the Constitutive Act of the AU and the Charter 50-51; extraordinary remedies 64-72; submission within a reasonable time 92-93)

Fair trial (right to defence, 118, 120-122, 160; legal aid, 138-145; evidence for criminal conviction, 174, 185, 198; consideration of alibi defence, 191-194; delivery of judgment in public, 224-227)

Personal liberty and security (right to be informed of reasons for arrest, 119, 158)

Reparations (release, 234; retrial, 235; other appropriate measures, 236)

Separate opinion: THOMPSON

Fair trial (delivery of judgment in public, 9, 10)

Reparations (release, 11-14)

Separate opinion: BEN ACHOUR

Reparations (release, 7-9)

Fair trial (delivery of judgment in public, 17)

I. The Parties

1. The Applicant is Mr Mohamed Abubakari, a national of the United Republic of Tanzania, who is currently serving a thirty-year term of

imprisonment at the Karanga Main Prison at Moshi, Kilimanjaro, for the offence of armed robbery.

2. The Respondent is the United Republic of Tanzania which ratified the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 18 February 1984, the Protocol on 7 February 2006; and deposited the declaration accepting the jurisdiction of the Court to receive cases from individuals and non-governmental organisations on 29 March 2010. The Respondent also acceded to the 11 December 1966 International Covenant on Civil and Political Rights (hereinafter referred to as "the Covenant") on 11 July 1976.

II. Subject of the Application

3. The Court was seised of an Application dated 8 October 2013 to which written submissions were annexed. The Annex comprised a copy of the Judgment of the Court of Appeal of Tanzania in Criminal Appeal No. 48 of 2004, in the matter of *Mohamed Abubakari v The Republic*¹ of 5 October 2004.

A. Facts of the matter

4. In his Application, the Applicant alleged that he was arrested by the Police on 10 April 1997 while he was in his home, and that he was kept in Police custody up to 14 April 1997. He averred that he was convicted of the offence of armed robbery and sentenced by the District Court of Moshi on 21 July 1998 to thirty (30) years imprisonment which he is currently serving at the Karanga Main Prison in the Moshi region. He further stated that he appealed against the conviction at the High Court at Moshi, but his Appeal was dismissed on 5 January 1999 (sic). He stated that he, thereafter, lodged an appeal before the Tanzania Court of Appeal at Arusha (Appeal No. 48 of 2000), and that Appeal was similarly dismissed.

B. Alleged violations

5. In both his written submissions and oral pleadings, the Applicant outlined several complaints in relation to the manner in which he was detained, tried and convicted by the Tanzanian Police and Judicial authorities. He complained in particular of:

- (i) having been detained upon his arrest, at a police post which had no basic facilities appropriate for receiving suspects;
- (ii) having been sentenced on the basis of an indictment marred by irregularities;
- (iii) having been prosecuted by a State Attorney who had a conflict of interest in relation to the armed robbery victim;
- (iv) not having been afforded the right to defend himself and the assistance of a lawyer at the time of his arrest;

1 Also attached to the Application is another Judgment of the High Court of Moshi dated 27 February 2013 in another Case, *Alfayo Michel Shemwilu and Ramadhani Shekiondo v The Republic Criminal Revision No. 2 of 2013*. This Judgment is on the issue of the sentence applicable in case of a crime of armed robbery.

- (v) not having been afforded the right to the free assistance of a lawyer during the judicial process;
- (vi) having thus been discriminated against;
- (vii) having not promptly received communication of the indictment and the statements of the prosecution witnesses to be able to defend himself;
- (viii) having been convicted on the basis of the testimony of a single individual, fraught with contradictions, in the absence of any identification parade;
- (ix) having been convicted without his alibi defence being seriously considered by the Judge;
- (x) having been convicted despite the fact that the crime weapons and the items stolen were not found;
- (xi) having been sentenced to thirty years in prison, a punishment which was not applicable at the time of the offence; and
- (xii) the judgment by which he was convicted and sentenced was not delivered in open court.

III. Summary of the procedure before the Court

6. The Application was received at the Court Registry on 8 October 2013.

7. On 5 November 2013, the Registry, pursuant to Rules 35(2) and (3) of the Rules of Court transmitted the Application to the Respondent, the Chairperson of the African Union Commission and, through her, to the Executive Council of the Union, as well as to all the other States Parties to the Protocol.

8. After having requested and obtained leave of Court for extension of time, the Respondent transmitted to the Registry its Response to the Application on 6 February 2014. That Response comprised in the Annex, a series of Tanzanian legal texts as well as two decisions of the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission").

9. The Registry received the Applicant's Reply on 7 March 2014.

10. On the same date, the Registry received a letter dated 5 March 2014 from the Applicant, in which he was seeking legal assistance from the Court, considering that he is a layman in legal matters. Following the directive of the Court, the Registry, by letter dated 2 June 2014, inquired from the Pan African Lawyers Union (PALU) whether it could provide legal assistance to the Applicant. By letter dated 7 August 2014 received at the Registry on 11 August 2014, PALU responded positively to the Registry's request.

11. At its 34th Ordinary Session held in Arusha from 8 to 19 September 2014, the Court decided to hold a Public Hearing on the matter in March 2015. Following a request dated 22 January 2015 from the Applicant for the Public Hearing to be postponed, and after having taken notice of the Respondent's reaction in a letter dated 4 February 2015, the Court decided at its 36th Ordinary Session held from 9 to 27 March 2015 to postpone the Public Hearing to 22 May 2015.

12. The Public Hearing took place on the scheduled date in Arusha, and the Court heard the oral submissions of the Parties:

For the Applicant:

- i) Advocate Donald DEYA, PALU,

For the Respondent State:

- i) Ms Nkasori SARAKEYA, Acting Director, Human Rights Department in the Office of the Attorney General, and
- ii) Mr Mark MULWAMBO, Principal State Attorney in the Office of the Attorney General.

13. In the course of the Public Hearing, the Judges put questions to the Parties, to which the latter provided answers.

IV. Prayers of the Parties

14. In the course of the written procedure, the following submissions were made by the Parties:

On behalf of the Applicant,

In the Application:

- “10I request the Court (ACHPR) to intervene due to unconstitutional acts against me by the subordinate Court, 1st and 2nd appellate Court of my country and the Police force in general.
- 11I humbly beg that, this court [to] restore justice where it was overlooked, quash both conviction and sentence and set me at Liberty
- 12this Court of Human and Peoples’ Rights may grant any other order or relief that it may deem fit”.

At the Public Hearing:

“....we make a few prayers on behalf of the Applicant:

One, for a declaration that the Respondent State violated the Applicant’s rights to a fair trial and enjoin the latter to provide him assistance for his defence.

Two, for a declaration that the Respondent State violated the Applicant’s right to legal aid and representation.

In view of the circumstances of the case, we pray for an Order of the Court that the Courts of the Respondent State re-examine the Applicant’s trial and conviction in light of the multiple violations of his fair trial rights that we have averred and that it does so within a reasonable time as this Honourable Court may determine.

We also seek a further Order contingent to this previous Order that in so doing in seeking a re-examination of the Applicant’s trial and conviction that the Respondent State provide aid and representation to the Applicant.

Lastly, we also pray for an Order that proceedings for reparation should follow the various declarations of violations of the rights of the Applicant that we have averred.

Finally, that this Court make any further declarations or orders as it deems necessary in the circumstances of the case to render substantive justice to the Applicant”

On behalf of the Respondent State,

In its Response:

“The Respondent prays the Court to order as follows in respect of admissibility of the Application:

- i) That the Applicant has not evoked **(sic)** the jurisdiction of the African Court;
- ii) That the Application has not met the admissibility requirements stipulated under paragraphs 1 to 7 of Rule 40 of the Rules of Court and Articles 56 and 6.2 of its Protocol;
- iii) That the Application be dismissed pursuant to Rule 38 of the Rules of Court;
- iv) Order the Applicant to pay costs.

With regard to the merits, to rule:

that the Government of the United Republic of Tanzania did not illegally arrest the Applicant;

- i) that the Government of the United Republic of Tanzania did not illegally detain the Applicant;
- ii) that the Government of the United Republic of Tanzania did not violate the right of the Applicant to be represented by a lawyer;
- iii) that the Government of the United Republic of Tanzania did not violate the right of the Applicant to defend himself;
- iv) that the Government of the United Republic of Tanzania did not violate the Applicant's right to equality before the law;
- v) that the Government of the United Republic of Tanzania did not discriminate against the Applicant;
- vi) that the Government of the United Republic of Tanzania did not infringe Section 311 of the Tanzanian Criminal Code;
- vii) that Applicant's conviction based on the testimony of a single witness is in conformity with the law;
- viii) that the prosecution witnesses in the initial criminal case No. 397/1997 did not make contradictory submissions ;
- ix) that the Applicant's conviction to thirty years term of imprisonment for armed robbery is in conformity with the law; and
- x) order the Applicant to pay costs".

At the Public Hearing:

"We pray to proceed with our prayers with regard to preliminary objections and jurisdiction of this Honourable Court. We pray the Court to admit the preliminary objections on the jurisdiction and admissibility of the Application itself and declare as follows.

That the Applicant in his Application has not evoked the jurisdiction of the Honourable Court.

Two, that the Application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules of Court and Article 56(6) of the Charter.

Three, that the Application has not met the admissibility requirement stipulated in 40(6) of the Rules of Court and Article 56(6) of the African Charter on Human and Peoples' Rights.

Four, that the Application be dismissed.

With regard to the issue of merits, we request the African Court to declare as follows: that the Government of the United Republic of Tanzania did not violate the Applicant's rights to be represented and to a fair trial with regard to all the allegations he has brought before the Court. Number two, we pray that no reparation be granted to the Applicant with regard to this Application, and, finally that the Application be duly dismissed".

V. Request for the production of fresh evidence

15. In its Response, the Respondent referred to its letter dated 13 December 2013 indicating, according to it, that the collection of evidence would take some time, and therefore craved the indulgence and leave of the Court to adduce fresh evidence when the latter would be available.

16. Furthermore, at the Public Hearing of 22 May 2015, each of the parties, pursuant to Rule 50 of the Rules of Court, sought leave of the Court to submit fresh documents essentially comprising the evidence on the case before the national courts. To justify the delay, the two parties invoked mainly the difficulties faced in seeking for and finding the said documents given the fact that the Registry of the District Court of Moshi had meanwhile been relocated elsewhere. Each of the parties also indicated that it had no objection to the other's request in this regard.

17. Rule 50 of the Rules of Court provides that:

“No party may file additional evidence after the closure of pleadings except by leave of Court”.

18. The Court decided at the Public Hearing, to grant the respective requests of the Parties and leave to produce the documents in question exercising its discretionary power on the issue of late production of evidence,

19. Consequently, the Parties submitted the aforesaid documents respectively on 5 June 2015 for the Applicant, and on 20 May 2015 for the Respondent State.

VI. Jurisdiction of the Court

20. In terms of Rule 39(1) of its Rules, the Court “shall conduct preliminary examination of its jurisdiction ...”.

A. Preliminary objection regarding material jurisdiction

21. As regards material jurisdiction, the Respondent State raised an objection, based on the fact that, in its view the Court was not supposed to act as an appellate jurisdiction; it also objected to the fact that the Applicant had allegedly not invoked the appropriate provisions of the Protocol and the Rules of Court.

i. Objection regarding lack of jurisdiction on the grounds that the Court could not have considered the evidence on which the Applicant's conviction was based without acting as an appellate jurisdiction

22. At the Public Hearing, the Respondent State, particularly in regard to the question of evidence on the basis of which the Applicant was tried by the national courts, argued that the Applicant was in effect requesting that the Court act as an appellate jurisdiction whereas it is not competent to do. The Respondent State in particular averred that "Article 3(1) the Protocol does not give the Court jurisdiction to pronounce itself on issues of evidence or to sit as an appellate court". Invoking the Court's jurisprudence in the Matter of *Ernest Francis Mtingwi v Republic of Malawi*, the Respondent State submitted that the Applicant had prayed this Court to "quash the decision of the Court of Appeal of Tanzania" whereas "Article 3(1) of the Protocol does not provide the Court the jurisdiction to act as an appellate court". The Respondent State further contended that analysis of evidence should be left solely to the national courts of the Respondent State.

23. At the same Public Hearing, Counsel for the Applicant responded that in the Matter of *Ernest Francis Mtingwi v Republic of Malawi*, the Applicant himself had indicated having filed an appeal against the decision of the Supreme Court of Malawi whereas, in the instant case, the Applicant alleges human rights violations by the Respondent through, *inter alia*, the acts of its judicial system. He points out in particular that "the Applicant did not deem to appeal the decisions of the Respondent State before his host State national courts"; that it "alleges violations of his rights notably by the organs and institutions of the Respondent State especially by, but not limited to, the Judiciary" and that, that was the reason for which he brought a case before this Court.

24. On the question as to whether the Court has jurisdiction to re-examine the evidence on the basis of which the Applicant was convicted by the national courts, his Counsel basing his argument on the jurisprudence of the European Court of Human Rights argues that even if the issue in the question of admissibility of evidence falls under the purview of national courts, this Court remains competent to ascertain whether the totality of the procedure followed before the said national courts is fair as required by Article 7 of the Charter.

25. The Court reiterates its position that it is not an appellate court in terms of the decisions rendered by the national court.² However, as it pointed out in its Judgment of 20 November 2015 in the Matter of *Alex Thomas v Republic of Tanzania*, this position does not preclude its jurisdiction to examine whether the procedures before the national courts are consistent with the international standards established by the Charter or other applicable human rights instruments.³

² See *Ernest Francis Mtingwi v Republic of Malawi*, Judgment of 15 March 2013, para. 14.

³ *Alex Thomas v United Republic of Tanzania*, Judgment of 20 November 2015, para 130: "Though this Court is not an appellate body with respect to decision of national

26. As regards, in particular, the evidence relied on in convicting the Applicant, the Court holds that, it was indeed not incumbent on it to decide on their value for the purposes of reviewing the said conviction. It is however of the opinion that, nothing prevents it from examining such evidence as part of the file evidence laid before it so as to ascertain in general, whether consideration of the said evidence by the national Judge was in conformity with the requirements of fair trial within the meaning of Article 7 of the Charter in particular.

27. As the European Court of Human Rights noted especially in the Matter of *Sarp Kuray v Turkey*:

“...the admissibility of evidence is primarily a matter for domestic law and rules ... in principle it is for national courts to assess the evidence before them. The mission entrusted to the Court by the Convention is not to rule on the question as to whether witnesses’ statements were properly admitted as evidence, but to determine whether the proceedings as a whole, including the way of presentation of evidence has been fair”.⁴

28. In general terms, this Court would be acting as an appellate jurisdiction only if, *inter alia*, it were to apply to the case the same law as the Tanzanian national courts, that is, Tanzanian law. However, this is clearly not the case in the matter before it, because by definition, the Court applies exclusively “the provisions of the Charter and any other relevant human rights instrument ratified by the States concerned” in accordance with the provisions of Article 7 of the Protocol.

29. On the basis of the aforesaid considerations, the Court holds that it is competent to determine whether the treatment of the matter by Tanzanian national courts has complied with the requirements set forth by the Charter in particular and any other applicable human rights instrument. Consequently, the Court dismisses the objection raised in this regard by the Respondent State.

courts, ... this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with standards set out in the Charter or any other human rights instruments ratified by the State concerned. With regard to manifest errors in proceedings at national courts, this court will examine whether the national courts applied appropriate principles and international standards in resolving the errors. This is the approach that has been adopted by similar international courts...

4 Judgment of 24 July 2012, para 69. See also: ECHR: *Dombo Beheer B.V v The Netherlands*, Judgment of 27 October 1993, para 31: “The Court cannot substitute its own assessment of the facts for that of national courts. Its task is to ascertain whether the proceedings as a whole, including the way in which evidence was taken, was ‘fair’ within the meaning of Article 6 para. 1 (art. 6-1)”; *Gafgen v Germany*, Judgment of 1 June 2010, para 164: To ascertain whether the proceedings as a whole was fair, there is need to ascertain that the rights of the Defence had been observed. There is need to inquire in particular if the Applicant was afforded the opportunity to challenge the veracity of the evidence and to object to their use. The value of the evidence should also be considered and if the circumstances in which they were obtained creates doubt as to their credibility and correctness; *Balta and Demir v Turkey*, Judgment of 23 June 2015, para 36: “The Court also recalls in this context that the admissibility of evidence belongs to the purview of domestic laws and national courts, and that its only task is to determine whether the procedure was fair”; *Sarp Kuray v Turkey*, Judgment of 24 July 2012, para 69. *Matter of Bochan v Ukraine*, Judgment of 11 March 2015, paras 61 and 62.

ii. Objection regarding lack of jurisdiction on the grounds that the Applicant did not invoke the appropriate provisions of the Protocol and the Rules of Court

30. In its Response, the Respondent objects to the jurisdiction of the Court on the ground that the Applicant, rather than invoking Article 3(1) of the Protocol and Rule 26 of its Rules, cited, as grounds for the jurisdiction of the Court, Articles 5 and 34(6) of the Protocol and Rule 33 of the Rules of Court, which rather, govern the uncontested issue of access to the Court. It argues that since the Applicant has not appropriately invoked the jurisdiction of the Court by citing the applicable provisions, its Application should consequently be dismissed with costs. It concludes in this regard that the Applicant has not been compliant with Article 3(1) of the Protocol and Rule 26 of the Rules of Court.

31. At the Public Hearing, Counsel for the Applicant, relying on the jurisprudence of the Court in the Matter of *Peter Joseph Chacha v United Republic of Tanzania*, submitted in reply that the Court shall have jurisdiction as long as “the rights alleged to be violated are protected by the Charter or any other human rights instrument ratified by the Respondent State”.

32. The Court notes that its jurisdiction is an issue of law which it has to determine on its own regardless of whether or not the issue is raised by the Parties in a case. It therefore follows that the fact that a Party cited provisions that are not applicable is of no consequence, because at any rate, the Court shall rule according to the law and is in a position to ground its jurisdiction on the appropriate provisions.

33. Furthermore, in the instant case, invoking Articles 5(3) and 34(6) of the Protocol to ground the jurisdiction of the Court is not even incorrect. Article 5(3) of the Protocol provides that: “the Court may entitle relevant Non Governmental organisations (NGOs) with Observer Status before the Commission to institute cases directly before it in accordance with Article 34(6) of this Protocol”. Article 34(6) of the Protocol provides that “at any time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol” and that “the Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration”. While these two articles, read together, show that they effectively relate to the seizure of the Court by individuals and NGOs, and hence to the question of access to the Court, it is also true that these provisions at the same time address the question of the personal jurisdiction of the Court as far as both the Applicant and the Respondent State are concerned. Indeed, the said Articles also, in the final analysis, determine whether or not the Court is competent in respect of the individuals or NGOs that have brought cases before it or whether or not in the instant case the Respondent State has accepted the jurisdiction of the Court. The wording of Article 34(6) of the Protocol is significant in this respect as it speaks of a “declaration accepting the competence of the Court”.

34. It is important to point out that Article 3(1) of the Protocol⁵ to which the Respondent State makes reference, addresses essentially the material jurisdiction of the Court, which is only one aspect of jurisdiction. Jurisdiction also covers personal, temporal and territorial jurisdiction.

35. In view of the aforesaid considerations, the Court dismisses the objection to its jurisdiction raised by the Respondent State. It holds that it has jurisdiction *ratione materiae* to examine the instant case given the fact that all the alleged violations (*supra*, para 12) *prima facie* concern the right to fair trial,⁶ as guaranteed especially by Article 7 of the Charter.

B. Other aspects of jurisdiction

36. With regard to the other aspects of its jurisdiction, the Court notes:

- (i) that it has jurisdiction *ratione personae* in respect of the two Parties given the fact that the United Republic of Tanzania made the requisite declaration under the aforementioned Article 34(6) on 29 March 2010;
- (ii) that it has jurisdiction *ratione temporis* since the alleged violations are continuous in nature, the Applicant having remained convicted on grounds which he believes are flawed by irregularities [see the Court's jurisprudence in the Zongo case];⁷
- (iii) that it has jurisdiction *ratione loci* in as much as the facts of the case occurred on the territory of a State Party to the Protocol, i.e. the Respondent State.

37. It therefore follows from all the preceding considerations, that the Court is fully competent to hear the instant case.

VII. Admissibility of the Application

38. According to the aforesaid Rule 39 of its Rules, "the Court shall conduct preliminary examination ... of the admissibility of the Application in accordance with Articles 50 and 56 of the Charter, and Rule 40 of these Rules".

39. According to Article 6(2) of the Protocol, "the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter".

40. Rule 40 of the Rules of Court which substantially restates the content of Article 56 of the Charter provides as follows:

5 This Article provides as follows: "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 human rights instrument ratified by the States concerned".

6 See in this regard the Judgments of this Court in *Franck David Omary and Others v United Republic of Tanzania*, Judgment of 28 March 2014, paras 74 and 75 and in the *Matter of Joseph Peter Chacha*, 28 March 2014, para 115: "The rights alleged to have been violated are protected under the Charter. The Court therefore finds that it has jurisdiction *ratione materiae* over the Application".

7 See African Court especially in the *Matter of Zongo and Others v Burkina Faso* (Preliminary Objections) Judgment of 21 June 2013, paras 71-77.

“Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, Applications to the Court shall comply with the following conditions:

1. disclose the identity of the Applicant notwithstanding the latter’s request for anonymity;
2. comply with the Constitutive Act of the African Union or the Charter;
3. do not contain any disparaging or insulting language;
4. are not based exclusively on news disseminated through the mass media;
5. are filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. are filed within a reasonable period from the time 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 of the matter; and
7. do not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any other legal instrument of the African Union”.

41. Whereas some of the above requirements are not in contention between the Parties, the Respondent State raised objections of incompatibility of the Application with the Constitutive Act of the African Union and the Charter, exhaustion of local remedies and the time limit for seizure of the Court.

A. Admissibility requirements that are not in contention between the Parties

42. The requirements regarding the identity of Applicants, the language used in the Application, the nature of the evidence and the *non bis in idem* principle (Sub Rules 1, 3, 4 and 7 of Rule 40 of the Rules of Court) are not in contention between the Parties.

43. The Court also notes, for its part, that nothing in the records submitted to it by the Parties suggests that any of the above requirements has not been met in the instant case.

44. Consequently, the Court holds that the requirements under consideration in this regard have been fully met in the instant case.

B. Objection based on incompatibility of the Application with the Constitutive Act of the African Union and the Charter

45. In its Response, the Respondent State is of the view that, in order for the requirement of compatibility of the Application with the Constitutive Act of the African Union as set forth in Article 56(2) of the Charter and Rule 40(2) of the Rules of Court to be met, the Application must invoke the provisions of the Charter that have allegedly been violated as well as the principles enshrined in the OAU Charter [now the Constitutive Act of the African Union] The Respondent State reiterates that instead of invoking the Articles of the Protocol on which the jurisdiction of the Court is grounded, the Applicant invoked only the

provisions of the Protocol that address access to the Court by individuals and NGOs. Moreover, according to the Respondent State, the Application does not cite any provision of the Charter of the Organization of African Unity and is content with invoking the Tanzanian Criminal Procedure Act, concentrating on the technicalities of the criminal matter which concerns it. The Respondent State in conclusion submits that the requirement of compatibility of the Application with the Constitutive Act of the African Union and the Charter has not been met and that the Application should be dismissed in its entirety.

46. In his Response, the Applicant maintains that, in his Application, he has invoked those provisions of the Charter that have been violated as well as the principles enshrined in the OAU Charter as prescribed in Articles 5 and 34(6) of the Protocol and Rule 33 of the Rules of Court.

47. At the Public Hearing and as indicated above (*supra*, para 31), Counsel for the Applicant argued that the Court was competent as long as the rights, violation of which is alleged, are guaranteed by the Charter and any other applicable human rights instrument.

48. As regards what the Respondent considers as erroneous invocation of the Articles of the Protocol on which the jurisdiction of the Court is grounded, the Court recalls that it had already disposed of this issue (*supra*, para 33) and does not therefore need to revert to it.

49. On the argument that the Applicant allegedly did not cite the relevant Articles of the Constitutive Act of the African Union, and of the Charter, the Court reaffirms that that situation does not render it incompetent to examine the Application,⁸ nor does it make the said Application inadmissible.

50. The Court notes that what is important for an Application to be compatible with the Constitutive Act of the African Union and the Charter is that, in their substance, the violations alleged in the Application are susceptible to be examined by reference to provisions of the Constitutive Act and/or the Charter and are not manifestly outside the scope of Application of these two instruments.

51. However, it is quite apparent in the instant case that the violations alleged herein, as already indicated, are all related to the right to a fair trial and fall within the ambit of the Charter which guarantees such rights in its Article 7, and of the Constitutive Act in its Articles 3(h) and 4(m) which set forth the promotion and protection of human rights, as well as respect of human rights, as a fundamental principle and objective of the continental organisation.

52. For all the aforementioned reasons, the Court dismisses the objection regarding the Application's incompatibility with the Constitutive Act of the African Union and the Charter.

8 See *supra*, note 6.

C. Objection based on non-exhaustion of local remedies

53. Firstly, in its Response, the Respondent State, after reaffirming the principle of exhaustion of local remedies in international law, argues that it was premature on the part of the Applicant to submit the instant case to this Court given the fact that it still had local remedies available to him. According to the Respondent State, after the 1999 decision of the High Court, the Applicant first had the possibility of lodging a petition regarding the alleged violations of his constitutional rights, based on the Basic Rights and Duties Enforcement Act No. 9, Chapter 3, Revised Edition of 2002.

54. At the Public Hearing, the representative of the Respondent State reiterated, in substance, that whereas the Applicant had the possibility of seizing the High Court on the alleged violation of his basic rights as guaranteed by the Constitution, as he was allowed to under the Constitution and the law, he chose not to and had thus not exhausted this remedy afforded him by the Tanzanian legal system.

55. Then, in its Response, the Respondent State argued that after the High Court decision of 2000 (sic), the Applicant also had the possibility of filing an Application for review of the judgment of that Court pursuant to the Rules of Procedure of that Court. The Respondent State, in conclusion, stated that the Applicant having not availed himself of that remedy, the Application did not meet the requirements set down in Article 40(5) of the Rules of this Court and should therefore be dismissed with costs against the Applicant.

56. At the Public Hearing, the representative of the Respondent State however recognised that the Applicant finally filed an Application for review in 2013, raising issues of identification and the credibility of the witness who identified him, as well as issues which according to the Respondent State had never been examined by the lower courts because the Applicant seized both the Court of Appeal and this Court at one and the same time. The representative of the Respondent State further pointed out that the Application for review was, in his opinion, an ordinary remedy and that the Court of Appeal should have been able to dispose of it within 24 months.

57. Lastly, at the same Public Hearing, the representative of the Respondent State reiterated that the Applicant had not availed himself of the remedy on the constitutional issue before the High Court, and that the Application for review was still pending before the Court of Appeal. He further maintains that, of all the nine complaints submitted by the Applicant before the African Court, only the complaint relating to issues of identification had been raised at the national level. In conclusion, the Respondent State averred that since it never had the opportunity to examine the other complaints, the Applicant has not exhausted local remedies and his Application should be declared inadmissible.

58. In his Reply, the Applicant indicated that his Application was filed, to the extent possible, after the exhaustion of local remedies given the fact that the only option available to him was being unduly prolonged as

the Court of Appeal of Tanzania wasted too much time before accepting his Application for Review No. 11 of 2013.

59. At the Public Hearing, Counsel for the Applicant, relying on the case law of the Commission, argued that the remedies, exhaustion of which is required, are only ordinary judicial remedies, and not the extraordinary remedies available in the Respondent State.

60. At the same Public Hearing, Counsel for the Applicant stated once again that the latter had been convicted three times at all levels of the Tanzanian judicial hierarchy; that, to his knowledge, there had been no Application for Review before the Court of Appeal; that even if there were to be an Application for Review, such an Application would still be extraordinary, and not ordinary; that in Case 333/2006 - *Southern Africa Human Rights NGO Network and Others v Tanzania*, the Respondent State acknowledged that the Court of Appeal is the highest court in the country; that as regards the constitutional remedy, the relevant articles of the Constitution [Art. 30(3) and (5); Art. 12] show that this is left to the judge's discretion; that under international jurisprudence including the UN Committee on the Elimination of All Forms of Discrimination Against Women, victims are not required to exhaust the special or extraordinary remedies.

61. Regarding the Respondent State's allegation that almost all the complaints now before the African Court had never been submitted before the national courts, Counsel for the Applicant replied that all the complaints had been presented before the national courts; and relying on court records and the Judgments filed by the Parties before this Court, he mentioned by way of example, identification issues, errors committed in respect of the invocation of an alibi by the Applicant, the absence of cross-examination of the witness, and the conflict of interest on the part of the Prosecutor.

62. As regards local remedies, the Court notes that the fact is undisputed that the Applicant appealed his conviction before the Court of Appeal of Tanzania, which is the highest court in the land, and that that Court had upheld the Judgments of the High Court and of the District Court in the instant case.

63. The key question that arises here is whether the other two remedies mentioned by the Respondent, i.e, the constitutional remedy before the High Court, and the Application for Review before the Court of Appeal, are remedies that the Applicant must exhaust within the meaning of Article 56(5) of the Charter which, in substance, is reproduced in Rule 40(5) of the Rules.

64. It is recognised in international law that the remedies that must be exhausted by the Applicants are ordinary judicial remedies. That was the point also underscored by the Court particularly in the case of *Alex Thomas v United Republic of Tanzania*.⁹

65. It is therefore important, in the instant case, to determine if the constitution-related complaint and the Application for review, as

⁹ Judgment of 20 November 2015, para 64. See also: *Wilfred Onyango Nganyi and 9 Others v United Republic of Tanzania*, Judgment of 18 March 2016, para 95.

conceived in the legal system of the Respondent State, are ordinary or extraordinary remedies.

66. In the legal system of the Respondent State, it is generally accepted that the usual remedies are, in a case like the instant one, the appeal before the High Court and the appeal before the Court of Appeal, which is the country's highest judicial organ.

67. Other remedies, such as the constitutional remedy or Application for review are apparently exceptional judicial remedies, which are not normally thought about, and are thus extraordinary remedies.

68. As regards the constitutional remedies in particular, as the Court observed in the case of *Alex Thomas v United Republic of Tanzania*, having considered the nature of the said remedy, it emerged that that was an extraordinary remedy which the Applicant was not required to use.¹⁰

69. In this respect, Section 8(2) of the Basic Rights and Duties Enforcement Act of the Laws of Tanzania provides that:

“The High Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law, or that the Application is merely frivolous or vexatious”.

70. The above provisions show that the institution of Constitutional Petitions to redress human rights violations in Tanzania will only be entertained where other remedies are not available and that they are an extraordinary remedy.

71. With respect to review, Section 66 of the Rules of Procedure of the Court of Appeal of Tanzania provides that this remedy is brought before the Court of Appeal against a decision it has itself made; that the remedy must, as much as possible, be considered by the same judges who delivered the Judgment being appealed against; and that the remedy may be exercised only in exceptional circumstances. In this regard, paragraph 1 of the aforementioned Section provides as follows:

“The Court may review its Judgment or Order, but no Application for review shall be entertained except on the following grounds:

- a) The decision was based on a manifest error on the face of the record resulting in the miscarriage of justice; or
- b) A party was wrongly deprived of an opportunity to be heard;
- c) The Court's decision was a nullity; or
- d) The Court had no jurisdiction to entertain the case; or
- e) The Judgment was procured illegally, or by fraud or perjury”.

72. It is clear from the above provision that review as a remedy is not common, that it is not granted as of right and that it can be exercised only exceptionally and under the restrictive conditions set forth by the same law. It can therefore be concluded with certainty that the remedy of review is available in the Tanzanian legal system as an extraordinary remedy that the Applicants are not obliged to exhaust before bringing a

¹⁰ Judgment of 20 November 2015, para 65. See also paras 60 – 64.

matter before this Court. As the Court noted in the case of “*Alex Thomas v United Republic of Tanzania*” an Application for review is an extraordinary remedy because the granting of leave by the Court of Appeal to file an Application for review of its decision is based on specific grounds and is granted at the discretion of the Court.¹¹

73. It must be said, moreover, that in the instant case, the Applicant tried to exercise this remedy, but the Court of Appeal is yet to take any action.

74. Regarding the Respondent State’s argument, contested by the Applicant, to the effect that the latter brought before the national courts only one complaint out of the nine he filed before this Court, it is clear from the judicial records filed with the Court by the Parties that:

- i) Of the nine issues the Respondent raised in response to the Applicant’s pleadings, only a particular issue, relating to the fact that the charge was allegedly defective was consistently raised as a legal issue/substantive ground of appeal.
- ii) Five other issues were raised in passing or may be imputed from or form the basis of the factual narrative of the Applicant. These are, namely that he was detained at the police post which had no basic facilities; that Section 32(1) and (2) and Section 33 of the Criminal Procedure Act were not complied with, that at the Police Station he had no legal representation and was not availed his right to call a lawyer or have his statement taken, and that he was not accorded the right to be represented and defended and that he was discriminated against.
- iii) Three issues were not addressed at the national level, namely the Judgment of the Trial Court was delivered contrary to Section 311 of the Criminal Procedure Act; that the sentence was improper; and that the 30 year prison sentence meted out to him was excessive.

75. It is therefore clear that most of the complaints brought before this Court had been raised before Tanzanian national courts, in one way or the other.

76. In any event, the Court notes that all of these complaints essentially relate to one and the same right, i.e. the right to a fair trial, which the Applicant has repeatedly demanded before the national courts. It therefore follows that even if the complaints in question had not been submitted in detail to the national courts, the Respondent State would not be justified to argue that all the remedies or some of them have not been exhausted, whereas the Applicant submitted the issue of his right to a fair trial before the said national courts – a right that these courts are supposed to guarantee *proprio motu* in all its aspects, without the Applicant having to specify the particular aspects.

77. It is therefore clear that the Applicant has exhausted all the ordinary remedies which he was supposed to exhaust. For this reason, the Court dismisses the objection of inadmissibility of the Application on grounds of failure to exhaust local remedies.

11 *Ibidem*, para 63.

D. Objection based on non-compliance with a reasonable time in filing the Application before the Court

78. In its Response, the Respondent submits that, if the Court finds that the Applicant has exhausted local remedies, the latter has however failed to submit his Application before this Court within a reasonable time from when the local remedies were exhausted.

79. It further argued that even if Rule 40(6) of the Rules of Court is not specific on the question of reasonable time, international human rights jurisprudence has established that six months is considered a reasonable time.

80. The Respondent points out that the decision of the Court of Appeal of Tanzania dates back to 5 October 2004, but concedes that Tanzania deposited its instrument of ratification only on 10 February 2006; it therefore maintains that the time elapsing since that date up to the referral of the matter to the Court on 8 October 2013 is seven (7) years and nine (9) months, and that this period is far higher than the six months considered to be reasonable.

81. The Respondent State further submitted that the fact that the Applicant was in prison did not and still does not prevent him from accessing the African Court, as he has done elsewhere in this procedure.

82. At the Public Hearing, the Respondent State reiterated that the Application had not been submitted to this Court within a reasonable time, pointing out that even if the time line was calculated from 2010 (the year in which it made the declaration accepting the competence of the Court to hear complaints from individuals and Non-Governmental Organisations), the period would still be around three years, well beyond the six months reference period.

83. In his Reply, the Applicant argued that it took time before bringing the matter before the Court because he has been in prison for sixteen years, and he was still unaware of the procedure to be followed before the Court.

84. At the Public Hearing, Counsel for the Applicant argued that the timeline within which it seized the Court is three years given that the Respondent State made the declaration accepting the jurisdiction of the Court only on 9 March 2010. He argued that this time line was reasonable, given the particular circumstances of the Applicant's situation - a prisoner, uneducated, indigent, layman plus the fact that he did not have the benefit of a lawyer's assistance.

85. Referring in particular to the case law of the Court in the matter of *Tanganyika Law Society and Human Rights Centre & Rev Christopher Mtikila v United Republic of Tanzania* and *Peter Chacha v United Republic of Tanzania*, Counsel for the Applicant explained that there was no fixed deadline to seize the Court, and that the issue should be decided on a case-by-case basis.

86. The Court wishes to point out, from the outset that Article 56(6) of the Charter does not indeed specify any period within which recourse to the Court should intervene. Rule 40(6) of its Rules which essentially

reproduces the above Article, simply speaks of 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 of the matter”.

87. The question that arises here is whether the period within which the Applicant seized the Court is a reasonable time within the meaning of Article 56(6) of the Charter. To adequately address this issue, it is necessary to first determine the date from which that time must be calculated and assessed.

88. Whereas the Respondent State submits that the period should start to run from the date of deposit of the instrument of ratification of the Protocol establishing this Court, that is, 10 February 2006 (*supra*, para 81), the Applicant believes that the time starts to run from 9 March 2010, the date on which the Respondent State signed the declaration accepting the jurisdiction of the Court to receive cases from individuals.

89. In the opinion of the Court, it is appropriate to take into account not only the date on which the Respondent State became a Party to the Protocol, but also and above all, with regard to an Application from an individual, the date on which that State filed the declaration accepting the competence of the Court to receive cases from individuals within the meaning of Article 34(6) of the Protocol. The records however show that the United Republic of Tanzania deposited the said declaration on 29 March 2010. In the view of the Court, it is from that date that the date of seizure has to be calculated.¹²

90. The Applicant having filed his Application at the Registry of the Court on 8 October 2013, the time line for seizure should run from 29 March 2010, to that date, that is, 3 years, 3 months and 10 days. The question that now arises is whether such a timeline is reasonable.

91. As the Court noted in a previous case, “... the reasonableness of the timeline for referrals to it depends on the circumstances of each case and must be assessed on case-by-case basis.”¹³

92. In the instant case, the fact that the Applicant is in prison; the fact that he is indigent; that he is not able to pay a lawyer; the fact that he did not have the free assistance of a lawyer since 14 July 1997; that he is illiterate; the fact that he could not be aware of the existence of this Court because of its relatively recent establishment; all these circumstances justify some flexibility in assessing the reasonableness of the timeline for seizure of the Court.¹⁴

¹² See African Court: *Norbert Zongo and Others v Burkina Faso* (Preliminary Objections) Judgment of 21 June 2013, para; *Alex Thomas v United Republic of Tanzania*, Judgment of 20 November 2015, para 73

¹³ In the Matter of *Zongo and Others v Burkina Faso* (Preliminary Objections) Judgment of 21 June 2013, para. 121. See also, African Commission: *Darfur Relief and Documentation Centre v The Sudan*, Communication 310/05, para 75, “The African Commission notes that the Charter does not provide for what constitutes ‘a reasonable period of time,’ and neither has it defined reasonable time. For this reason, the African Commission would therefore treat each case on its own merits”.

¹⁴ In this regard, In the Matter of *Zongo and Others v Burkina Faso* (Preliminary Objections) Judgment of 21 June 2013, para 122.

93. The Court therefore holds that the timeline between the date it was seized of the instant case, that is, 8 October 2013, and the date on which the Respondent deposited the declaration accepting the jurisdiction of the Court to receive individual Applications, that is 29 March 2010, is reasonable within the meaning of Article 56(6) of the Charter. The Court therefore dismisses the objection on admissibility grounded on failure to file the Application before the Court within a reasonable time.

94. Having thus examined herein-above all the requirements of admissibility under Article 56 of the Charter, the Court holds that the Application is admissible.

VIII. The merits of the case

A. The allegation that, on his arrest, the Applicant was detained at a police post which lacked basic facilities

95. In his Application, the Applicant first complained that, since his arrest on 10 April 1997 he was detained until 14 April 1997 at a police post that had no basic facilities to accommodate detainees.

96. In his Reply, the Applicant reiterated that the police detention venue was not up to standard, and that even today, the conditions in police posts are not conducive for human living.

97. In its Response, the Respondent State maintained that the allegation is unfounded; that detention facilities at police posts conform to the required regulatory standards; that the Applicant must provide concrete proof of his allegation; and that the arrest and detention of the Applicant has been done in accordance with the law.

98. At the Public Hearing, the Respondent State reiterated this position, explaining in particular that all police stations have the infrastructure required to comply with the regulations particularly in terms of the number of prisoners in a cell, latrines, toilets, cleanliness, and food for prisoners; the regulations prohibit the mistreatment of prisoners and allow them to complain to the person in charge of the police post who will then carry out investigation and take appropriate action; and, besides, that it is the first time the Applicant ever spoke of this complaint which he never raised either before the police post commandant or before the national courts.

99. The Court notes that in view of the challenge to the allegation under consideration by the Respondent State, the Applicant, who bears the burden of proof, has not provided any such proof. The Court therefore dismisses this allegation.

B. The allegation that the charge against the Applicant was defective

100. In his Application, the Applicant alleges that the charge sheet was marred by defects.

101. In his written submissions attached to the Application, the Applicant argued that on the charge sheet by which he was arraigned

before the trial, it was indicated that he was the only one to have committed the armed robbery, whereas the evidence indicates that they were many. He argues that according to law, the charge sheet should have been amended accordingly, which was not done.

102. In its Response, the Respondent contests that allegation and asked that the Applicant provide strict proof thereof. Regarding the difference between the content of the charge sheet, which mentions only one accused person, and the evidence before the Judge indicating that there were several thieves, the Respondent State indicated that the law provides for the possibility of modifying the charge sheet only if there has been a defect in the substance and on the form; that in the instant case, the fact that the other thieves were not mentioned in the charge sheet did not distort the substance or form of the charge; and that had the other thieves been arrested, the charge sheet would have been duly amended to include them. The Respondent State further argued that if other people involved in the armed robbery were to be arrested even today, they could still be charged with the crime since there is no time limitation in criminal matters; and that in fact their inclusion in the charge sheet would have been a huge irregularity, and would have rendered the charge sheet defective.

103. The Respondent State concludes that the allegation is frivolous and misconceived and should be dismissed.

104. At the Public Hearing of 22 May 2015, the Respondent State argued that the Applicant has never brought the grievance to the attention of the national courts; and that in any case, an accused person can be tried alone, and not necessarily with co-defendants. He further explained that one person had been tried while there were more others on the charge sheet because trial can proceed only when someone has been arrested and arraigned before the judge; and when the procedure concerning that person has reached an advanced stage, others would eventually be tried separately.

105. The Court holds the view that the mere fact that the Applicant was charged alone while the testimonies showed that there were several thieves, does not necessarily infringe on his right to a fair trial under Article 7 of the Charter. Indeed, in criminal matters, liability is personal, and the fact that the other persons possibly involved in the robbery were not found and charged, changes nothing in terms of his own possible liability. As underscored in Article 7(2) of the Charter, "... punishment is personal and can be imposed only on the offender." In reality, the fact that mention was not made of the involvement of these other persons, even if not identified, should not impact on the key question of the possible liability of the Applicant and the punishment incurred.

106. For these reasons, the Court holds that there has, in this respect, been no violation of the right to a fair trial as guaranteed by Article 7 of the Charter.

C. The allegation that the Prosecutor was in a situation of conflict of interest

107. At the Public Hearing, Counsel for the Applicant pleaded that the Applicant was convicted “in a trial through a Prosecutor who had a conflict of interest in the matter”; that the Applicant has consistently indicated to the national courts that it had come to his knowledge that the Prosecutor in the primary court was related to the complainant, but that this allegation of conflict of interest has never been investigated, whereas that would have required the appointment of a different prosecutor to handle the case; and that the Applicant raised the issue of the relationship between the Prosecutor and the complainant in court as far back as 12 August 1997.

108. At that same hearing, the Respondent State’s representative, referring to the record of the proceedings before the national courts, explained that the Applicant’s complaint in this regard was based on hearsay as he indicated that he was told that the Prosecutor had a relationship with the complainant; that the court sought to know more; that the Prosecutor averred that the allegations were not true and were baseless; that on the basis of this rebuttal, the court was satisfied with the matter and saw it fit to proceed with consideration of the case; and that in any case, the Applicant had the possibility of bringing the complaint to the Director of Public Prosecutions who could have changed the Prosecutor in the interest of justice, which the Applicant did not do.

109. The Court notes that the record of domestic judicial procedures shows that the Applicant had, indeed, requested a change of the Prosecutor for reasons of alleged conflict of interest; that the Prosecutor contested this allegation; but that the court ultimately took no explicit decision on this, and simply proceeded with consideration of the case.

110. The Court notes that a possible conflict of interest on the part of a Prosecutor for reasons of his alleged relationship with the complainant is a matter of crucial importance in any trial, especially in criminal cases, as it touches on the very principle of impartiality of judicial institutions, including prosecuting institutions, as impartiality is one of the pillars of a fair trial.

111. Consequently, the Court holds that, in the instant case, the national judge, before further consideration of the case, should have pushed for further investigations on the issue of conflict of interest, asking the Applicant to substantiate and prove his allegations; and then make a formal decision on the issue. As the judge did not take any of these actions, but merely chose to proceed with the trial, the Court holds that the Respondent State has violated the right of the Applicant to a fair trial under Article 7 of the Charter. As the dictum goes, “justice must not only be done but must be seen to be done”.¹⁵

¹⁵ *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, [1923] All ER Rep; The Bangalore Principles of Judicial Conduct 2002, Value 3.2; United Nations Office of the High Commissioner on Human Rights *Guidelines on the Role of Prosecutors*

D. The allegation that at the time of his arrest and detention at the police station, the Applicant was not afforded the right to defend himself and to be assisted by a lawyer

112. In his Application, the Applicant complains that, upon his arrest, he was not afforded the right to express himself; to make a written statement to the police; to call a lawyer and to be assisted by him; and that the absence of a lawyer led to injustice, thus denying him his constitutional rights.

113. In his Reply, the Applicant argued, in that regard, that during his detention at the police post, his fundamental rights were neither read to him nor brought to his attention and this was in violation of the law.

114. In its Response, the Respondent State disputed the allegation that the Applicant was not informed of his rights. It asserted that he was, in particular, informed of his right to remain silent and his right to consult a lawyer, a relative or friend, in accordance with Section 53 of the Criminal Procedure Code [para 44]. The Respondent State further maintained that the Applicant must provide full proof in support of his allegations.

115. At the Public Hearing, the Respondent State further explained that the Applicant was not convicted on the basis of any statement made at the police post, but rather on the testimony of a witness, and therefore that his Application should be dismissed as unfounded.

116. The Court recalls that according to Article 7 of the Charter:

“Every individual shall have the right to have his cause heard. This comprises...

c) the right to defense, including the right to be defended by counsel of his choice”.

117. The Court notes in the instant case that the Respondent State refutes the allegation that the Applicant was not informed of his constitutional rights, but was unclear as to whether he was afforded the right to express himself and to make a written statement to the police.

118. As regards the issue of a possible deposition by the Applicant before the police at the time of this arrest, the file records before the national courts, as submitted to the Court by the Parties, show that during the pleadings before the trial magistrate, the Applicant complained, among other things, that the police did not inform him of the reasons for which he was detained, the offence of which he has been accused and that there was no trace of his statement to the police in his records. In the circumstances, the Court cannot but presume that the Applicant’s right to defend himself by submitting a written statement to the police has not been respected by the Respondent State.

119. Regarding the allegation that the Applicant at the time of his arrest, was not informed of his constitutional rights, the records before the national courts show no trace of a police report detailing such information. Consequently, the Court finds that the Applicant's right to be informed of his constitutional rights was not respected by the Respondent State.

120. On the allegation that the Applicant was, upon arrest, not afforded the assistance of a lawyer, the records show that the Applicant represented himself in court on 14 April, 24 April, 13 May and 26 May 1997, respectively, and that Advocate Njau intervened for the first time on 9 June 1997, that is, about two months after his arrest.

121. In principle, as the Commission noted in the Matter of *Abdel Hadi, Ali Radi and Others v Republic of The Sudan*, the fact of not having access to a lawyer for a long period after arrest affects the victims' ability to effectively defend themselves, and constitutes a violation of Article 7(1)(c) of the Charter.¹⁶

122. In the circumstances of the present case, where the Court records at the national level make no mention of the Applicant being informed of his right to be assisted by Counsel at the time of his arrest, the Court is of the opinion that the Applicant's right to have access to Counsel upon his arrest was violated by the Respondent State.

E. The allegation that the Applicant was not afforded free legal assistance during the proceedings

123. In his Application, the Applicant further alleges that during the trial at the first instance and appellate courts, he was not assisted by Counsel; that he did his best to prove his innocence all by himself but without success; and that all that caused him prejudice, especially as it was in breach of Article 13 of the Tanzanian Constitution on the right to equal treatment for all.

124. In his written submissions attached to the Application, the Applicant invokes the Criminal Procedure Act of Tanzania on the right to be defended by a lawyer in criminal proceedings and the right to legal assistance, and argues that had he been duly represented, his current predicament should not have been there to haunt his life.

125. He reiterates that he was not afforded the right to be represented and defended as provided by Section 310 of the Criminal Procedure Act. He further argued that the fact that he was initially defended by a lawyer, Mr Njau does not mean that he was not at a disadvantage; the latter having represented him as a relation, but when he had more clients, he decided to abandon him since his services were free of charge.

126. At the Public Hearing, Counsel for the Applicant maintained that as at 12 October 1997, the latter no longer had an Advocate; and that despite the existence of a law on legal aid, he had to defend himself all

¹⁶ Communication 368/09, Decision of November 2013, para 90. See in this regard: - ECHR: *Matter of A.T v Luxembourg*, Judgment of 9 April 2015, paras 63- 65.

alone both in the lower courts and at the Court of Appeal. He added that no attempt was made by the judicial authorities to afford him legal assistance or representation, whereas they had the power to do so; whereas under the African Commission on Human and Peoples' Rights' Principles and Guidelines on the Right to Fair Trial and Legal Assistance¹⁷ in Africa, the State is under the obligation to extend legal aid to the accused if he/she cannot afford to hire an attorney, or where the interests of justice so require, which situation has to be assessed according to the seriousness of the offence and the severity of the penalty. He also invoked the *Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa* on accessing legal aid in the criminal justice system in Africa and argued that for the purpose of adopting measures in compliance with the right to a fair trial under Article 1 of the Charter, the State had to take on board the principles set forth in the Lilongwe Declaration.

127. At the same hearing, Counsel for the Applicant stated that the latter had requested for legal aid, but was told that legal aid was available only in cases of homicide; that in the circumstances, the Respondent State in particular violated Article 7 of the Charter and Article 14 of the Covenant on the right to a fair trial, including the right to legal assistance.

128. In its Response, the Respondent State asserts that it grants free legal representation to all accused persons liable to capital punishment; that beyond this hypothesis, the grant of legal aid is not compulsory, but is subject to the indigence status of the accused, or if it is required in the interest of justice.

129. Reverting to the issue of the special circumstances of the matter, the Respondent State indicates that according to the records of the Moshi District Court, the Applicant was represented by a lawyer by the name of Mr Njau; and that if, subsequently, this lawyer no longer handled the case, it was not for financial reasons, but rather because the Applicant believed that his lawyer wanted "to settle the matter" (sic).

130. The Respondent State further argued that the fact that the Applicant was not represented by an Advocate does not at all mean that he was disadvantaged, since the Criminal Procedure Act allows him to appear in person during administration of evidence, and recognises his right to be informed of his rights as an accused so that he can defend himself. In that score, the Respondent State submits that these are procedural measures afforded an accused to enable him to defend himself, and that the said measures have all been applied, and no exception was made with regard to the Applicant.

131. The Respondent State further maintained that the right to defence is not curtailed when, as was the case in this matter, the accused must remain on remand during his trial, because due to the nature of the crime, his release is precluded under the law. In conclusion, it prayed the Court to dismiss this allegation as utterly baseless and devoid of merit.

17 See *infra*, note 17.

132. At the Public Hearing, the representative of the Respondent State also pointed out that the Applicant never requested the assistance of a lawyer and has never raised this issue before the municipal courts.

133. At the same hearing, the representative of the Respondent State argued that legal aid is contingent on the availability of financial resources and the capability of the Respondent State to provide it; and that as

“legal aid is provided only in homicide cases, the Respondent State cannot therefore provide legal assistance to all those who seek it, since this is directly related to the financial capacity and capability of the country”.

134. The Respondent repeatedly argued that the Applicant has never brought to the attention of the Judge the fact that he was in need of legal aid; that at the onset of the proceedings, the Applicant had said that he had the means to hire a lawyer, that thereafter he never told the Judge why he did away with his lawyer; and that even where the penalty is that of life imprisonment, legal aid is not automatic and must be requested.

135. The question that arises at this juncture is whether or not, after the departure of Advocate Njau, the State had the obligation to provide the Applicant the services of a lawyer under the free legal assistance scheme.

136. Under Articles 3 and 7 of the Protocol, the Court applies the Charter and other relevant human rights instruments and not the national laws of the Respondent State. It follows that the Court is not bound by the national laws of States, as such laws themselves can be at variance with the Charter or the said other instruments, where the laws in question are incompatible with the Charter and the instruments, or do not meet the standards emanating from their interpretation.

137. The Court notes, in this regard, that Article 7 of the Charter does not specifically address the issue of provision of free legal assistance. In contrast, the International Covenant on Civil and Political Rights explicitly provides in its Article 14(3)(d) that

“any person charged with a criminal offense shall be entitled to the following minimum guarantees in full equality: ... d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, *if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it*” (italics added).

138. The Court holds that Article 7 of the Charter read together with Article 14 of the Covenant, guarantees for any one charged with a criminal offence, the right to be automatically assigned a Counsel free of charge, where he does not have the means to pay him, whenever the interests of justice so require.

139. Moreover, the Court is of the opinion that an indigent person under prosecution for a criminal offence is particularly entitled to free legal assistance where the offence is serious, and the penalty provided by law is severe. As the Court noted in the *Matter of Alex Thomas v United Republic of Tanzania*, the Respondent State “was enjoined to provide

the Applicant with legal aid, given the serious nature of the charges against him and the potential sentence he faced if convicted".¹⁸

140. In the instant case, the question is whether the fact that the Respondent State, pursuant to its laws and relevant court decisions, did not automatically and compulsorily grant legal assistance to a person liable to thirty years imprisonment sentence, is compliant with Article 7 of the Charter and Article 14 of the Covenant and other relevant international standards.

141. The Court notes in this regard that Article 7 of the Charter and 14(3)(d) of the Covenant does not make any distinction between the different categories of criminal offence in terms of the applicable penalty, or as to whether the issue is that of capital punishment or imprisonment.

142. The Court notes that a sentence of 30 years in prison is severe though not as severe as the death sentence or a sentence of life imprisonment.

143. The Court also notes that nothing in the records indicates that the Applicant has or had other sources of regular income; and that having been incarcerated, he could no longer have such an income - which grounds prompted the Court to assign a lawyer to him at his request in the instant case.

144. The Court notes, lastly, that the Respondent State failed to adequately demonstrate that it had absolutely no financial capacity to grant free legal assistance to indigent persons, perpetrators of serious crimes liable to punishment as severe as thirty years imprisonment.

145. For these reasons, the Court in the instant case, holds that the Respondent State ought to have afforded the Applicant, automatically and free of charge, the services of a lawyer throughout the proceedings in the local courts. In failing to do so, the Respondent State violated Article 7 of the Charter and Article 14 of the Covenant.

F. The allegation that the Applicant was discriminated against in terms of legal assistance

146. In his written submissions annexed to the Application, the Applicant alleges that he did not have the benefit of legal aid, and that he was discriminated against, especially for reasons of his state of poverty, in violation of Article 13 of the Tanzanian Constitution.

147. At the Public Hearing, Counsel for the Applicant invoked the Principles and Guidelines of the African Commission on Human and Peoples' Rights on the Right to a Fair Trial and Legal Assistance in Africa, particularly principle (f) thereof on the role of Prosecutors who should carry out their functions without bias and eschew all political, social, racial, ethnic, religious, cultural, sexual, gender or any kind of discrimination, should protect the public interest and act objectively

18 Judgment of 20 November 2015, para 115. See also paragraphs 116 to 124, as well as the jurisprudence and international practice cited.

taking into proper account the position of both the suspect and the victim.

148. At that same Public Hearing, Counsel for the Applicant also cited Article 3 of the Charter which guarantees the right to equality before the law.

149. In its Response, the Respondent State refutes the allegation of discrimination and demanded that the Applicant provide concrete proof of this allegation; it affirmed that the Applicant has never been discriminated against.

150. The Respondent State also reiterates that the Applicant has not been discriminated against on the grounds that he did not have the means to pay a lawyer; that the fact of not having a lawyer does not place him at a disadvantage given that the Criminal Procedure Act allows him to understand the charges brought against him and to defend himself. The Respondent State concludes that the allegation is baseless, lacks merit and should be dismissed.

151. At the Public Hearing, the Respondent State reiterated its position and argued that “the Applicant has not demonstrated in what way he was discriminated against and does not say what he calls preferential treatment of other accused persons who were in the same situation and circumstances as he is in”.

152. The Court reiterates that the right to equality and non-discrimination is guaranteed by Article 3 of the Charter which provides that:

“1. Every individual shall be equal before the law.

2. Every individual shall be entitled to equal protection of the law”.

153. The Court holds that it is incumbent on the Party purporting to have been a victim of discriminatory treatment to provide proof thereof.¹⁹

154. In the instant case, the Court notes that the Applicant has not shown how he has been discriminated against in terms of the way the Tanzanian law on legal assistance was applied to him. He has not shown, in particular, that the law was applied differently to other people in the same situation as he. The Court therefore dismisses the allegation and holds that the Respondent State has not violated Article 3 of the Charter.

G. The allegation that the Applicant did not receive timely communication of the indictment and statements of witnesses to enable him defend himself

155. At the Public Hearing, Counsel for the Applicant alleged that the latter repeatedly requested copies of the indictment and the witnesses’ statements to enable him defend himself, but without success; that his first request was made on 26 May 1997 but that it was only fifty days

¹⁹ See in this regard: International Criminal Tribunal for Former Yugoslavia: *Celebici* (IT-96-21 A), Judgment on Appeal of 20 February 2001, para 607.

later that he received only one witness statement; that five months later, the Prosecutor admitted to failure to bring the statements of the other witnesses due to shortage of stationery; that on 17 October 1997, the Applicant reminded the court that he had received only one witness statement, but that, at that point, the Prosecutor denied and claimed that all the documents had been given; and that despite all that, the court decided to proceed with consideration of the case without investigating these shortcomings.

156. At the same Public Hearing, the Respondent State, relying on the records of the proceedings in the local courts, explained that on the day of the hearing, the Prosecutor had two witnesses ready to testify; that the Applicant indicated that he had the indictment and the witness statements, but requested a stay of the case because he was suffering from hypertension and a headache; but that the Applicant was in reality trying to delay consideration of the case for fear of the outcome of the trial.

157. The Court notes that under Article 7(1)(c), every individual shall have the right to defence, and that under Article 14(3) of the Covenant, everyone charged with a criminal offense shall be entitled

“... a) [to] be informed promptly and in detail in a language which he understands, of the nature and cause of the charge against him; [and] b) [to] have adequate time and facilities for the preparation of his defence ...”.

158. The Court is of the opinion that the right of the accused to be fully informed of the charges brought against him is a corollary of the right to defence, and is above all, a key element of the right to a fair trial.²⁰

159. The Court notes that, in the instant case, consideration of the records of the domestic judicial proceedings shows that on 26 May 1997, the defendant requested the court to forward to him the witnesses' statements and the indictment and that on 4 July 1997, the Prosecutor informed the court that the witnesses' statements were not available due to shortage of paper. The records again show that on 14 July 1997, the Prosecutor handed to the defendant the statement of one witness; that on 9 September 1997, the Prosecutor again informed the court that he had not been able to bring the witnesses' statements to the accused due to shortage of stationery. It also indicates that on 17 October 1997, the accused again asked the court to forward to him the charge sheet and the outstanding witness statements but the Prosecutor was opposed to the request, arguing that he had already handed the witnesses' statements to Counsel for the accused; and that the court ordered that, as the accused had received two witnesses' statements, the case could proceed forthwith.

160. It is thus apparent from the records that the indictment and the witnesses' statements were not promptly communicated by the Prosecutor; that some evidence was not communicated to the Applicant for reasons as flimsy as shortage of paper; that the evidence

²⁰ See in this regard: ECHR: *Matter of Pélissier and Sassi v France*, Judgment of 25 March 1999, para 52; *Balta and Demir v Turkey*, Judgment of 23 June 2015, para 37; Inter-American Court of Human Rights: *Matter of Yvon Neptune v Haiti (Merits, Reparation and Costs)*, Judgment of 6 May 2008, paras 102-109.

was made available to him with considerable delay; that the court decided to proceed with the case whereas the Applicant was not personally in possession of all the evidence substantiating the charge preferred against him; that in these circumstances, it is clear that the Applicant was not in a favourable position to proceed with his own defence.

161. The Court thus holds that the police and judicial authorities, having not acted with due diligence to communicate in due time to the Applicant all the elements of the charge, the Respondent State has violated his right to a defence, as guaranteed by Article 7(1)(c) of the Charter and Article 14(3)(a) and (b) of the Covenant.

H. The allegation that the charge was based solely on the testimony of a single witness who, moreover, had made contradictory statements

162. The Applicant alleges in his Application that his identification was based on the testimony of one person, and that the conviction and sentence relied on a single piece of evidence which was weak, tenuous, unreliable and uncorroborated.

163. In his written submissions attached to the Application, the Applicant explains in detail how the witness Suzan Justin Frank is not credible. He produces extracts from this person's testimony which he finds contradictory, and argues that she lied in the sense that she never knew the house or place where the accused was living prior to being told by the visitor who went to sympathise with her. He maintained that, according to the Tanzanian jurisprudence, for purposes of identification of a suspect, one witness shall be valid only if the Court is fully satisfied that the witness is telling the truth; but in this case, this precondition was not met. He asked the Court to revisit the testimonies used as evidence by the Tanzanian courts.

164. In his Reply, and still on the fact that the conviction relied on the contradictory testimony of one person, the Applicant reiterated that this constitutes an irregularity; and that it was needful, in accordance with Tanzanian law, to have scrupulously checked whether the only witness was telling the truth.

165. At the Public Hearing, Counsel for the Applicant, relying on the tenor of the Judgments rendered by the national courts, that on the day of the robbery, 5 April 1997, all those who went to the police station, including the complainant, prosecution witness No. 1, indicated that they could not identify the robbers considering that it all happened in the evening, and the conditions were not favourable; however, that several days later and at the hearing, the same complainant stated that only she has been able to identify the Applicant and that the other witnesses could not identify the robbers. He added that there are a number of other inconsistencies in her written statements and in her testimony before the court and in particular that she said during cross-examination before the lower courts that she went on the same day of the robbery [5 April 1997] to the home of the Applicant for the purpose of identifying him, pretending to buy milk, and that after she had identified him, she went to the police station; whereas during cross-

examination, she changed her statement saying that she had in fact been to the home of the Applicant on 9 April and this led to his arrest on 10 April 1997. The Counsel for the Applicant further submitted that this same witness had also said that the day after the robbery, she was absent for five days, without explaining how, that if she had travelled, she could be there on 5 or 9 April 1997, that she again contradicted her first statement in Swahili saying, on the one hand, that the Applicant was among the robbers at the time of the robbery, and on the other, that no, he was instead picked up along the way when the vehicle she was in, with some thieves was driving from point A to point B.

166. Grounding his argument on the jurisprudence of the Court of Appeal of Tanzania, according to which corroboration of the evidence of a single witness is required in the identification of an accused made under unfavourable conditions, unless the judge is fully satisfied that the witness is telling the truth, Counsel for the Applicant concluded that “in view of the inconsistencies, the Court could not have been satisfied that the witness could identify the accused with those who committed the robbery under those unfavourable conditions”.

167. At the same hearing and in regard to the identification of the Applicant, Counsel for the Applicant maintained that no identification parade in respect of the accused was even carried out.

168. In its Response, the Respondent State refuted the allegation that the sole witness was not telling the truth, and demanded that the Applicant provide concrete proof of this allegation; adding that the Evidence Act does not prescribe the number of witnesses required to prove any fact.

169. It further requested the Court to apply the doctrine of margin of assessment, as there is established case law in the Respondent State which states that a conviction can be based on the evidence of a single witness, provided the trial magistrate is satisfied that the witness is telling the truth.²¹

170. In conclusion, the Respondent State contends that the argument of the Applicant that his conviction based on the identification by one witness is irregular and baseless, since the highest court of the land has deemed that a conviction based on a single witness is permissible only as long as the trial court is satisfied with the credibility of the witness and the circumstances of the identification of an accused; and consequently, that the allegations of the Applicant lack merit and should be dismissed with costs.

171. At the Public Hearing, the Respondent State’s representative reiterated this position.

172. Finally, as regards the identification of the Applicant, the Respondent State’s representative explained that under Tanzanian law, “when a person knows the perpetrator, there is no need to have an identification parade, and this is what happened in this particular case”.

²¹ The Respondent State cites the *Matter of Hassan Juma Kanenyera and Others v United Republic of Tanzania* (1992) TLR, 100] and the *Matter of Waziri Amani v The Republic* (1980) TLR, 250.

173. The Court recalls that even if it has no power to re-evaluate the evidence on which the national court relied for the conviction, it retains the power to determine whether, in general, the manner in which the national court has evaluated the evidence is compliant with the relevant provisions of the applicable international human rights instruments [*supra*, para 26].

174. In this regard, the Court first notes that a fair trial requires that the imposition of a sentence of a criminal offence, and in particular a heavy prison sentence, should be based on strong and credible evidence. That is the purport of the right to presumption of innocence also enshrined in Article 7 of the Charter.

175. The Court notes that even in Tanzanian jurisprudence, criminal conviction on the basis of a single witness is subject to strict conditions, and is clearly a situation that should arise only in exceptional circumstances. As noted by the Respondent State itself, in the Matter of *Waziri Amani v United Republic of Tanzania*, the Court of Appeal/High Court declared that “no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight”.²²

The wording of this *dictum* clearly shows that the judge should in principle not convict on the basis of a single witness, but he may exceptionally do so only if all the possibilities of mistaken identity are eliminated and unless the testimony is absolutely unassailable.

176. In the instant case, the Court notes that the records of the domestic judicial proceedings show that the complainant, prosecution witness No. 1 and the only witness who claims to have recognised the Applicant, repeatedly says that she identified the Applicant because

“he sat next to her in the back seat of the car ; that she knew the address of the Applicant before the incident occurred, but that some people had directed her to his home; that she identified the Applicant’s face and voice and that she went to his home on 5 April 1997, the very day of the incident pretending that she was going to buy milk; that the police arrested him the next day; that after the incident, she had travelled for five days and returned on 9 April 1997, and that she was in no hurry to get the Applicant arrested”.

177. The records also show that the date on the last page of the written statement of the complainant is 11 April 1997, whereas the first page indicates other dates which are not clear.

178. The same records further show that the husband of the complainant, prosecution witness No. 2, indicated that the incident was reported to the police on the same evening of the crime; that the complainant did not know where the Applicant lived before the incident; that she told him that the Applicant had entered the car later with a gun and a spear, and not at the onset of the incident.

179. The records show, lastly, that three prosecution witnesses, including the husband of the complainant, said that they were not able

22 See *supra*, note 21, para 20.

to recognise the perpetrators of the robbery because it was dark; and that the robbery occurred on 5 April 1997 at 9.45 pm.

180. A perusal of the entire record and, in particular, the statement of the complainant and that of prosecution witness No. 1 reveals uncertainties in at least the following points: the moment at which the Applicant purportedly intervened in the course of the incident; the fact that the complainant knew the domicile of the Applicant before the incident; the day the complainant went to the home of the Applicant; the date the incident was reported to the police; and the day on which the Applicant was arrested.

181. In the circumstances, it is difficult to say that all possibilities of error especially with respect to the identity of the perpetrator of the crime have been eliminated, since the witness statements were either contradictory or, to say the least, riddled with inconsistencies, and are far from constituting a watertight testimony.

182. The Court then notes that even if he had ultimately asked for the conviction of the Applicant, the *Senior State Attorney* admitted such possibility of error before the Court of Appeal, as reported by the Judgment of the aforesaid Court dated 5 October 2004 on the same case.

“He [the Senior State Attorney] did not support the conviction on the ground that the identification of the appellant was solely based on the evidence of the single witness, PW 1, under unfavourable conditions. The circumstances were such that, in his view, the possibility of mistaken identity could not be ruled out” [fifth sheet].

183. In view of the aforesaid, it cannot be said that the testimony in question constituted unassailable evidence.

184. As regards the identification of the Applicant, in particular, the Court notes that in the special circumstances in which the robbery occurred in the instant case, it would have been safer for the competent authorities to also carry out an identification parade.

185. For all these reasons, the Court holds that the conviction of the Applicant based on the testimony of a single individual and riddled with inconsistencies, did not meet the requirements of a fair hearing under Article 7 of the Charter.

I. The allegation that the issue of the Applicant’s alibi has not been adequately addressed by national courts

186. At the Public Hearing, Counsel for the Applicant argued that the issue of alibi invoked by the Applicant before the national courts was not adequately addressed by the latter. He stated further that the Applicant indeed maintained that between 20 March and 7 April 1997, he was in admission at the Muhimbili hospital in Dar es Salaam, hundreds of kilometres from the crime scene, and that he could therefore not have been in Moshi on 5 April 1997; and in that regard, he tendered two pieces of evidence, namely, a bus ticket showing the transport to Dar es Salaam and a discharge certificate issued by the hospital upon his leaving the hospital - a certificate which he handed to the investigating officer. The Counsel for the Applicant indicated that

while admitting the bus ticket in evidence, the trial magistrate at the same time claimed that the alibi had not been notified to the court as required by law, and that it is therefore an after-thought. He emphasised the point that in regard to the discharge sheet issued by the hospital, that although the trial judge had accepted the same as evidence, the appellate judge that there was no discharge sheet; that despite the fact that the Applicant had indicated that he had handed the certificate to the investigating officer, the latter was never called to testify, despite the Applicant's request to this effect. He concluded that in the circumstances, the issue of the alibi evidence has not been properly treated by the national courts, which therefore cannot persuade themselves that they properly convicted the Applicant for the very serious offence of armed robbery.

187. At the same Public Hearing, Counsel for the Applicant pointed out that, he had in any case raised the issue of the alibi from the onset of the investigation procedure, handing his client's bus ticket and hospital discharge sheet to the investigating officer.

188. In the course of that same Public Hearing, the representative of the Respondent State argued that, with respect to the hospital discharge sheet, the Applicant contradicted himself by saying, on the one hand, that it is his relatives who would produce the discharge sheet before the judge, and on the other hand, that he handed it to the police officer in charge of the investigation; and that the judicial records rather show that it was his lawyer who was in possession of the discharge certificate. Regarding the issue of alibi in general, the representative of the Respondent State stressed that the law requires that the alibi be raised by prior notice and that in any case, the trial magistrate had considered the defence of alibi and dismissed the same.

189. At the same hearing, the Respondent State's representative explained that under Tanzanian law, an accused must first notify the Court and the Prosecution of the intention to invoke an alibi, and thus allow the Prosecution enough time to conduct investigations into allegations of alibi advanced by the accused. He stated further that if the defence is raised after the prosecution case is closed, the Court may in its discretion admit the evidence but accord no weight whatsoever to ensure that justice is done; that raising the defence of alibi after closing its case is rather prejudicial and does not reflect justice. He added that with regard to the hospital discharge sheet, investigation was not conducted, in view of the fact that this question was raised after the presentation of the prosecution's pleadings; and that on cross-examination, the Applicant said he had sent his parents to bring the discharge sheet, thus continuing to contradict himself.

190. The Court notes that the records of the domestic judicial proceedings show that the Applicant had indeed invoked an alibi, but that the trial magistrate had found that the alibi defence had not been submitted to the court in accordance with the law, and that it was just an after-thought.

191. The Court holds that at the time of the police investigation and in the course of the trial, the Applicant clearly raised the issue of his alibi; and this should have been seriously considered by the police and the

judicial authorities of the Respondent State. Where an alibi is established with certainty, it can be decisive on the determination of the guilt of the accused. This issue was all the more crucial especially as, in the instant case, the indictment of the Applicant relied on the statements of a single witness, and that no identification parade was conducted [*supra*, paras 162 et seq. and 186 et seq].

192. The Court also holds that, in the instant case, the police and the judicial authorities of the Respondent State have not taken seriously the alibi argument advanced by the Applicant, regardless of the uncertainties or possible contradictions in his allegations. Implicit in the right to a fair trial is the need for a defence grounded on possible alibi to be thoroughly examined and possibly set aside, prior to a guilty verdict. In this regard, the Respondent State is not justified in invoking the state of its domestic judicial system and technicalities that may be used to subvert compliance with its international commitments in matters of human rights.²³

193. The Court further holds that by failing to further its investigations on the alibi defence raised by the Applicant, and by relying on only the evidence adduced by the prosecution, the national judge violated the principle of equality of arms between the Parties in matters of evidence, which is absolutely vital for justice.²⁴

194. For all the foregoing reasons, the Court holds that the absence of detailed investigation of the alibi allegation made by the Applicant, and the non-consideration of this defence by national courts constitute a violation of his right to a fair trial as guaranteed by Article 7 of the Charter.

J. The allegation that the Applicant was convicted without the crime weapons or the stolen items being recovered

195. At the Public Hearing, Counsel for the Applicant submitted that at the time of his arrest he was found neither with the crime weapons nor with the items stolen, and that he had mentioned all that to both the trial magistrate and the appellate Judge.

196. At the same Public Hearing, the Respondent State's representative argued that according to the witnesses, there were weapons such as guns, a club, a machete and a sword used to threaten the victims; that by law, all that the prosecution has to prove is that an offensive weapon has been used, that the Applicant was in the company of two or more persons, and at that time or later, he used this offensive weapon to intimidate victims.

²³ See also in this regard, the Court's judgment in the Matter of *Tanganyika Law Society and Others v United Republic of Tanzania*, 14 June 2013, paras 108-109; Commission: Communication No 212/98 *Amnesty International v Zambia*, para 50.

²⁴ See in this regard: ECHR: *Dombo Beheer B.V v The Netherlands* Judgment of 27 October 1993, para 33.

197. The Court notes that the Respondent State recognises that the crime weapons have not been found, and that the existence and nature of the said weapons have been established based on testimonies.

198. The Court notes, however, that the fact that the crime weapons have not been recovered does not mean that the offence of armed robbery cannot be established based on factors other than physical evidence, provided these other factors have weighty probative value.

199. Consequently, the Court cannot infer from the mere absence of the crime weapons, that the Applicant did not have a fair trial under Article 7 of the Charter.

K. The allegation that the sentence pronounced by the judge against the Applicant was not applicable under Tanzanian law at the relevant time

200. In his Application, the Applicant alleges that even if there had been evidence indicting him - which is not the case - the sentence of thirty years imprisonment meted against him was not applicable, and therefore that his conviction was unconstitutional [para 8]. He further alleged that the thirty years prison sentence was introduced and published in Government Notice No. 269 of 2004 in Section 287 A of the Penal Code.

201. In his written submissions attached to the Application, the Applicant states that as of 2002, the Criminal Code did not provide for imprisonment of thirty (30) years; that the Code provided for twenty (20) years imprisonment or life imprisonment; that the penalty of thirty (30) years imprisonment was therefore unconstitutional; and that the 2002 amendment which prescribed thirty (30) years imprisonment occurred after his conviction on 21 July 1998. He invoked two Judgments of the Moshi High Court rendered in 2012 and 2013,²⁵ which annulled the sentences of thirty years imprisonment handed down in 2001 and 2003.

202. In his Reply, the Applicant reiterated this position.

203. In its Response, the Respondent State refutes the allegation that the sentence could not be thirty years in prison, and explains that according to Section 286 of the Penal Code, the punishment prescribed was actually life imprisonment, but that the judge reduced it to thirty years in consideration of the Minimum Sentences Act which provided for this minimum sentence for armed robbery. It maintained that the Government Notice No. 269 of 2004 cited by the Applicant was merely correcting a simple typographical error in the numbering of Sections of the Penal Code of 2004.

204. At the Public Hearing, the Respondent State explained that in 1994 the Parliament by Law No. 6 of 1994 amended Section 5 of the Minimum Sentence Act by setting a minimum sentence of thirty years in jail for the offence of armed robbery, and that that sentence was

²⁵ The Applicant cites the following cases: Ramadhani Shekiondo and Alfayo Michael H/C Moshi, Criminal Revision No. 2/2013; Emanuel Estomi H/C Moshi App. No. 28/2012.

applied to the instant case, even though the penalty provided by Section 286 of the Penal Code was life imprisonment.

205. On the Judgment setting aside the thirty year prison sentence in the case of *Alfayo Michael Shemwilu and Ramadhani Shekiondo v The Republic* cited by the Applicant (*supra*, para 201), the Respondent State's representative argued that that was a decision of the High Court [Criminal Revision No. 2 of 2013], but that the Court of Appeal, in contrast, ruled in the case of *William R. Gerrison v Republic* that a sentence of thirty years imprisonment was appropriate for the crime of armed robbery [Criminal Appeal No. 69 of 2004].

206. At the same Public Hearing, the Respondent State's representative reiterated that it is Act No. 6 of 1994 which provides for the thirty years minimum sentence for the offence of armed robbery that was applied to the Applicant in 1997. It further argued that Act No. 4 of 2004 entered into force by virtue of Government Notice No. 269 of 2004 which simply clarified that armed robbery is deemed to have occurred where the accused is in possession of dangerous weapons.

207. The Court notes that the only relevant question in contention here is whether the penalty to which the Applicant was sentenced in 1998 and upheld in 1999 and 2004 was not provided by the law.

208. According to Article 7(2) of the Charter: "No penalty may be inflicted for an offence for which no provision was made at the time it was committed."

209. In the instant case, the law applicable at the time of the offence (armed robbery), that is April 1997, is the Tanzanian Penal Code and the Minimum Sentences Act of 1972 as amended in 1989 and then in 1994.

210. It follows from Section 286 of this Penal Code that a person convicted of armed robbery is liable to a penalty of imprisonment for life, with or without corporal punishment. It also follows from Section 5(b) of the Minimum Sentences Act that the minimum sanction for this offence is thirty years in prison. These provisions, read together, show that the applicable penalty for armed robbery was clearly a thirty (30) year minimum prison sentence.

211. Furthermore, the High Court judgment of 1 June 1999 recounts that the penalty imposed in this case is the minimum set by law for convicted offenders.

212. Moreover, it follows from the records that Act No. 4 of 2004, which the Court of Appeal could have applied in its judgment of 5 October 2004 did not amend the sentence applicable to armed robbery.

213. For all the foregoing reasons, in pronouncing and upholding the thirty years imprisonment sentence against the Applicant in the instant case, the Tanzanian national courts have not violated the principle of non-retroactivity of penalties.

L. The allegation that the Judgment of the District Court [1997] was not pronounced in open court

214. In his Application, the Applicant claims that the court judgment by which he was sentenced in 1998, was not pronounced in public, in contravention of Section 311 of the Criminal Procedure Act.

215. In his written submissions annexed to the Application, the Applicant maintained that the records show that the Judgment was read in an office on 21 July 1998, instead of being delivered in open court.

216. In his Reply, the Applicant reiterated this position.

217. At the Public Hearing, Counsel for the Applicant again argued that at the District Court, decision was taken in the chambers of a judge and that no reason for that was given in the said decision.

218. In its Response, the Respondent State refutes this allegation and argues that if Section 311 of the Criminal Procedure Act provides that Judgments shall be delivered in public, the same Section also makes provisions for options.

219. The Respondent State further argues that due to limitation of space, the Chambers of Judges are used as courtrooms, whereby the public can be present during oral pleadings and delivery of Judgments. It also maintains that the case against the Applicant was neither heard *in camera*, nor was the Judgment delivered *in camera*, because anyone who wanted to be present on the two occasions was allowed to do so.

220. At the Public Hearing, the Respondent State's representative again explains that because of the problem of space, offices are used during procedures; and that the Applicant was not tried *in camera* given the fact that anyone who wanted to participate in the proceedings could do so.

221. The Respondent State's representative further explains that when the chambers are used, Public Hearings are held only when the doors are wide open and that any member of the public can access and sit in; it is only under these conditions that the Court may sit as an open court; the cause list of the Court is posted in public outside the Courts; and that closed courts are held only when the victim is a child and the offence the accused has been charged with is for instance rape; and this is to protect the dignity of the child. He further argued that the fact that the chambers are regarded as courtrooms when the doors are wide open is the "Court's practice and we interpret this widely".

222. The Court notes that the Charter is silent on the principle of publicity of court decisions in relation to the right to a fair trial under its Article 7. In contrast, Article 14(1) of the Covenant provides in part that "... any Judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

223. The Court notes that, in the instant case, the Parties agree that the judgment should have been delivered in open court, and the fact that, in this case, the judgment of the trial court was pronounced in the chamber of a magistrate. The only issue in contention is whether a

hearing held in the chamber of a judge, which is entirely open to the public, can be regarded as open court, and if therefore the judgment delivered in such circumstances can be deemed to have been pronounced in public.

224. In the opinion of the Court, the question as to whether the judgment was delivered in public should be determined with some flexibility and not too formally. As declared by the European Court of Human Rights in the matter of *Lorenzetti v Italy*, “the requirement whereby a judgment must be rendered in public was interpreted with a measure of flexibility.”²⁶ In the same matter, the Court recalled that “it is necessary to determine in each case in light of the peculiar nature of the relevant procedure and depending on the purport and objective of Article 6(1), the form of publicity to be given to a judgment as provided under the domestic law of a particular State”.²⁷ It holds that “the requirement to publicise judgments should not necessarily take the form of oral pronouncement, and declared that the requirements under Article 6 (of the European Human Rights Convention) have been met because any interested person could consult the full text of the judgments of the Military Court of Cassation”.²⁸ (Registry translation)

225. In the opinion of the Court, publicity of a judgment is assured as long as it is rendered in a premises or open area; provided the public is notified of the place and the latter can have free access to the same.

226. In the instant case, it is not indicated that the judge’s chamber in which the hearing took place was not open and accessible to the public, and there is no allegation either, that the public has not been notified and could not freely access the said chamber. The record shows, on the contrary, that the delivery of court decisions in judges’ chambers is a common practice due to insufficient space, and it can therefore be assumed that the public is aware of this practice.

227. Consequently, the Court holds that the fact that the delivery of the judgment sentencing the Applicant took place in the chamber of a judge is not, in itself, a violation of his right to a fair trial.

IX. The issue of reparations

228. In his Application, the Applicant requested, among other things, that justice be restored in his favour; that his conviction and the

²⁶ Judgement of 10 April 2012, para 37.

²⁷ *Ibidem*. See also the jurisprudence cited.

²⁸ *Ibidem*. 38. The Court recalls that “in the matter of *Ernst v Belgium* (No. 33400/96, judgment of 15 July 2003), it held that the publicity requirements set forth under Article 6(1) of the Convention had been sufficiently complied with due to the fact that the Applicants were able to procure for themselves the texts of the decision by approaching the Registry a few days after delivery of the said judgment in the Chamber of the Counsel of the Court of Cassation” (*Ibidem*). It further indicated that in the instant case “the order of the Court of Appeal and the judgment of Court of Cassation had been deposited in the Registry and that the Applicant was notified accordingly” and that “in view of the jurisprudence mentioned above, the Court holds that the publicity requirements set forth by Article 6(1) of the Convention have been sufficiently complied with” (*Ibidem*, para 39).

sentence meted to him be quashed; that he be set free and that the Court order such other measures as it may deem appropriate.

229. At the Public Hearing, Counsel for the Applicant prayed the Court to order the Respondent State to have the case retried by the national courts taking into account the defects found, and this, within a reasonable time to be determined by the Court; order the Respondent State to provide legal aid and free representation to the Applicant for the retrial; and order that reparation be awarded in respect of all the human rights violations established.

230. In its submissions at the same Public Hearing, the Respondent State's representative for his part asked that "... no reparation should be granted to the Applicant with regard to this Application ...".

231. Article 27(1) of the Protocol establishing the Court provides that "if the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation including the payment of fair compensation or reparation."

232. In this regard, Rule 63 of the Rules of Court provides that "the Court shall rule on the request for reparation ... by the same decision establishing the violation of a human and peoples' right or, if the circumstances so require, by a separate decision."

233. In the instant case, the Court will decide on certain forms of reparation in this judgment, and rule on other forms of reparation at a later stage of the proceedings.

234. Regarding the Applicant's prayer to be set free, as the Court stated in the matter of *Alex Thomas c. United Republic of Tanzania*, such a measure could be ordered by the Court itself only in special and compelling²⁹ circumstances. In the instant case, the Applicant has not indicated such special and compelling circumstances.

235. As regards the prayer for a retrial, the Court holds that such a measure would not be fair to the Applicant in as much as he has already spent 19 years in prison, more than half of the sentence, and given that a fresh local judicial procedure could be long.³⁰

236. Taking this special consideration into account, the Court instead orders the Respondent State to take all other appropriate measures within a reasonable time, to remedy the human rights violations established.

237. As for other forms of reparation, the Court will make a ruling on the prayers of the Parties, after hearing them more fully.

X. Costs

238. In the submissions in Response, the Respondent State prayed the Court that the costs of the procedure be charged to the Applicant.

239. The Applicant did not make any statement on this issue.

29 Judgment of 20 November 2015, para 157.

30 See in this regard, *Ibidem*, para 158.

240. The Court notes that Rule 30 of its Rules provides that “unless otherwise decided by the Court, each party shall bear its own costs.”

241. The Court shall decide on the issue of costs when making a ruling on other forms of reparation.

242. *For these reasons,*

THE COURT,

Unanimously:

i) *Dismisses* the objection to the Court’s jurisdiction *ratione materiae* based on the argument that, by examining the evidence of the Applicant’s guilt, it would be constituting itself as an appellate Court;

ii) *Dismisses* the objection to the Court’s jurisdiction *ratione materiae* based on the argument that the Applicant did not invoke the relevant provisions of the Protocol and the Rules of Court;

iii) *Declares* that it has jurisdiction to hear the Application;

iv) *Dismisses* the objection regarding inadmissibility of the Application on the grounds that it is incompatible with the Constitutive Act of the African Union and the Charter;

v) *Dismisses* the objection regarding inadmissibility of the Application on grounds of non-exhaustion of local remedies;

vi) *Dismisses* the objection regarding inadmissibility of the Application on grounds of failure to file the Application before the Court within reasonable time;

vii) *Declares* the Application admissible;

viii) *Rules* that the Respondent State has not violated Article 7 of the Charter and/or Article 14 of the Covenant as regards the Applicant’s allegations that: the police post where he was held at the time of his arrest was not provided with basic facilities; that he was discriminated against in terms of free legal assistance; the indictment sheet was marred with irregularities; that he was sentenced without the crime weapons and the stolen items being found; and that he was sentenced to a term of imprisonment not provided for by the law at the time the offence occurred;

ix) *Rules* that the Respondent State has violated Article 7 of the Charter and Article 14 of the Covenant as regards the Applicant’s alleged right to defend himself and have the benefit of a Counsel at the time of his arrest; to obtain free legal assistance during the judicial proceedings; to be promptly given the documents in the records to enable him defend himself; his defence based on the fact that the Prosecutor before the District Court had a conflict of interest with the victim of the armed robbery, considered by the Judge; not to be convicted solely on the basis of the inconsistent testimony of a single witness in the absence of any identification parade; and to have his alibi defence given serious consideration by the Respondent State’s police and judicial authorities;

By majority of seven for and two against, Judge Elsie N. THOMPSON and Judge Rafâa BEN ACHOUR dissenting:

i) *Declares* that the Respondent State has not violated Article 7 of the Charter and/or Article 14 of the Covenant as regards the allegation that the sentence was not pronounced at a Public Hearing;

ii) Declares that the Applicant's prayer to be released from prison has not been accepted;

Unanimously:

iii) *Orders* the Respondent State to take all appropriate measures within a reasonable time frame to remedy all the violations established, excluding a reopening of the trial, and to inform the Court of the measure so taken within six (6) months from the date of this Judgment;

iv) *Reserves* its ruling on the prayers for other forms of reparation and on costs;

v) *Orders* the Applicant to submit to the Court his brief on other forms of reparation within thirty days from the date of this Judgment; also *orders* the Respondent State to submit to the Court its response on other forms of reparation within thirty days of receipt of the Applicant's brief.

Separate Opinion: Thompson

1. I agree substantially with the merits of the judgment of the Court except for the order of the Court at paragraphs 236, 242(xii) and 242(ix) which I would approach in a different manner to make a specific order.

2. The Applicant alleges violation of several articles of the African Charter on Human and Peoples' Rights which have been set out in the judgment and he seeks amongst other reliefs, that he be released from prison.

3. The Court finds violation of Article 7 of the Charter and Article 14 of the International Covenant on Civil and Political Rights (ICCPR) based largely on lack of fair hearing, and then orders the state to: "to take all the necessary measures, within a reasonable time, to remedy the violations established, excluding the re- opening of the trial, and to notify the Court of the measures taken within six months from the date of this Judgment".

4. On the issue regarding the Court's finding that the Respondent did not violate Article 7 of the Charter when the conviction and sentencing of the Applicant was conducted in the magistrate's Chambers, I also depart from the finding of the Court. The Charter may be silent on the issue of public delivery of judgment but the Court is empowered by Articles 60 and 61 of the Charter

"to draw inspiration from international law on human and peoples' rights and to take into consideration as subsidiary measures other general or special international conventions, customs generally accepted as law, general principle of law recognized by the African States as well as legal precedents and doctrine".

5. The ICCPR, which the Applicant alleges to have been violated, specifically provides, in Article 14(1) thereof, that “any judgement rendered in a criminal case or in a suit of law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children”.¹

6. Also, in General Comment No. 13, the Human Rights Committee,² stated that: “the provisions of Article 14 apply to all courts and tribunals within the scope of that Article whether ordinary or specialized”. I wish to add that the European Court of Human Rights (ECtHR) has observed that the purpose of publicity of judgment is “to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial.”³

7. In the instant case, the Respondent’s own national laws are unambiguously clear as to the mode of delivery of judgment. Section 311(1) of the Tanzanian Criminal Procedure Act states:

“311.-(1) The Decision of every trial of any criminal case or matter shall be delivered in an open court immediately or as soon as possible after termination of trial, but in any case not exceeding ninety days, of which notice shall be given to the parties or their advocates, if any, but where the decision is in writing at the time of pronouncement, the Judge or Magistrate may, unless objection to that that course is taken by either the prosecution or the defence, explain the substance of the decision in an open court in lieu of reading such decision in full.”

8. The magistrate at the national level did not give any reason for delivering the judgment in Chambers. The Applicant alluded to this, as elaborated in paragraphs 215 and 216 of this Court’s judgment. The Respondent answered this by stating that due to limitation of space, the chambers of Judges are used as courtrooms, whereby the public can be present during oral pleadings and delivery of judgments. This is of no moment as the trial itself was held in open court.

9. Having found that the Applicant’s sentencing and conviction was not done in open court, the Court would have found a violation of his rights to fair trial and in the circumstance find a violation of Article 7 and Article 14(1) of the ICCPR. The majority Judgment has relied on *Lorenzetti v Italy* where the ECtHR held that, “the requirement whereby a judgment must be rendered in public was interpreted with a measure of

1 See also Article 6(1) of The Convention for the Protection of Human Rights and Fundamental Freedoms better known as the European Convention which stipulates that judgement “shall be pronounced publicly”; Article 8(5) of the American Convention on Human Rights refers only to the publicity of the proceedings as such; Articles 22(2) and 23(2) of the Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia, respectively, provide for the delivery “in public” of the judgment of the Trial Chamber. Finally, according to Article 74(5) of the Statute of the International Criminal Court, the “decisions or a summary thereof shall be delivered in open court”.

2 *United Nations Compilation of General Comments*, 123, para 4.

3 Application 7984/77 *Prelto and Others v Italy* Judgment of 8 December 1983 para 27 Application 8273/78 *Axen v Federal Republic of Germany* Judgment of 8 December 1983 para 32.

flexibility”.⁴ The majority Judgment has found that the lack of adequate courtrooms is reason enough for flexibility. In my opinion, the totality of the prevailing conditions in the judicial process must be examined to determine whether such flexibility can be allowed. This would be appropriate where a judgment can be accessed immediately, despite it not having been rendered in open court.

10. This is not the case in the local circumstances of this matter as judgments are not immediately available to parties and the public, therefore the most appropriate means by which they would access the judgment would be when it is being rendered in open court.⁵ In the instant case, since in all likelihood, as is common, the judgment would not be immediately accessible to the Applicant and it was not read in open court, a violation of Article 7 of the Charter was occasioned.

11. On the specific issue as to the Order of the Applicant’s release, the Court is of the opinion and I entirely agree, that an Order of release of a convict can only be done in “very specific and/or compelling circumstances”. The Court, however goes further to say that the Applicant has not shown exceptional circumstances, and also that the fact that the conviction and sentence was not delivered in open court did not constitute a violation of Article 7 of the Charter by the Respondent. This is where I depart with the majority Judgment.

12. In spite of the fact that the Applicant does not state that particular facts exhibit exceptional circumstance, I am of the firm view that the Court found such specific and/or compelling circumstances when it noted that the resumption of the trial or retrial of the Applicant would not be “fair to the Applicant in as much as he has already spent 19 years in prison, more than half of the sentence, and given that a fresh local judicial procedure could be long”.

13. The Court also found that the Applicant was convicted on “inconsistent testimony of a single witness in the absence of any identification parade” and that “the Applicant’s alibi defence was not given serious consideration by the Respondent State’s police and judicial authorities”.

14. From the foregoing, I cannot find more “specific and/or compelling” circumstances than that the Applicant’s conviction was based on the inconsistent testimony of a single witness in the absence of any identification parade; that the Applicant’s alibi defence was not given serious consideration by the Respondent’s police and judicial authorities; and that the Applicant has been in prison for 19 years out of the 30 years prison term, following a trial which the Court has declared to have been an unfair trial, in violation of the Charter.

15. The Court in this case is hesitant in making an order of releasing the Applicant and has opted to leave the issue to the discretion of the Respondent. The Court may want to note that it had previously made similar Orders in Application No. 005/2013, *Alex Thomas v United*

⁴ Judgment of 10 April 2012, para 37.

⁵ Application No 005/2013, *Alex Thomas v United Republic of Tanzania*, Judgment of 20 November 2015 paras 108 and 109.

Republic of Tanzania,⁶ which the Respondent State has not complied with.

16. The ECtHR in the case of *Del Rio Prada v Spain*,⁷ after finding that the Applicant had been unjustly kept in prison and her rights violated had held “by sixteen votes to one, that the Respondent State is to ensure that the Applicant is released at the earliest possible date”. This case related to the alleged violation of Article 7 of the European Convention on Human Rights which provides that “1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”

17. The Applicant in that matter argued that an amendment to the criminal code and the adoption of a new approach to the remission of sentences which resulted in the extension of her release date by 9 years amounted to the retroactive Application of a penalty that did not exist at the material time she was sentenced. The Respondent State in that case maintained that the changes in the law and the new approach to remission of sentences were outside the scope of the requirement of non-retroactivity as they did not create a penalty retroactively, but were only addressing the enforcement of a penalty. The European Court found that where changes to the law or the interpretation of the law affected a sentence or remission of sentence in such a way as to seriously alter the sentence in a way that was not foreseeable at the time when it was initially imposed, to the detriment of the convicted person and his or her Convention rights, those changes, by their very nature, concerned the substance of the sentence or penalty and not the procedure or arrangements for executing it, and accordingly fell within the scope of the prohibition of retroactivity.⁸ That Court therefore found a violation of Article 7 of the Convention and having done so, decided on the alleged violation of Article 5 of the Convention, which is in terms similar to Article 6 of the Charter setting out the right “not to be deprived of one’s freedom except for reasons and conditions laid down by law”. The Applicant had argued that a finding of a violation of Article 7 of the Convention would mean that her continued imprisonment from the date when she was due to have been released from prison based on the former sentencing and remission of sentences approach, was therefore not according to a procedure prescribed by law as is required by Article 5 of the Convention. The European Court, having found that the new sentencing and remission of sentences approach fell within the scope of the principle of non- retroactivity set out in Article 7 of the Convention, found that the Applicant’s continued imprisonment was therefore not according to a procedure prescribed by law and therefore found a

6 Application No. 005/2013, *Alex Thomas v United Republic of Tanzania*, Judgment of 20 November 2015 page, 65, 161(ix).

7 Judgment in Application No 42750/09 *Case of Del Rio Prada v Spain*, 21 October 2013, para 3 of the disposition.

8 *Ibid* paras 108, 109 and 171.

violation of Article 5 of the Convention.¹ It is on this basis that the Court ordered her release from prison.

18. In the case of *Loayza-Tamayo v Peru*, the Inter-American Court of Human Rights ordered the release of the victim as not doing so would have resulted in a situation of double jeopardy, which is prohibited by the American Convention on Human Rights.²

19. My view is therefore that, there is no other remedy in the circumstances of this case other than that, the Applicant be released. The Court even in the operative paragraph fell shy of pronouncing itself on the release and sought to leave it to the discretion of the State. Going by the attitude of the Respondent in the compliance with the Court's orders in the *Alex Thomas* case, the Court would have granted the Applicant's relief and ordered that he be released, rather than leaving the issue to the discretion of the Respondent, a discretion which the Respondent may never exercise.

Separate opinion: BEN ACHOUR

1. I subscribe to most of the reasoning and decisions of the Court in the Matter of Mohamed Abubakari versus the United Republic of Tanzania (Application 007/2013).

2. However, I am unable to go along with the majority of members of the Court on two issues which, in my view, are important:

- The first issue relates to the refusal of the Court to order the release of the prisoner who is currently serving 30 years prison sentence pronounced by the Moshi District Court on 21 July 1998. I had expressed similar disagreement on this point in the Matter of Alex Thomas.³
- The second issue relates to the absence of publicity of the trial due to the fact that the Applicant's conviction was pronounced in the chamber of a judge; which in my view constitutes a serious breach of the principle of publicity of proceedings in general, and criminal proceedings in particular.

I. Refusal of the Court to order the release of the Prisoner

3. As in the matter of Alex Thomas,⁴ the Applicant (Mohamed Abubakari) alleged the violation of several of his rights, upon his arrest, during his remand, and indeed in the course of his trials.⁵

1 *Ibid* para 131.

2 Inter-American Court of Human Rights *Case of Loayza-Tamayo v Peru* Merits Judgment of 17 September 1997 Series C No. 33, Resolatory paras 5 and 84.

3 Judgment of 20 November 2015.

4 *Idem*.

5 Cf paragraph 5 of the judgement.

4. In light of the said allegations, the Court rightly held that the Respondent State violated Article 7 of the Charter and Article 14 of the Covenant as regards the Applicant's alleged right to defend himself and have the benefit of a Counsel at the time of his arrest; to free legal assistance during the judicial proceedings; be promptly given the documents in the records to enable him defend himself; not to be convicted solely on the basis of the inconsistent testimony of a single witness in the absence of any identification parade, etc". In sum, the Court admits that Mr Abubakari did not have a fair trial.

5. The Court ordered the Respondent State to "take all the necessary measures, within reasonable time, to remedy the violations established." However, in paragraph 234 of its judgment, the Court held that the release of the Applicant could be ordered ... "only in special and compelling circumstances." The Court further finds that the Applicant has not indicated such exceptional and compelling circumstances. I do not share this opinion.

6. I wish to first emphasize that I accept that the order for release can be pronounced "only in special and compelling circumstances". This is an established jurisprudence of international human rights courts. It happened, however, that an order for release was indeed ordered.⁶

7. In the instant case, despite the fact that the Applicant did not invoke special facts to justify exceptional circumstances, I reiterate my firm belief that the Court has itself established the said exceptional and/or compelling circumstances when it upheld all the irregularities that marred the various stages of the case, from arrest to the stage of heavy sentence of 30 years imprisonment.

8. I do not see any "circumstance" more "exceptional and/or compelling" than the one in which the Applicant found and still finds himself, having been languishing in prison for 18 years out of the 30 years inflicted on him following a trial that the Court declared unfair and at variance with certain provisions of the Charter.

9. Unfortunately, by refusing to order the release of the Applicant, the Court did not take its reasoning to its logical conclusion. Yet, it is the only "reparatory" measure that the Court could have ordered, given the circumstances of the case. Indeed, rather than leave to the Respondent the discretion to take appropriate measures, the Court should have ordered the release of the Applicant.

II. Applicants conviction was pronounced in the Chamber of the judge

10. The 30 years imprisonment conviction for the armed robbery charge was, as repeatedly alleged by the Applicant, pronounced not "in open court" but "in the chamber of a judge without any reason".

6 Cf ECHR, Grand Chamber, the case of *Del Rio Prada v Spain*, Application No. 42750/09, Judgment of 21 October 2013. "3. Rules by sixteen votes against one, that it is incumbent on the Respondent State to ensure the release of the Applicant as soon as possible". Available: <http://hudoc.echr.coe.int/eng>

11. The Respondent State did not refute this allegation. It even confirmed the allegation, somehow. Indeed, in its response Brief, it invoked Article 310 of the Tanzanian Criminal Procedure Code which enshrines the principle that judgments should be pronounced in public, subject to certain exceptions (paragraph 218 of the judgment).

12. The Respondent State went so far as to provide justification for this practice by advancing the argument of “lack of space” and maintaining that “judges’ chambers are used as courtroom”, adding that “any person who wanted to be present was allowed to do so.”

13. It goes without saying that the argument is specious and indeed misleading. Not only that the reasonable dimensions of a judge’s chamber do not normally allow for the presence of a significant number of people; but, even if the chamber is sufficiently spacious and specially designed to receive the public, a public hearing in a judge’s chamber is in itself intimidating both for the accused and for the public.

14. The Respondent State argues that hearings in judge’s chambers are held only “when the doors are wide open” and that “the cause list of the court is posted in public and is available outside the courtroom” (paragraph 221 of the judgment).

15. By implication, the Court accepts this argument by affirming that “in the opinion of the Court, publicity of a judgment is assured as long as it is rendered in the premises or open area, provided that the public is notified of the place and the latter has free access to the same” (§ 225 of the judgment). The Court goes as far as finding for this *curiosity* an argument in the Charter which is “silent on the principle of publicity of court decisions pronounced in relation to the right to a fair trial under its Article 7”. However, the Court does not fail to note that this principle is indeed enshrined in Article 14 of the International Covenant on Civil and Political Rights duly ratified by the Respondent State on 16 July 1976.

16. The Human Rights Committee, commenting on Article 14 (1) of the ICCPR states in paragraph 6 of General Comment 13 that “The publicity of hearings is an important safeguard in the interest of the individual *and of society at large*”. *It added however in Article 14, paragraph 1 that it “acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph.” It noted in conclusion that, “apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons...”*⁷

17. It follows from the foregoing that pronouncing a criminal judgment in a judge’s chambers even where its doors are open, and even if it is not strictly *in camera*, is nonetheless an unacceptable limitation to the principle of publicity set forth in Article 14(1) of the ICCPR and is a key component of a fair trial. For this reason, I cannot go along with the Court’s reasoning on this particular point.

7 Emphasis added.

Habiyalimana Augustino and Mbuuro Abdulkarim v Tanzania
(provisional measures) (2016) 1 AfCLR 646

Habiyalimana Augustino and Mbuuro Abdulkarim v The United Republic of Tanzania

Order (provisional measures), 3 June 2016. Done in English, French, Portuguese and Arabic, the English text being authoritative.

Judges: THOMPSON, NIYUNGEKO, OUGUERGOUZ, TAMBALA, ORE, KIOKO, BEN ACHOUR, BOSSA and MATUSSE

Recused under Article 22: RAMADHANI

The Applicant alleged violation of fair trial rights in proceedings that led to the imposition of the death penalty. The Court held that provisional measures were necessary to avoid irreparable harm despite the moratorium adopted by the Respondent State and the fact that no execution had been carried out in a long time.

Provisional measures (death penalty, 16-18)

I. Subject of the Application

1. The Court received, on 8 March 2016, an Application by Habiyalimana Augustino and Mbuuro Abdulkarim (hereinafter referred to as “the Applicants”), instituting proceedings against the United Republic of Tanzania (hereinafter referred to as “the Respondent”), for alleged violations of human rights.

2. The Applicants, who are Burundian nationals currently detained at Butimba Central Prison in Mwanza, were sentenced to death by the High Court of Tanzania at Bukoba on 31 May 2007. That death sentence was confirmed by the Court of Appeal, which is the highest Court in Tanzania, on 2 March 2012. The Applicants then made an Application to the Court of Appeal for review of its judgment on 7 April 2012, which was registered as No. 05 of 2012 (sic).

3. The Applicants allege, *inter alia*, that:

- (a) Their conviction was based on evidence and exhibits that do not meet the required standard of proof, that is, beyond reasonable doubt.
- (b) The trial court erred by conducting the hearing in Swahili, a language unknown to them.
- (c) The Application for review, despite being registered in 2012, has not been heard or listed to date.

II. Procedure before the Court

4. The Application was received at the Registry of the Court on 8 March 2016.

5. Pursuant to Rule 36 of the Rules of Court, on 21 April 2016, the Registry served the Application on the Respondent.

III. Jurisdiction

6. In dealing with an Application, the Court has to ascertain that it has jurisdiction on the merits of the case under Articles 3 and 5 of the Protocol.

7. However, in ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction.¹

8. Article 3(1) of the Protocol provides that “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”.

9. The Respondent ratified the Charter on 9 March 1984 and the Protocol on 10 February 2006, and is party to both instruments; it equally deposited, on 29 March 2010, a declaration accepting the competence of the Court to receive cases from individuals and Non-Governmental Organisations, within the meaning of Article 34(6) of the Protocol read together with Article 5(3) of the Protocol.

10. The alleged violations the Applicants are complaining about are guaranteed under Article 7(1) of the Charter and the Court therefore has jurisdiction *ratione materiae* over the Application.

11. In light of the foregoing, the Court has satisfied itself that, *prima facie*, it has jurisdiction to deal with the Application.

IV. On the provisional measures

12. In their Application, the Applicants did not request the Court to order provisional measures.

13. Under Article 27(2) of the Protocol and Rule 51(1) of the Rules, the Court is empowered to order provisional measures *proprio motu* “in cases of extreme gravity and when necessary to avoid irreparable harm to persons” and “which it deems necessary to adopt in the interest of the parties or of justice”.

14. It is for the Court to decide in each situation if, in the light of the particular circumstances, it should make use of the power provided for by the aforementioned provisions.

15. The Applicants are on death row and it appears from this Application that there exists a situation of extreme gravity, as well as a risk of irreparable harm to them.

1 See Application 002/2013 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures dated 15 March 2013) and Application 006/2012 *African Commission on Human and Peoples' Rights v Kenya* (Order for Provisional Measures dated 15 March 2013); Application 004/2011 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures dated 25 March 2011).

16. Given the particular circumstances of the case, where the risk of execution of the death penalty will jeopardise the enjoyment of the rights guaranteed under Article 7(1) of the Charter, the Court has decided to invoke its powers under Article 27(2) of the Protocol.

17. The Court finds that the situation raised in the present Application is of extreme gravity and represents a risk of irreparable harm to the rights of the Applicants as protected by Article 7(1) of the Charter, if the death sentence were to be carried out.

18. Consequently, the Court holds that the circumstances require an Order for provisional measures, in accordance with Article 27(2) of the Protocol and Rule 51 of its Rules, to preserve the *status quo*, pending the determination of the main Application.

19. For the avoidance of doubt, this Order shall not in any way prejudice any findings that the Court will make regarding its jurisdiction, as well as the admissibility and the merits of the Application.

For these reasons,

20. The Court, unanimously, orders the Respondent to:

- a) refrain from executing the death penalty against the Applicants pending the determination of the Application.
- b) report to the Court within sixty (60) days from the date of receipt of this Order, on the measures taken to implement the Order.

Deogratius Nicholaus Jeshi v Tanzania (provisional measures)
(2016) 1 AfCLR 649

Deogratius Nicholaus Jeshi v The United Republic of Tanzania

Order (provisional measures), 3 June 2016. Done in English, French, Portuguese and Arabic, the English text being authoritative.

Judges: THOMPSON, NIYUNGEKO, OUGUERGOUZ, TAMBALA, ORE, GUISSÉ, KIOKO, BEN ACHOUR, BOSSA and MATUSSE

Recused under Article 22: RAMADHANI

The Applicant alleged violation of fair trial rights in proceedings that led to the imposition of the death penalty. The Court held that provisional measures were necessary to avoid irreparable harm despite the moratorium adopted by the Respondent State and the fact that no execution had been carried out in a long time.

Provisional measures (death penalty, 16-18)

I. Subject of the Application

1. The Court received, on 22 March 2016, an Application by Deogratius Nicholaus Jeshi (hereinafter referred to as “the Applicant”), instituting proceedings against the United Republic of Tanzania (hereinafter referred to as “the Respondent”), for alleged violations of human rights.

2. The Applicant, who is currently detained at Butimba Central Prison, was sentenced to death by the High Court of Tanzania at Bukoba on 15 July 2010. That death sentence was confirmed by the Court of Appeal, which is the highest Court in Tanzania, on 7 March 2013. The Applicant then made an Application to the Court of Appeal for review

of its judgment in Application No.6 of 2013.

3. The Applicant alleges, *inter alia*, that:

- (a) the Court of Appeal misdirected itself on points of law and occasioned a miscarriage of justice in its judgment by failing to consider that his conviction by the High Court was based on extra-judicial statements obtained from himself and his co-accused;
- (b) the Court of Appeal misdirected itself by considering that the allegedly stolen articles admitted at trial as exhibits were relevant to proving the alleged murder;
- (c) the Court of Appeal caused him prejudice by failing to list his Application for review to be heard, although it was filed in 2013;
- (d) the High Court misdirected itself on points of law in its ruling to admit an exhibit because it overlooked the contradictions in the evidence of prosecution witnesses during the trial within a trial conducted regarding admission of the exhibit;

- (e) the High Court erred by relying on the exhibit to find that he fully participated in the murder as the exhibit only proved theft; and
- (f) both the High Court and the Court of Appeal unfairly convicted him on the basis of prosecution evidence that was not credible.

II. Procedure before the Court

4. The Application was received at the Registry of the Court on 22 March 2016.

5. Pursuant to Rule 36 of the Rules of Court, on 3 May 2016, the Registry served the Application on the Respondent.

III. Jurisdiction

6. In dealing with an Application, the Court has to ascertain that it has jurisdiction on the merits of the case under Articles 3 and 5 of the Protocol.

7. However, in ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction.¹

8. Article 3(1) of the Protocol provides that “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”.

9. The Respondent ratified the Charter on 9 March 1984 and the Protocol on 10 February 2006, and is party to both instruments; it equally deposited, on 29 March 2010, a declaration accepting the competence of the Court to receive cases from individuals and Non-Governmental Organisations, within the meaning of Article 34(6) of the Protocol, read together with Article 5(3) of the Protocol.

10. The alleged violations the Applicant is complaining about are guaranteed under Article 3(1) and (2) and Article 7(1)(c) and (d) of the Charter and the Court therefore has jurisdiction *ratione materiae* over the Application.

11. In light of the foregoing, the Court has satisfied itself that, *prima facie*, it has jurisdiction to deal with the Application.

IV. On the provisional measures

12. In his Application, the Applicant did not request the Court to order provisional measures.

¹ See Application 002/2013 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures dated 15 March 2013) and Application 006/2012 *African Commission on Human and Peoples' Rights v Kenya* (Order for Provisional Measures dated 15 March 2013); Application 004/2011 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures dated 25 March 2011).

13. Under Article 27(2) of the Protocol and Rule 51(1) of the Rules, the Court is empowered to order provisional measures *proprio motu*, “in cases of extreme gravity and when necessary to avoid irreparable harm to persons” and “which it deems necessary to adopt in the interest of the parties or of justice”.

14. It is for the Court to decide in each situation if, in the light of the particular circumstances, it should make use of the power provided for by the aforementioned provisions.

15. The Applicant is on death row and it appears from this Application that there exists a situation of extreme gravity, as well as a risk of irreparable harm to the Applicant.

16. Given the particular circumstances of the case, where the risk of execution of the death penalty will jeopardise the enjoyment of the rights guaranteed under Articles 3(1) and 2 and 7(1)(c) and (d) of the Charter, the Court has decided to invoke its powers under Article 27(2) of the Protocol.

17. The Court finds that the situation raised in the present Application is of extreme gravity and represents a risk of irreparable harm to the rights of the Applicant as protected by Articles 3(1) and (2) and 7(1)(c) and (d) of the Charter, if the death sentence were to be carried out.

18. Consequently, the Court holds that the circumstances require an Order for provisional measures, in accordance with Article 27(2) of the Protocol and Rule 51 of its Rules, to preserve the *status quo*, pending the determination of the main Application.

19. For the avoidance of doubt, this Order shall not in any way prejudice any findings the Court shall make regarding its jurisdiction, the admissibility and the merits of the Application.

For these reasons,

The Court, unanimously, orders the Respondent to:

- a) refrain from executing the death penalty against the Applicant pending the determination of the Application.
- b) report to the Court within sixty (60) days from the date of receipt of this Order, on the measures taken to implement the Order.

Cosma Faustin v Tanzania (provisional measures) (2016) 1 AfCLR 652

Cosma Faustin v The United Republic of Tanzania

Order (provisional measures), 3 June 2016. Done in English, French, Portuguese and Arabic, the English text being authoritative.

Judges: THOMPSON, NIYUNGEKO, OUGUERGOUZ, TAMBAL, ORE, GUISSÉ, KIOKO, BEN ACHOUR, BOSSA and MATUSSE

Recused under Article 22: RAMADHANI

The Applicant alleged violation of fair trial rights in proceedings that led to the imposition of the death penalty. The Court held that provisional measures were necessary to avoid irreparable harm despite the moratorium adopted by the Respondent State and the fact that no execution had been carried out in a long time.

Provisional measures (death penalty, 16-18)

I. Subject of the Application

1. The Court received, on 22 March 2016, an Application by Cosma Faustin (hereinafter referred to as “the Applicant”), instituting proceedings against the United Republic of Tanzania (hereinafter referred to as “the Respondent”), for alleged violations of human rights.

2. The Applicant, who is currently detained at Butimba Central Prison, was sentenced to death by the High Court of Tanzania at Bukoba on 23 August 2006. That death sentence was confirmed by the Court of Appeal, which is the highest Court in Tanzania on 8 November 2011. The Applicant then made an Application to the Court of Appeal for review of its judgment in Application No.6 of 2012.

3. The Applicant alleges, *inter alia*, that:

- (a) the High Court erred by relying on the evidence of prosecution witnesses to convict him because it was not credible, and which was contradictory and inconsistent; and
- (b) the Court of Appeal caused him prejudice occasioning a miscarriage of justice by not considering his Application for a review of the appeal judgment.

II. Procedure before the Court

4. The Application was received at the Registry of the Court on 22 March 2016.

5. Pursuant to Rule 36 of the Rules of Court, on 10 May 2016, the Registry served the Application on the Respondent.

III. Jurisdiction

6. In dealing with an Application, the Court has to ascertain that it has jurisdiction on the merits of the case under Articles 3 and 5 of the Protocol.

7. However, in ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction.¹

8. Article 3(1) of the Protocol provides that “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”.

9. The Respondent ratified the Charter on 9 March 1984 and the Protocol on 10 February 2006, and is party to both instruments; it equally deposited, on 29 March 2010, a declaration accepting the competence of the Court to receive cases from individuals and

Non-Governmental Organisations, within the meaning of Article 34(6) of the Protocol, read together with Article 5(3) of the Protocol.

10. The alleged violations the Applicant is complaining about are guaranteed under Articles 3(2) and Article 7(1)(d) of the Charter and the Court therefore has jurisdiction *ratione materiae* over the Application.

11. In light of the foregoing, the Court has satisfied itself that, *prima facie*, it has jurisdiction to deal with the Application.

IV. On the provisional measures

12. In his Application, the Applicant did not request the Court to order provisional measures.

13. Under Article 27(2) of the Protocol and Rule 51(1) of the Rules, the Court is empowered to order provisional measures *proprio motu* in cases of “extreme gravity and when necessary to avoid irreparable harm to persons” and “which it deems necessary to adopt in the interest of the parties or of justice”.

14. It is for the Court to decide in each situation if, in the light of the particular circumstances, it should make use of the power provided for by the aforementioned provisions.

15. The Applicant is on death row and it appears from this Application that there exists a situation of extreme gravity, as well as a risk of irreparable harm to the Applicant.

16. Given the particular circumstances of the case, where the risk of execution of the death penalty will jeopardise the enjoyment of the

1 See Application 002/2013 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures dated 15 March 2013) and Application 006/2012 *African Commission on Human and Peoples' Rights v Kenya* (Order for Provisional Measures dated 15 March 2013); Application 004/2011 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures dated 25 March 2011).

rights guaranteed under Articles 3(2) and 7(1)(d) of the Charter, the Court has decided to invoke its powers under Article 27(2) of the Protocol.

17. The Court finds that the situation raised in the present Application is of extreme gravity and represents a risk of irreparable harm to the rights of the Applicant as protected by Articles 3(2) and 7(1)(d) of the Charter, if the death sentence were to be carried out.

18. Consequently, the Court holds that the circumstances require an Order for provisional measures, in accordance with Article 27(2) of the Protocol and Rule 51 of its Rules, to preserve the status quo, pending the determination of the main Application.

19. For the avoidance of doubt, this Order shall not in any way prejudice any findings the Court shall make regarding its jurisdiction, the admissibility and the merits of the Application.

For these reasons,

The Court, unanimously, orders the Respondent to:

- a) refrain from executing the death penalty against the Applicant pending the determination of the Application.
- b) report to the Court within sixty (60) days from the date of receipt of this Order, on the measures taken to implement the Order.

Joseph Mukwano v Tanzania (provisional measures) (2016) 1 AfCLR 655

Joseph Mukwano v The United Republic of Tanzania

Order (provisional measures), 3 June 2016. Done in English, French, Portuguese and Arabic, the English text being authoritative.

Judges: THOMPSON, NIYUNGEKO, OUGUERGOUZ, TAMBALA, ORE, GUISSÉ, KIOKO, BEN ACHOUR, BOSSA and MATUSSE

Recused under Article 22: RAMADHANI

The Applicant alleged violation of fair trial rights in proceedings that led to the imposition of the death penalty. The Court held that provisional measures were necessary to avoid irreparable harm despite the moratorium adopted by the Respondent State and the fact that no execution had been carried out in a long time.

Provisional measures (death penalty, 16-18)

I. Subject of the Application

1. The Court received, on 5 April 2016, an Application by Joseph Mukwano (hereinafter referred to as “the Applicant”), instituting proceedings against the United Republic of Tanzania (herein after referred to as “the Respondent”), for alleged violations of human rights.

2. The Applicant, who is currently detained at Butimba Central Prison, was sentenced to death by the High Court of Tanzania at Bukoba on 15 July 2010. That death sentence was confirmed by the Court of Appeal, which is the highest Court in Tanzania, on 7 March 2013. The Applicant then made an Application to the Court of Appeal for review of its judgment in 2013.

3. The Applicant alleges, *inter alia*, that:

- (a) the Court of Appeal erred by confirming his conviction by the High Court although the conviction was wrongly based on possession of stolen articles; and
- (b) the Court of Appeal erred by confirming his conviction by the High Court although the conviction was based on extra-judicial statements/ confessions provided by himself and his co-accused.

II. Procedure before the Court

4. The Application was received at the Registry of the Court on 5 April 2016.

5. Pursuant to Rule 36 of the Rules of Court, on 10 May 2016, the Registry served the Application on the Respondent.

III. Jurisdiction

6. In dealing with an Application, the Court has to ascertain that it has jurisdiction on the merits of the case under Articles 3 and 5 of the Protocol.

7. However, in ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction.¹

8. Article 3(1) of the Protocol provides that “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”.

9. The Respondent ratified the Charter on 9 March 1984 and the Protocol on 10 February 2006, and is party to both instruments; it equally deposited, on 29 March 2010, a declaration accepting the competence of the Court to receive cases from individuals and Non-Governmental Organisations, within the meaning of Article 34(6) of the Protocol read together with Article 5(3) of the Protocol.

10. The alleged violations the Applicant is complaining about are guaranteed under Article 3(2) of the Charter and the Court therefore has jurisdiction *ratione materiae* over the Application.

11. In light of the foregoing, the Court has satisfied itself that, *prima facie*, it has jurisdiction to deal with the Application.

IV. On the provisional measures

12. In his Application, the Applicant did not request the Court to order provisional measures.

13. Under Article 27(2) of the Protocol and Rule 51 (1) of the Rules, the Court is empowered to order provisional measures *proprio motu* in cases of extreme gravity and when necessary to avoid irreparable harm to persons” and “which it deems necessary to adopt in the interest of the parties or of justice”.

14. It is for the Court to decide in each situation if, in the light of the particular circumstances, it should make use of the power provided for by the aforementioned provisions.

15. The Applicant is on death row and it appears from this Application that there exists a situation of extreme gravity, as well as a risk of irreparable harm to the Applicant.

16. Given the particular circumstances of the case, where the risk of execution of the death penalty will jeopardise the enjoyment of the

¹ See Application 002/2013 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures dated 15 March 2013) and Application 006/2012 *African Commission on Human and Peoples' Rights v Kenya* (Order for Provisional Measures dated 15 March 2013); Application 004/2011 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures dated 25 March 2011).

rights guaranteed under Article 3(2) of the Charter, the Court has decided to invoke its powers under Article 27(2) of the Protocol.

17. The Court finds that the situation raised in the present Application is of extreme gravity and represents a risk of irreparable harm to the rights of the Applicant as protected by Article 3(2) of the Charter, if the death sentence were to be carried out.

18. Consequently, the Court holds that the circumstances require an Order for provisional measures, in accordance with Article 27(2) of the Protocol and Rule 51 of its Rules, to preserve the status quo, pending the determination of the main Application.

19. For the avoidance of doubt, this Order shall not in any way prejudice any findings the Court shall make regarding its jurisdiction, the admissibility and the merits of the Application.

For these reasons,

20. The Court, unanimously, orders the Respondent to:

- a) refrain from executing the death penalty against the Applicant pending the determination of the Application.
- b) report to the Court within sixty (60) days from the date of receipt of this Order, on the measures taken to implement the Order.

Amini Juma v Tanzania (provisional measures) (2016) 1 AfCLR 658

Amini Juma v The United Republic of Tanzania

Order (provisional measures), 3 June 2016. Done in English, French, Portuguese and Arabic, the English text being authoritative.

Judges: THOMPSON, NIYUNGEKO, OUGUERGOUZ, TAMBALA, ORE, GUISSÉ, KIOKO, BEN ACHOUR, BOSSA and MATUSSE

Recused under Article 22: RAMADHANI

The Applicant alleged violation of fair trial rights in proceedings that led to the imposition of the death penalty. The Court held that provisional measures were necessary to avoid irreparable harm despite the moratorium adopted by the Respondent State and the fact that no execution had been carried out in a long time.

Provisional measures (death penalty, 16-19)

I. Subject of the Application

1. The Court received, on 13 April 2016, an Application by Amini Juma (hereinafter referred to as “the Applicant”), instituting proceedings against the United Republic of Tanzania (hereinafter referred to as “the Respondent”), for alleged violations of human rights.

2. The Applicant is a convict, currently detained at Maweni Central Prison in Tanga, Tanzania. The Applicant was convicted for murder by the High Court of Tanzania at Arusha on 18 September 2008 and sentenced to life imprisonment. The Applicant appealed to the Court of Appeal of Tanzania which is the highest Court in Tanzania, in

Criminal Appeal No. 303 of 2008, and his appeal was dismissed on 17 October 2011 and his life imprisonment sentence set aside and revised with the mandatory sentence to suffer death by hanging.

3. The Applicant states that he lodged an Application for review at the Court of Appeal but that the Court of Appeal has delayed in the review of its decision until today.

4. The Applicant states, *inter alia*, that:

- (a) The evidence used to convict him was facial identification and that the description by Prosecution Witness 1 was very scanty and that it could fit any other person.
- (b) There were contradictions in the evidence. He states that Exhibit P3, the motorcycle found in the possession of the Applicant was a HONDA 250, yet Prosecution Witness 2 identified it as a YAMAHA.
- (c) The Court of Appeal of Tanzania did not fully evaluate the evidence on record as they were required to do.

- (d) The Court of Appeal misled itself as to the location of the crime. He states that at the committal proceedings, the crime was alleged to have occurred at Kivuyo at Meserani Village in Monduli District, whereas in the judgment of the Court of Appeal, the scene of the crime is stated to be Meserani Village in Monduli. This, the Applicant states instead that he was arrested at Mererani in Simanjiro District and Manyara Region. The Applicant states that this misdirection created the false impression that he was arrested near the scene, yet he was arrested more than one hundred (100) kilometres away.
- (e) The Applicant contends there were undue delays in the hearing of his Application for review at the Court of Appeal and discrepancies in trial and appellate proceedings.

II. Procedure before the Court

5. The Application was received at the Registry of the Court on 13 April 2016.

6. Pursuant to Rule 36 of the Rules of Court, by a notice dated 31 May 2016, the Registry served the Application on the Respondent.

III. Jurisdiction

7. In dealing with an Application, the Court has to ascertain that it has jurisdiction on the merits of the case under Articles 3 and 5 of the Protocol.

8. However, in ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction.¹

9. Article 3(1) of the Protocol provides that “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”.

10. The Respondent ratified the Charter on 9 March 1984 and the Protocol on 10 February 2006, and is party to both instruments; it equally deposited, on 29 March 2010, a declaration accepting the competence of the Court to receive cases from individuals and Non-Governmental Organisations, within the meaning of Article 34(6) of the Protocol read together with Article 5(3) of the Protocol.

11. The alleged violations the Applicant is complaining about are guaranteed under Articles 3 and 7(1) of the Charter and the Court therefore has jurisdiction *ratione materiae* over the Application.

12. In light of the foregoing, the Court has satisfied itself that, *prima facie*, it has jurisdiction to deal with the Application.

¹ See Application 002/2013 *African Commission on Human and Peoples’ Rights v Libya* (Order for Provisional Measures dated 15 March 2013) and Application 006/2012 *African Commission on Human and Peoples’ Rights v Kenya* (Order for Provisional Measures dated 15 March 2013); Application 004/2011 *African Commission on Human and Peoples’ Rights v Libya* (Order for Provisional Measures dated 25 March 2011).

IV. On the provisional measures

13. In his Application, the Applicant did not request the Court to order provisional measures.

14. Under Article 27(2) of the Protocol and Rule 51(1) of the Rules, the Court is empowered to order provisional measures *proprio motu*, “in cases of extreme gravity and when necessary to avoid irreparable harm to persons” and “which it deems necessary to adopt in the interest of the parties or of justice”.

15. It is for the Court to decide in each situation if, in the light of the particular circumstances, it should make use of the power provided for by the aforementioned provisions.

16. The Applicant is on death row and it appears from this Application that there exists a situation of extreme gravity, as well as a risk of irreparable harm to the Applicant.

17. Given the particular circumstances of the case, where there is a risk of execution of the death penalty which may jeopardise the enjoyment of the rights guaranteed under Articles 3 and 7(1) of the Charter, the Court has decided to invoke its powers under Article 27(2) of the Protocol.

18. The Court finds that the situation raised in the present Application is of extreme gravity and represents a risk of irreparable harm to the rights of the Applicant as protected by Articles 3 and 7(1) of the Charter, if the death sentence were to be carried out.

19. Consequently, the Court holds that the circumstances require an Order for provisional measures, in accordance with Article 27(2) of the Protocol and Rule 51 of its Rules, to preserve the status quo, pending the determination of the main Application.

20. For the avoidance of doubt, this Order shall not in any way prejudice any findings the Court shall make regarding its jurisdiction, the admissibility and the merits of the Application.

For these reasons,

21. The Court, unanimously, orders the Respondent to:

a) refrain from executing the death penalty against the Applicant pending the determination of the Application.

b) report to the Court within sixty (60) days from the date of receipt of this Order, on the measures taken to implement the Order.

Syndicat des anciens travailleurs du group de laboratoire Australian Laboratory Services, ALS-Bamako (Morila) v Mali (2016) 1 AfCLR 661

Syndicat des anciens travailleurs du group de laboratoire Australian Laboratory Services, ALS-Bamako (Morila) v The Republic of Mali

Decision, 5 September 2016. Done in English, French and Portuguese, the French text being authoritative.

Judges: RAMADHANI, THOMPSON, NIYUNGEKO, OUGUERGOUZ, TAMBALA, ORÉ, GUISSÉ, KIOKO, BEN ACHOUR, BOSSA and MATUSSE

The Application did not comply with the Court's Rules. The Court referred the Applicant to an NGO for assistance. However, the Application was not redrafted to comply with the Rules and was therefore struck out.

Admissibility (insufficient details of alleged violations, 9, 28; assistance for the Applicant requested from NGO, 11)

I. Parties

1. The Applicant is the *Syndicat des Anciens Travailleurs du Groupe de Laboratoire Australian Laboratory Services, ALS-Bamako (Morila)*, a private limited liability company operating in the mining sector and based in Bamako, Mali.

2. The Applicant is affiliated to the *Fédération Nationale des Mines et de l'Energie (FENAME)*, which in turn is affiliated to the *Confédération Syndicale des Travailleurs du Mali (CSTM)*.

3. The Respondent ratified the African Charter on Human and Peoples' Rights (hereinafter, referred to as "the Charter") on 21 December 1981 and deposited the instrument of ratification on 22 January 1982. The Respondent also ratified 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") on 10 May 2000 and deposited the instrument of ratification on 20 June 2000. On 19 February 2010, it deposited the declaration accepting the competence of the Court to receive cases from individuals and non-governmental organisations, in accordance with Article 34(6) of the Protocol.

II. Subject of the decision

4. On 29 December 2014, the Secretary General of the *Fédération Nationale des Mines et de l'Energie (FENAME)* seized the Court on behalf of the Applicant.

5. The initial Application was filed against the top management of the company. The Applicant claimed that the employees had knowingly been lead contaminated and unfairly dismissed, that the former workers asked for compensation for damages suffered and for the company to pay for their healthcare expenses as well as those of their families.

III. Procedure

6. By a letter of 7 January 2015, the Registry acknowledged receipt of the Application and informed the Applicant that it had put the registration of the Application on hold pending the submission by the Applicant of further information on the Respondent's identity, as well as the submission of evidence of compliance with Rule 34 (1), (2) and (4) of the Rules of Court.

7. On 11 February 2015, the Applicant transmitted a set of reports and documents relating to the workers' lead-contamination.

8. By a letter dated 16 February 2015, the Applicant redrafted the Application, this time around, against, Mali in lieu of the *Groupe Laboratoires ALS Mali SARL*.

9. By a letter of 19 February 2015, the Registry drew the attention of the Applicant to the fact that the same still did not comply with the relevant provisions of the Protocol and of the Rules of the Court, in particular, Rule 34 (4), and advised the Applicant to seek assistance to re-draft and re-submit the Application.

10. Following the Court's decision, at its 34th Ordinary Session, held from 8 to 19 September 2014, the Registry proceeded to register the Application.

11. At its 36th Ordinary Session, held from 9 to 27 March 2015, the Court examined the Application and instructed the Registry to request the International Human Rights Federation (IHRF) to assist the Applicant.

12. By a letter of 8 April 2015, the Registry wrote to IHRF requesting it to provide legal assistance to the Applicant.

13. By an e-mail dated 10 June 2015, IHRF wrote to the Registry indicating its acceptance to provide legal assistance to the Applicant.

14. At its 38th Ordinary Session, held from 31 August to 18 September 2015, the Court examined the Application and concluded that it still did not conform to the requirements of the Rules and noted that IHRF had not formally responded to the request for legal assistance.

15. By a letter of 22 September 2015, the Registry informed IHRF that the Court had noted the lack of a formal response to the request for legal assistance and urged it to do so within 30 days.

16. By an e-mail of 29 September 2015, IHRF informed the Registry that it was gathering information on the case and asked for a few more days to respond to the request

17. At its 39th Ordinary Session, held from 9 to 20 November 2015, the Court directed the Registry to forward a letter to IHRF, requesting the

latter to provide its response to the request for legal assistance within 15 days.

18. By a letter of 13 November 2015, the Registry asked IHRF to formally inform the Court of its decision regarding the request within 15 days.

19. By a letter of 13 November 2015, IHRF accepted to provide legal assistance to the Applicant.

20. In the same letter, IHRF reported that the Application on the payment of claims was being handled domestically, through an out-of-court settlement between the parties, and requested information regarding the Application on the lead poisoning.

21. By a letter of 3 December 2015, the Registry responded and informed IHRF, with the Applicant in copy, that there was only one Application before the Court, that of 16 February 2015, which had been submitted in replacement of the Application dated 29 December 2014, which the Court requested the Applicant to recast for lack of conformity to the Rules.

22. By a letter dated 7 December 2015, the Applicant informed the Registry that it was not aware of the agreement IHRF referred to in its letter dated 13 November 2015, given that the matter was pending before the domestic courts.

23. By a letter dated 11 December 2015, the Applicant requested the Court to withdraw the said Application on the lead poisoning because the domestic remedies had not been exhausted.

24. By a letter of 4 January 2016, the Registry reminded the Applicant that there was only one Application before the Court, that of 16 February 2015, which the Court had indicated needed to be recast and that the Applicant should do so with the assistance of a Counsel.

25. At its 40th Ordinary Session, held from 29 February to 18 March 2016, the Court instructed the Registry to draw the attention of the Applicant to the need to reformulate the Application so as to comply with the applicable provisions of the Protocol and the Rules, failing which the relevant provisions therein would be invoked.

26. By a letter of 21 March 2016, the Registry requested the Applicant, with its Legal Representative in copy, to approach the latter in order to recast the Application, so as to conform to the provisions of Rules 34 (1), (2) and (4) of the Rules of the Court, failing which the relevant provisions therein would be invoked.

27. By a letter of 4 May 2016, the Registry drew the attention of the Applicant, with its Legal Representative in copy, to the fact that it had not reformulated the Application, indicating that it should do so within 15 days, failing which the relevant provisions of the Rules of the Court would be invoked.

28. The Applicant did not submit the reformulated Application within the above referred time.

For these reasons,

i. The Court notes that its decision to register the Application hinged on the premise that the deficiencies identified on the same would be rectified. To that end, the Court provided legal assistance to the Applicant through IHRF.

ii. The Court notes that, even after having been provided with legal assistance, the Applicant has not reformulated the Application, notwithstanding successive extensions of time for it to do so.

iii. The Court notes further that the various communications addressed to the Applicant and their Counsel were duly served at the designated addresses.

iv. The Court concludes that the non-reformulation of the Application, in order for it to conform to the provisions of Article 34 (1), (2) and (4) of the Rules, points to a lack of interest on the part of the Applicant and their Counsel in pursuing the matter before the Court.

v. The Court, making use of its inherent powers, decides, unanimously, that the Application be and the same is hereby, struck out, without prejudice to the possibility of the Applicant submitting a new Application on the same matter.

Oscar Josiah v Tanzania (provisional measures) (2016) 1 AfCLR 665

Oscar Josiah v The United Republic of Tanzania

Order (provisional measures), 18 November 2016. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSÉ, BEN ACHOUR, BOSSA, MATUSSE, MENGUE and MUKAMULISA

The Applicant alleged violation of fair trial rights in proceedings that led to the imposition of the death penalty. The Court held that provisional measures were necessary to avoid irreparable harm despite the moratorium adopted by the Respondent State and the fact that no execution had been carried out in a long time.

Provisional measures (death penalty, 16-18)

I. Subject of the Application

1. The Court received, on 2 September 2016, an Application from Oscar Josiah (hereinafter referred to as “the Applicant”), instituting proceedings against the United Republic of Tanzania (hereinafter referred to as “the Respondent”), for alleged violations of human rights.
2. The Applicant, who is currently detained at Butimba Central Prison, was sentenced to death by the High Court of Tanzania at Bukoba on 2 October 2015. That death sentence was confirmed by the Court of Appeal, which is the highest Court in Tanzania, on 25 February 2016.
3. The Applicant alleges, *inter alia*, that the High Court and the Court of Appeal erred when they failed to consider the inconsistencies and contradictions in the testimonies of the prosecution witnesses, and also went further to convict the Applicant using the evidence of PW2 (wife of the accused) whose evidence kept changing throughout.

II. Procedure before the Court

4. The Application was received at the Registry of the Court on 2 September 2016.
5. Pursuant to Rule 36 of the Rules of Court, on 15 November 2016, the Registry served the Application on the Respondent.

III. Jurisdiction

6. In dealing with an Application, the Court has to ascertain that it has jurisdiction on the merits of the case under Articles 3 and 5 of the Protocol.

7. However, in ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction.¹

8. Article 3(1) of the Protocol provides that “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”.

9. The Respondent ratified the Charter on 9 March 1984 and the Protocol on 10 February 2006, and is party to both instruments; it equally deposited, on 29 March 2010, a declaration accepting the competence of the Court to receive cases from individuals and Non-Governmental Organisations, within the meaning of Article 34(6) of the Protocol read together with Article 5(3) of the Protocol.

10. The alleged violations the Applicant is complaining about are guaranteed under Articles 3(2) and 7(1)(c) of the Charter, and the Court therefore has jurisdiction *ratione materiae* over the Application.

11. In light of the foregoing, the Court has satisfied itself that, *prima facie*, it has jurisdiction to deal with the Application.

IV. On the Provisional Measures

12. In his Application, the Applicant did not request the Court to order Provisional Measures.

13. Under Article 27(2) of the Protocol and Rule 51(1) of the Rules, the Court is empowered to order provisional measures *proprio motu* “in cases of extreme gravity and when necessary to avoid irreparable harm to persons” and “which it deems necessary to adopt in the interest of the parties or of justice”.

14. It is for the Court to decide in each situation if, in the light of the particular circumstances, it should make use of the power provided for by the aforementioned provisions.

15. The Applicant is on death row and it appears from this Application that there exists a situation of extreme gravity, as well as a risk of irreparable harm to the Applicants.

16. Given the particular circumstances of the case, where the risk of execution of the death penalty will jeopardise the enjoyment of the rights guaranteed under Articles 3(2) and 7(1)(c) of the Charter, the Court has decided to invoke its powers under Article 27(2) of the Protocol.

17. The Court finds that the situation raised in the present Application is of extreme gravity and represents a risk of irreparable harm to the

¹ See Application 002/2013 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures dated 15 March 2013) and Application 006/2012 *African Commission on Human and Peoples' Rights v Kenya* (Order for Provisional Measures dated 15 March 2013); Application 004/2011 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures dated 25 March 2011).

rights of the Applicant as protected by Articles 3(2) and 7(1)(c) of the Charter, if the death sentence were to be carried out.

18. Consequently, the Court holds that the circumstances require an Order for provisional measures, in accordance with Article 27(2) of the Protocol and Rule 51 of its Rules, to preserve the *status quo*, pending the determination of the main Application.

19. For the avoidance of doubt, this Order shall not in any way prejudice any findings the Court shall make regarding its jurisdiction, the admissibility and the merits of the Application.

For these reasons,

20. The Court, unanimously, orders the Respondent to:

a) refrain from executing the death penalty against the Applicant pending the determination of the Application.

b) report to the Court within sixty (60) days from the date of receipt of this Order, on the measures taken to implement the Order.

Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (2016) 1 AfCLR 668

Actions pour la Protection des Droits de l'Homme (APDH) v The Republic of Côte d'Ivoire

Judgment, 18 November 2016. Done in English and French, the French text being authoritative.

Judges: KIOKO, NIYUNGEKO, OUGUERGOUZ, RAMADHANI, TAMBALA, THOMPSON, GUISSÉ, BEN ACHOUR, BOSSA and MATUSSE

Recused under Article 22: ORE

The case dealt with the law regulating the composition, organisation and functioning of the Ivorian Electoral Commission. The Court held that the African Democracy Charter and ECOWAS Democracy Protocol were human rights instruments in terms of Article 3 of the Court Protocol. On the merits, the Court held that these instruments did not prescribe any precise characteristics of an independent and impartial electoral body. An electoral body would, however, be deemed independent if 'it has administrative and financial autonomy; and offers sufficient guarantees of its members' independence and impartiality'. In the case at hand the imbalance in representation in favour of the ruling coalition amounted to a violation of its obligation to establish an independent and impartial electoral management body.

Jurisdiction (human rights instruments, 49, 57-61, African Democracy Charter and ECOWAS Democracy Protocol, 63-65,

Admissibility (exhaustion of local remedies: availability, effectiveness, sufficiency, 93; administrative jurisdiction, 96-98; constitutional validity decided by Constitutional Council, 101, outcome of local remedies already known, 103)

Political participation (independent and impartial electoral body, 116-118; balanced composition of electoral body, 125-133, 150)

Equal protection of the law (political candidates, 151)

Separate opinion: OUGUERGOUZ

Political participation (distinguish between impartiality and independence, 14-16, 22)

Remedies (Court should not go beyond Applicant's prayers, 30-31)

I. The Parties

1. The Applicant, *Actions pour la Protection des Droits de l'Homme*, herein-after referred to as "APDH", presents itself as an Ivorian Non-Governmental Human Rights Organization established in March 2003, for the promotion, protection and defence of human rights. It also declares that it has Observer Status before the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission").

2. The Respondent State, the Republic of Côte d'Ivoire, became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter on Human Rights") on 31 March 1992, and to 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") on 25 January 2004 (date of its entry into force). The Respondent State deposited the declaration accepting the jurisdiction of the Court to receive cases from individuals and non-governmental organizations on 23 July 2013.

II. Subject of the Application

3. The Applicant has seized the Court with a prayer to rule that Law No 2014 335 amending Law No 2001-634 of 9 October 2001, providing for the composition, organization, duties and functioning of the Independent Electoral Commission (IEC) is not in conformity with the international human rights instruments ratified by the Respondent State, more particularly the African Charter on Democracy, Elections and Governance (hereinafter referred to as "the African Charter on Democracy") and to the ECOWAS Protocol on Democracy and Good Governance supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management and Resolution (hereinafter referred to as the "ECOWAS Democracy Protocol") and consequently order the Respondent State to amend the law in question in light of its international commitments.

A. Context and facts of the matter

4. This matter has its origin in the adoption by the National Assembly of the State of Côte d'Ivoire on 28 May 2014 of Law No 2014-335, relating to the Independent Electoral Commission of the State of Côte d'Ivoire.

5. It is noteworthy that the Ivorian Electoral body was established by Edict No 2000-551 of 9 August 2000. Prior to that date, elections were organized and managed by the State through the Ministry of Internal Affairs. The Edict was subsequently amended on several occasions.

6. As indicated in Article 17 of the aforesaid Edict, the National Electoral Commission (NEC) was a transitional body with the task to organize the presidential, legislative and municipal elections of 2000. Its mandate was expected to come to an end not later than fifteen (15) days after the proclamation of the results of the municipal elections.

7. After the above elections, and pursuant to the establishment of the institutions provided by the Constitution of 1 August 2000, the

Parliament, on 9 October 2001, adopted Law No 2001-634 establishing the Independent Electoral Commission (IEC).

8. The attempted military coup d'état of 19 September 2002 which after its failure transformed into a military-political rebellion did not make it possible to see the new IEC at work.

9. In the ensuing political negotiations¹ aimed at resolving the crisis, Parliament, on 14 December 2004, adopted Law No 2004-642 amending the above mentioned Law No 2001-634 of 9 October 2001.

10. This IEC was composed of the representatives of the political parties as well as those of the armed movements, members of the rebellion.

11. Notwithstanding the advent of the said Law, it was only after the conclusion of the Pretoria Agreement² and the signing of Presidential Decisions Nos. 200506/PR of 15 July 2005 and 2005-11/PR of 29 August 2005 that it became possible to establish the Central Commission of the IEC in its current configuration.

12. This IEC was also temporary because Article 53 of the Presidential decision 2005-06, above mentioned, provided that the mandate of members of the said IEC was supposed to expire at the end of the general elections of 2010.

13. It is therefore pursuant to the above provision that the Government adopted and got the National Assembly to vote on 28 May 2014, that is, slightly over one year before the general elections of 2015, the aforementioned Law No 2014-335 impugned by the Applicant in the instant case.

14. Two days after the adoption of the Law by the National Assembly, Mr Kramo Kouassi, acting on behalf of a group of 29 parliamentarians of the National Assembly, on 30 May 2014, seized the Constitutional Council of Côte d'Ivoire with a prayer to declare four (4) provisions of the aforesaid law (Articles 5, 15, 16 and 17) unconstitutional. According to him, the provisions in question violate the right to equality before the law enshrined in the Ivorian Constitution in its Article 2 which provides that "All human beings are born free and equal before the law and Article 33(1) which provides that "the suffrage shall be universal, free, equal and secret".

15. Mr Kramo Kouassi alleged that the presence within the IEC Central Commission of a personal representative of the President of the Republic and a personal representative of the President of the National Assembly constitutes a breach of the principle of equality of candidates given the fact that, according to him, the first can stand as a candidate to succeed himself, and the latter also fulfils the eligibility requirements set forth by the electoral law.

1 These negotiations which resulted in the Agreement known as Linas-Marcoussis Agreement or Kléber Agreement took place in a meeting held from 15 to 26 January 2003 at Linas-Marcoussis, France, with the aim to put an end to the civil war which had been raging since 2002.

2 The Agreement was signed on 6 April 2005.

16. He maintained further that the representation in the IEC, of the Minister in charge of Territorial Administration, the Minister in charge of Economy and Finance, the High Judicial Council, the region Prefect, the Department Prefect and the Sub-Prefect is superfluous in the sense that the law governing the IEC in its Article 37, provides that the latter shall be accorded Government assistance in terms of administrative, financial and technical staff, whose support is required for the proper functioning of its services; that the said representation is not only worthless but is also unfair in as much as it creates, in favour of the President of the Republic, an unequal treatment on account of the over-representation of the latter within the IEC.

17. Consequently, he prayed the Constitutional Council to declare that the aforementioned provisions of the impugned law are not in conformity with the Constitution.

18. In a Decision rendered on 16 June 2014, the Constitutional Council dismissed Mr Kouassi's prayers and declared that the impugned provisions were in conformity with the Constitution. The law was then promulgated on 18 June 2014.

19. It was in this context that APDH, on 12 July 2014, seized the Court with the instant case.

B. Alleged violations

20. The Applicant alleges that the Respondent State violated its commitment to establish an independent and impartial electoral body as well as its commitment to protect the right to equality before the law and to equal protection by the law, as prescribed in particular by Articles 3 and 13(1) and (2) of the Charter on Human Rights, Articles 10(3) and 17(1) of the African Charter on Democracy, Article 3 of the ECOWAS Democracy Protocol, Article 1 of the Universal Declaration of Human Rights and Articles 26 of the International Covenant on Civil and Political Rights (herein-after referred to as "the Covenant").

III. Procedure before the Court

21. The Application was received at the Registry on 12 July 2014.

22. On 26 September 2014, the Registry notified the Respondent State that an Application had been filed against it, and invited the latter to submit a Response thereto within 60 days of receipt of the notification pursuant to Rule 37 of the Rules.

23. On 7 October 2014, the Registry forwarded a copy of the Application to the other entities mentioned in Rule 35 of the Rules.

24. On 9 January 2015, the Registry contacted the Respondent State, drawing its attention to the expiry of the 60 days' timeframe allowed for it to file its Response to the Application.

25. On 15 April 2015, the Applicant transmitted additional pleadings to its initial Application. On 8 May 2015, the Applicant prayed the Court to enter a judgment in default on the ground that the Respondent had, up till then, failed to file its Response to the Application.

26. At its 37th Ordinary Session held from 18 May to 5 June 2015, the Court received the Respondent State's Response and, in the interest of justice, decided to accept the same even though it was submitted out of time.

27. On 2 June 2015, the Respondent's Response was transmitted to the Applicant who, by email dated 8 June 2015, notified the Registry of its intention not to file a Reply to the Respondent State's Response. The Applicant prayed the Court to render its decision on the basis of the initial Application, the additional pleadings and the annexes submitted on 15 April 2015.

28. At its 38th Ordinary Session held from 31 August to 18 September 2015, the Court decided, pursuant to Rule 45(2) of the Rules³ and paragraph 45 of its Practice Directions, to solicit the opinion of the African Union Commission and the African Institute for International Law on the question as to whether the African Charter on Democracy is a human rights instrument within the meaning of Article 3 of the Protocol.

29. The two institutions transmitted their opinions on 29 October 2015 and 7 January 2016, respectively.

30. On 8 January 2016, the Registry notified the Parties of the closure of written procedure and of the date set for a Public Hearing.

31. On 8 February 2016, the Respondent State filed, out of time, additional observations in which it raised objections to the admissibility of the Application. After deliberation, the Court decided to accept the observations, in the interest of justice.

32. On 15 February 2016, the Registry transmitted the Respondent State's observations to the Applicant and invited the latter to file its observations.

33. On 18 May 2016, the Registry obtained from the Commission confirmation that the NGO, APDH, indeed has Observer Status before it, in accordance with Article 5(3) of the Protocol.

34. On 3 March 2016, the Court had a Public Hearing during which the Judges⁴ heard the oral pleadings of the Parties:

For the Applicant:

Mr Guizo Bernard TAKORE, President, APDH Judicial Committee.

For the Respondent State:

- 1) Mr Moussa SEFON, Justice Advisor, Office of the President of the Republic;
- 2) Mr Mamadou DIANE, Human Rights and Humanitarian Action Advisor, Office of the President of the Republic;

3 The Court may ask any person or institution of its choice to obtain information, express an opinion or submit a report to it on any specific point.

4 The Court on its own motion may invite an individual or organization to act as *amicus curiae* in a particular matter pending before it.

- 3) Mr Ibourahéma M. BAKAYOKO, Magistrate; Director, Protection of Human Rights and Public Freedoms, Ministry of Human Rights and Public Freedoms.

35. At the same Hearing, the Judges put questions to which the Parties provided answers.

IV. Prayers of the parties

36. The following prayers were presented by the Parties in the written procedure:

The Applicant:

37. In its Application, APDH prays the Court to rule that the aforementioned Law No 2014-335 is not in conformity with the African Charter on Democracy and, consequently, order the State of Côte d'Ivoire to review the said law in light of its international commitments.

38. In its additional pleadings, the Applicant prays the Court to:

- i) Declare and rule that its Application is well founded;
- ii) Declare and rule that the Ivorian Law No 2014-335 of 5 June, 2014 (sic) on the Independent Electoral Commission especially the new Articles 5, 15, 16 and 17 thereof, violates the right to equality of everyone before the law as well as the right to an independent and impartial national electoral body with responsibility for management of elections as provided under Articles 10(3) and 17(1) of the African Charter on Democracy;
- iii) Consequently, order the State of Côte d'Ivoire to make its electoral body compliant with the provisions of the aforesaid Charter.

The Respondent:

39. In its Response, the Respondent State prays the Court to rule that the Application is unfounded and, consequently, order the Applicant to withdraw the same.

40. In its additional pleadings, the Respondent State prays the Court to declare the Application inadmissible for failure to exhaust local remedies and if the Court declares the Application admissible, to rule that it is not founded in law and consequently dismiss the same.

41. The Parties reiterated their prayers during the Public Hearing.

V. Jurisdiction of the Court

42. According to Rule 39(1) of the Rules, the Court shall conduct a preliminary examination of its jurisdiction; and shall, in that regard, satisfy itself that it, successively, has personal, material, temporal and territorial jurisdiction to hear the case.

A. Personal jurisdiction

43. The Protocol provides that the State against which an action has been instituted must not only be a Party to the Protocol, but also, with respect to cases instituted by individuals or NGOs, it must have made and deposited the declaration accepting the jurisdiction of the Court to

receive such cases under Article 34(6) of the Protocol read together with Article 5(3) thereof.

44. In the instant case, the Court has noted that the Respondent State became a Party to the Protocol on 25 January 2004 and deposited the declaration contemplated under Article 34(6) of the Protocol on 23 July 2013. The Court therefore has jurisdiction to hear the instant case in respect of the Respondent State.

45. Regarding the Applicant, the Court observes that the Application was filed on behalf of an Ivorian Non-Governmental Organization, APDH, which has Observer Status before the Commission.

46. It follows from the foregoing that the Court's personal jurisdiction in the instant case, with respect to both the Respondent and the Applicant, has been established.

B. Material jurisdiction

47. Article 3(1) of the Protocol provides that

"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 State concerned".

48. The Court has already noted that the Respondent State is a Party to the Charter on Human Rights and the Protocol. It notes also that the Respondent State became a Party to the Covenant on 26 March 1992, the ECOWAS Democracy Protocol on 31 July 2013, and to the African Charter on Democracy on 28 November 2013.

49. The Court however also has to satisfy itself that these two instruments, namely: the African Charter on Democracy and the ECOWAS Democracy Protocol, are human rights instruments within the meaning of Article 3 of the Protocol.

50. The Court recalls that it sought the opinion of the African Union Commission and the African Institute for International Law on this issue.

51. The African Union Commission points out that the objectives of the African Charter on Democracy as spelt out in Article 2(1) thereof include, to "promote adherence, by each State Party, to the universal values and principles of democracy and respect for human rights"; that by Article 3(1) of the same Charter, State Parties undertake to implement it in accordance with the principles of "respect for human rights and democratic principles"; that as per Article 4 of the Charter on Human Rights, State Parties commit themselves to promote democracy, the principle of the rule of law and human rights and recognize popular participation through universal suffrage as the inalienable right of the people; that furthermore, as per Article 6, State Parties shall ensure that citizens enjoy fundamental freedoms and human rights taking into account their universality, interdependence and indivisibility.

52. The African Union Commission states in conclusion that, in view of the foregoing and other provisions, the African Charter on Democracy

may be described as “a relevant human rights instrument” which the Court has jurisdiction to interpret and implement

53. For its part, the African Institute for International Law notes that the link between democracy and human rights has been established by several international human rights instruments, especially the Universal Declaration of Human Rights in its Article 21(3) which provides that:

“The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”

54. The Institute also contends that the African Charter on Democracy is a human rights instrument in the sense that it confers rights and freedoms to individuals. According to the Institute, this Charter explains, interprets and enforces the rights and freedoms enshrined in the Charter on Human Rights, the Constitutive Act of the African Union, the Grand Bay Declaration and Plan of Action (1999), the Declaration on the Principles Governing Democratic Elections in Africa⁵ and the Kigali Declaration of 2003. It declares that this Charter also forms part of the continental human rights architecture and is integrated into several decisions of the African Commission on Human and Peoples' Rights. According to the Institute, the said legal instruments should not be read separately but rather together.

55. The Institute states in conclusion that, in view of the aforesaid, a State which does not honour its obligations under Article 17 of the African Charter on Democracy is in breach of several human rights including the individual right of everyone to freely participate in the public affairs of his/her country and the collective right to self-determination.

56. The Court takes note of the observations of the African Union Commission and the African Institute for International Law.

57. The Court holds that, in determining whether a Convention is a human rights instrument, it is necessary to refer in particular to the purposes of such Convention. Such purposes are reflected either by an express enunciation of the subjective rights of individuals or groups of individuals, or by mandatory obligations on State Parties for the consequent enjoyment of the said rights.

58. On the express enunciation of subjective rights, this is illustrated by provisions, which directly confer the rights in question.

59. Article 13(1 and 2) of the Charter on Human Rights provides that:

“1. Every individual shall have the right to participate freely in the government of his cut, either directly through freely chosen representatives in accordance with the provisions of the law.

2. Every citizen shall have the right of equal access to the public service of the country.”

60. Regarding the prescription of obligations for States, the Charter on Human Rights in its Article 26 stipulates that

5 AHD/Decl.9 (XXXVIII), 2002.

“State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter”.

61. The Court further notes that, where a State becomes a Party to a human rights treaty, international law obliges it to take positive measures to give effect to the exercise of the said rights.

62. Article 1 of the Charter on Human Rights stipulates that:

“The Member States of the Organization of African Unity, parties to the present Charter shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them”.

63. The Court therefore holds that the obligation on the part of State Parties to the African Charter on Democracy and to the ECOWAS Democracy Protocol to establish independent and impartial national electoral bodies is aimed at implementing the aforesaid right prescribed by Article 13 of the Charter Human Rights, that is, the right to participate freely in the Government of one’s country, either directly or through freely chosen representatives in accordance with the provisions of the law.

64. The European Court of Human Rights also came to a similar conclusion when it had to determine, for the first time, complaints regarding the violation of Article 3 of Protocol No 1 to the European Convention on Human Rights on the right to free elections.⁶

65. In view of the foregoing, the Court, in conclusion, holds that the African Charter on Democracy and the ECOWAS Protocol on Democracy and Governance are human rights instruments within the meaning of Article 3 of the Protocol, and therefore that it has jurisdiction to interpret and apply the same.

C. Temporal jurisdiction

66. The Court holds that, in the instant case, the relevant dates are the date of the entry into force, for the Respondent State, of the above-mentioned international instruments ratified by that State, and that of the deposition of the declaration prescribed by Article 34(6) of the Protocol allowing individuals and non-governmental organizations to bring cases directly to the Court. Given that the facts on which the alleged violations are based took place after the aforesaid dates (*supra*. paragraphs 44 and 48), the Court finds that it has temporal jurisdiction to hear the case.

⁶ Article 3 of Protocol No 1 to the European Convention on Human Rights reads as follows: “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”. The European Court indicated that the above-mentioned Article at first sight looks different from the other provisions of the Convention and its Protocols which guarantee the rights. The Court however held that this Article guarantees subjective rights such as the right to vote and to stand as a candidate in elections (*Mathieu-Mohin and Clerfayt v Belgium*, Judgment of 2 March 1987, series A No 113, paras 46-51).

D. Territorial jurisdiction

67. The Court notes that the facts on which the alleged violations are based occurred on the territory of the Respondent State. It therefore holds that it has territorial jurisdiction to hear the case.

68. It therefore follows from all the foregoing considerations that the Court has the jurisdiction to hear the instant case.

VI. Admissibility of the Application

69. According to the aforementioned Rule 39 of the Rules,

“the Court shall conduct preliminary examination of its jurisdiction and the admissibility of the Application in accordance with Article 50 and 56 of the Charter, and Rule 40 of these Rules”.

70. According to Article 6(2) of the Protocol, “the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.

71. Rule 40 of the Rules which, in substance, replicates the contents of Article 56 of the Charter provides as follows:

“Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, Applications to the Court shall comply with the following conditions.

1. Disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
2. Comply with the Constitutive Act of the Union and the Charter;
3. Not contain any disparaging or insulting language;
4. Not be based exclusively on news disseminated through the mass media;
5. Be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with a matter; and
7. Not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union”.

72. Whereas some of the above conditions are not in contention between the parties, the Respondent State raised objections relating to the language used in the Application and exhaustion of local remedies.

A. Admissibility conditions which are not in contention between the Parties

73. The conditions regarding the identity of the Applicant, the Application's compatibility with the Constitutive Act of the African Union and the Charter, the nature of the evidence, the time limit for seizure of the Court and the principle according to which an Application must not concern cases previously settled by the Parties (sub rules 1, 2, 4, 6 and

7 of Rule 40 of the Rules and Article 56 of the Charter) are not in contention among the Parties.

74. The Court considers that nothing in the pleadings submitted before it by the Parties suggests that any of the foregoing conditions has not been met in the instant case.

75. The Court considers that the said conditions have been met in the instant case.

B. The admissibility conditions in contention between the Parties

i. Objection to admissibility on the ground of the language used by the Applicant

76. In its additional observations, the Respondent State maintains that the Applicant's written submissions contain insulting language towards it and its institutions.

77. It argues that when the Applicant states that "the Constitutional Judge curiously refused to censor this law", it was casting aspersions on the credibility of this institution; that by stating that "the President of the Constitutional Council later tendered his resignation" without explaining why, the Applicant seems to be insinuating that the resignation was orchestrated by the institutions of the State, especially the President of the Republic who appointed the Judge.

78. The Respondent State further submits that casting doubts on the composition of the Independent Electoral Commission itself is a way of saying that the election organized by the said Commission is not valid and, consequently, that the elected President is not worthy of representing his country.

79. The Respondent State in conclusion maintains that the aforementioned language is insulting towards it and casts doubts on the dignity and honour of the President of the Republic.

80. The Applicant denies the Respondent State's allegations and submits that the language used is not insulting. It contends that it has said the truth and that, besides, the information has been disseminated by the media; that it was only presenting the facts as they happened.

81. In this respect the Commission indicated that:

"... in determining whether a certain remark is disparaging or insulting ... the Commission has to satisfy itself whether the said remark or language ... is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence..."⁷

82. In the instant case, the Court notes that the Respondent State has not produced evidence showing that the expressions used above by the Applicant were disparaging or insulting.

7 African Commission on Human and Peoples' Rights: *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe*, Communication No 284/2003, 3 April 2009, para 91.

83. The Court further holds that the Applicant was only presenting the acts of the Ivorian authorities and that none of the expressions used is insulting towards the latter.

84. It therefore dismisses the objection to the Application's admissibility on that ground.

ii. Objection to admissibility on grounds of failure to exhaust local remedies

85. In its additional submissions to the brief in Response, the Respondent State reiterates that the Applicant did not exhaust the local remedies before filing the case before the Court. It contends that the Applicant could have seized the Constitutional Council to determine the unconstitutionality of the impugned law; that in Côte d'Ivoire, the said remedy is truly judicial within the meaning of this notion as understood by the Commission; that, in fact, upon being found grounded, the remedy results in the annulment of the adopted law.

86. The Respondent further contends that the Ivorian administrative law makes it possible to hold the State liable for its legislative activity; and that such procedure may lead the State to either abrogate an impugned law or amend the same.

87. The Respondent State argues, lastly, that it lies with the Applicant to produce evidence as to the exhaustion of local remedies, failing which its Application would be declared inadmissible; that this is also the position of the African Commission in Communications Nos. 127/94 and 198/97, *in the Matter of Sana Dumbuya v The Gambia and SOS Esclaves v Mauritania*.

88. In conclusion, the Respondent State prays the Court to rule that the Applicant has not exhausted the aforementioned local remedies and, therefore, declare the Application inadmissible.

89. Concerning the unconstitutionality of the impugned law, the Applicant contends that, according to Article 77(2) of the Ivorian Constitution, human rights advocacy associations may refer to the Council only the laws relating to public freedoms; that given that the impugned law is a law governing an independent administrative authority, no remedy is open to non-governmental organizations and individuals to solicit the withdrawal or review of such a law.

90. In its additional observations, the Applicant further contends that, according to Article 77 of the Ivorian Constitution, the Constitutional Council should be seized only prior to promulgation of laws; that even if the Applicant were entitled to seize the Constitutional Council, it would be necessary that the Applicant be informed of the adoption of such a law by the National Assembly.

91. It maintains that, in Côte d'Ivoire, the only means by which the existence of a law is brought to the attention of the citizens, is the publication thereof in an Official Gazette after its promulgation; that, in the circumstances, it would be impossible for human rights associations to seize the Constitutional Council prior to promulgation of the laws as required by the Constitution.

92. The Applicant made no observation on the competence of the administrative jurisdictions suggested by the Respondent State.

93. As underscored in the Court's jurisprudence as well as in that of the Commission,⁸ in the Application of the rule governing exhaustion of local remedies, the following three conditions must be met, namely: availability, effectiveness and sufficiency of the remedies.

94. In the Matter of *Nobert Zongo and Others v Burkina Faso*,⁹ for example, the Court decided that "the effectiveness of a remedy is measured in terms of its ability to solve the problem raised by the Applicant".

95. In the same vein, the Inter-American Court of Human Rights held that:

"... Adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted".¹⁰

96. Regarding the remedies before administrative jurisdictions as mentioned by the Respondent State, Article 5(2) of Ivorian Law No 94-440 relating to the Supreme Court provides that the Administrative Chamber "shall hear in the first instance and without appeal cases of annulment on the grounds of abuse of authority, against decisions emanating from the administrative authorities".

97. It follows from the aforementioned provision that administrative jurisdictions are not competent to hear cases of unconstitutionality of laws.

98. The Court therefore holds that the administrative remedy is not sufficient and, for this reason, that the Applicant did not have to exercise it.

99. Concerning the unconstitutionality of the impugned law, the Court notes that Article 77 of the Ivorian Constitution provides that:

"The laws can, before their promulgation, be referred to the Constitutional Council by the President of the National Assembly or by one-tenth at least of the Deputies or by the parliamentary groups. The associations of the defense of the Rights of Man legally constituted can equally refer to the Constitutional Council the laws concerning the public freedoms. The Constitutional Council decides in a time period of fifteen days counting from its seizing."

100. The Court observes that the impugned law does not relate to public freedoms and that, for that reason, the Applicant could not refer

8 *Reverend Christopher Mtikila v Tanzania* (Application 009-001/2011), Judgment of 14 June 2013 para 82.1; *Lohé Issa Konaté v Burkina Faso* (Application 004/2013), Judgment of 5 December 2014 para 92 See also Communications Nos. 147/95 and 149/96, *Sir Dawda Jawara v The Gambia*, para 32.

9 Application No 013/2011, Judgment of 28 March 2014, para 68.

10 *Velasquez-Rodriguez v Honduras*, Judgment of 29 July 1998 (Series C), No 4, para 64.

it to the Constitutional Council for determination of its conformity with the Constitution.

101. The Court further observes that the Constitutional Council of the State of Côte d'Ivoire has already ruled on the constitutionality of the impugned law in its Decision on the Application filed by Mr Kramo Kouassi acting on behalf of a group of 29 parliamentarians of the National Assembly (*supra*, paragraph 18). The Constitutional Council held that the impugned provisions were in conformity with the Constitution.

102. In the circumstances, it is clear that the Applicant in the instant case could

expect nothing from the Constitutional Council with respect to its prayer for annulment of the impugned law.

103. The Court, in its previous judgments in the Matters of Reverend Christopher R. Mtikila and Lohé Issa Konaté, decided that “there was no need to go through the same judicial process the outcome of which was known”.¹¹

104. In view of the aforesaid, the Court finds that it was not necessary for the Applicant to exercise the remedies mentioned by the Respondent (*supra*, paragraphs 85 and 86).

105. The Court consequently declares the Application admissible.

106. Having declared that it has jurisdiction to deal with this matter and that the Application is admissible, the Court will now consider the merits of the case.

VII. Merits of the case

107. The Applicant alleges that the Respondent State violated its commitment to establish an independent and impartial electoral body as well as its commitment to protect the right to equality before the law and to equal protection by the law, as prescribed in particular by Articles 3 and 13(1 and 2) of the Charter on Human Rights, Articles 10(3) and 17(1) of the African Charter on Democracy, Article 3 of the ECOWAS Democracy Protocol, Article 1 of the Universal Declaration of Human Rights and Article 26 of the Covenant.

A. The allegation according to which the Respondent State violated its obligation to establish an independent and impartial electoral body

108. The Applicant submits that the right for the citizens to have national independent and impartial electoral bodies emanates from the commitment made by the said States under Article 17 of the African Charter on Democracy and Article 3 of the ECOWAS Democracy Protocol; that implementation of the said commitment is reflected in the

¹¹ *Reverend Christopher R Mtikila (Preliminary Objection of Inadmissibility)* Judgment of 14 June 2014, para 82.3 and *Lohé Issa Konaté* (Application 004/2013, Judgment of 5 December, 2014, para 112.

obligation also emanating from these provisions; that the State Parties, including Côte d'Ivoire, have the obligation to establish and strengthen independent and impartial national electoral bodies.

109. The Applicant contends that a majority of the members of the Ivorian electoral body represent personalities, groups and political parties; that since the latter have special interests to protect, their representatives cannot claim to be independent or impartial; that an agent is hardly independent of his superior from whom he receives the directives required to discharge his mandate; that this lack of independence is valid for all members of the IEC representing personalities or political parties.

110. The Applicant argues that, in choosing this mode of representation of personalities and political parties for the composition of its electoral body, the Respondent State violated its commitment to establish an independent and impartial body for management of elections.

111. The Respondent State refutes the Applicant's allegations. It maintains that the composition of the electoral body integrates all the parties concerned for the proper conduct, transparency and credibility of the electoral exercise; that the current configuration of the IEC was arrived at consensually; that, besides, this practice is consistent with the letter and spirit of the ECOWAS Democracy Protocol, especially Article 3 thereof.

112. With respect to representation of personalities and political parties within the IEC, the Respondent State contends that, within the meaning of Article 5 of the impugned law, representation as a mandate does not bind members of the IEC to the personalities and political parties; that the said members of the electoral commission are not subject to any administrative hierarchy nor do they receive instructions from the Government; that it was in fact for this reason that the impugned law describes the IEC as "an independent administrative authority endowed with legal personality and financial autonomy".

113. The Respondent State further maintains that the appointment of members of the Bureau of the IEC Central Commission through election is sufficient proof of the independence and impartiality of this body.

114. Article 17(1) of the African Charter on Democracy on which the Applicant relies, provides that:

"State Parties affirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union's Declaration on the Principle Governing Democratic Elections in Africa.

To this end, State Parties shall establish and strengthen independent and impartial national electoral bodies responsible for the management of elections".

115. Article 3 of the ECOWAS Democracy Protocol also mentioned by the Applicant provides that:

"The bodies responsible for organising the elections shall be independent and/or neutral and shall have the confidence of all the political actors. Where necessary, appropriate national consultations shall be organised to determine the nature and the structure of the bodies".

116. The foregoing provisions show that there are no precise indications as to the characteristics of an “independent” and “impartial” electoral body.

117. According to the Dictionary of International Public Law, “independence” is the fact of a person or an entity not depending on any other authority than its own or at least not depending on the State in which he exercises his functions. As for impartiality, this is the absence of bias, prejudice and conflict of interest.¹²

118. The Court holds that an electoral body is independent where it has administrative and financial autonomy; and offers sufficient guarantees of its members’ independence and impartiality.

119. This is also the position of the International Institute for Democracy and Electoral Assistance (International IDEA), which is a credible international institution, specialized in electoral matters.¹³

120. Given the fact that the Applicant’s allegations relate to the composition of the Ivorian electoral body, the Court shall determine the independence and impartiality of this body in relation to its structure as prescribed by the impugned law.

121. Regarding the institutional independence of this body, Article 1(2) of the impugned law provides that: “... the IEC is an independent administrative authority endowed with legal personality and financial autonomy”.

122. The above provision shows that the legal framework governing the Ivorian electoral body leaves room for assumption that the latter is institutionally independent.

123. The Court, however, notes that institutional independence in itself is not sufficient to guarantee the transparent, free and fair elections advocated in the African Charter on Democracy and the ECOWAS Democracy Protocol. The electoral body in place should, in addition, be constituted according to law in a way that guarantees its independence and impartiality, and should be perceived as such.

124. The Court notes that the majority of the members of the Ivorian electoral body are appointed by personalities and political parties contesting elections.

125. The Court is of the opinion that, for a body to be able to reassure the public about its ability to organise transparent, free and fair election, its composition must be balanced.

126. The issue here is therefore to determine whether the composition of the Ivorian electoral body is balanced.

127. Article 5 of the impugned law provides that:

“The Independent Electoral Commission shall comprise a Central Commission and local Commissions at regional, departmental, communal and sub-prefectural levels. Members of the Central Commission shall

¹² Jean Salmon *Dictionary of International Public Law* - Bruylant, Brussels, 2001, pp 570 and 562.

¹³ *Electoral Management Design: Handbook of the IDEA* (2010) 7.

comprise: i) 1 (one) representative of the President of the Republic; ii) 1 (one) representative of the President of the National Assembly; iii) 1 (one) representative of the Minister of Territorial Administration; iv) 1 (one) representative of the Minister of the Economy and Finance; v) 1 Magistrate appointed by the High Judicial Council; vi) 4 (four) representatives of the Civil Society two of whom shall be drawn from faith-based organizations, one from Non-Governmental non-religious Organizations and a Lawyer appointed by the Bar; vii) 4 (four) representatives of the party or political coalition in power; viii) 4 (four) representatives of opposition political parties or groups”.

128. The foregoing provision shows that the ruling political party and coalition, and political groupings of the Opposition are each represented by four (4) members.

129. The Court however notes that the Government in place is further represented by four (4) other members, namely, one representative of the President of the Republic, one representative of the President of the National Assembly, one representative of the Minister in charge of Territorial Administration, and one representative of the Minister in charge of Economy and Finance.

130. The Government is, therefore, represented by eight (8) members as against four (4) for the Opposition.

131. The Court observes further that the impugned law provides, in its Article 36, that the IEC Central Commission shall take its decisions by simple majority of the members present.

132. The imbalance in the composition of the Ivorian electoral body was also noted by the African Union Election Observer Mission (AUEOM) which, in its report of 27 October 2015, indicated as follows:

“... In view of its composition, AUEOM found that there was an imbalance in the numerical representation of the ruling coalition and the political parties. AUEOM noted that the electoral authority does not command consensus within the political class, although the current IEC is the outcome of negotiations between the ruling party and the opposition parties, despite its heavy political component. From its exchanges with the socio-political actors, the Mission clearly perceived the mistrust of a section of the opposition and the civil society as to the impartiality of the electoral body...” (Registry translation)

133. The foregoing shows that the Ivorian electoral body does not meet the conditions of independence and impartiality and cannot be perceived as such.

134. In the same vein, the European Court of Human Rights, with regard to the independence and impartiality of tribunals, held that “in order to maintain confidence in the independence and impartiality of the court, appearances may be of importance”.¹⁴

135. The Court, in conclusion, consequently holds that by adopting the impugned law, the Respondent State violated its commitment to establish an independent and impartial electoral body as provided

¹⁴ Case of *Findlay v United Kingdom* (Application No 22107/93), Judgment of 25 February 1995, para 76.

under Article 17 of the African Charter on Democracy and Article 3 of the ECOWAS Democracy Protocol.

136. Consequently, the Court further holds that the violation of Article 17 of the African Charter on Democracy affects the right of every Ivorian citizen to participate freely in the conduct of the public affairs of his country as guaranteed by Article 13 of the Charter on Human Rights.

B. The allegation according to which the Respondent State has violated its obligation to protect the right to equality before the law and equal protection by the law

137. The Applicant maintains that the impugned law accords advantages to certain candidates at the expense of others; that the President of the Republic, for instance, is over-represented within the IEC whereas independent candidates and those of the Opposition are not represented therein; that proof thereof is that out of the 17 members comprising the Central Commission of the Ivorian electoral body, 13 through various entities, represent the President of the Republic, either as representatives of political parties, or representatives of political personalities (President of the Republic, President of the National Assembly, various Ministers) or as representatives of the institutions under his control (High Judicial Council).

138. The Applicant further submits that the said members can, during elections, tilt the balance in favour of the President of the Republic who is a candidate for his own succession, or in favour of partisan candidates at the expense of independent candidates and candidates of the Opposition.

139. The Applicant in conclusion maintained that by adopting the impugned law, the Respondent State violated its commitment to protect the rights to equality before the law and the right to equal protection by the law as enshrined in several international human rights instruments to which the State is a Party, especially the Charter on Human Rights (Article 3), the African Charter on Democracy (Article 10(3)), the ECOWAS Protocol on Democracy and Good Governance (Article 3), the Universal Declaration of Human Rights (Article 1), and the Covenant (Article 26).

140. The Respondent State refutes this allegation, arguing that it is difficult to understand the Applicant's complaint over the representation of the so-called independent candidates because according to the Respondent State such a claim challenges the strong presence of members appointed by the political parties or the political authorities.

141. It further contends that no provision of the impugned law deprives Ivorian citizens that have fulfilled the requisite conditions of the right to participate in the public affairs of their country.

142. The Court notes that equality and non-discrimination are fundamental principles of international human rights law and that everyone, without distinction, should enjoy all the rights.

143. Article 10(3) of the African Charter on Democracy on which the Applicant particularly relies, provides as follows: "State Parties shall

protect the right to equality before the law and equal protection by the law as a fundamental precondition for a just and democratic society.”

144. Article 3 of the Charter on Human Rights also mentioned by the Applicant provides that: “1. Every individual shall be equal before the law 2. Every individual shall be entitled to equal protection of the law”.

145. Article 26 of the Covenant is much more detailed in this regard. It provides as follows:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

146. The principle of “equality” in law presupposes that the law protects everyone without discrimination.¹⁵

147. Concerning discrimination, it is defined as a differentiation of persons or situations on the basis of one or several unlawful criterion/criteria.¹⁶

148. In the same vein, the European Court of Human Rights declared in the Matter of *Yumak and Sadak v Turkey* that:

“With regard to electoral systems, the Court’s task is to determine whether the effect of the rules governing parliamentary elections is to exclude some persons or groups of persons from participating in the political life of the country, and whether the discrepancies created by a particular electoral system can be considered arbitrary or abusive or whether the system tends to favour one political party or candidate by giving them an electoral advantage at the expense of others”.¹⁷

149. The Court has found that the composition of the Ivorian electoral body is imbalanced in favour of the Government and that this imbalance affects the independence and impartiality of that body.

150. It is therefore clear that in the event that the President of the Republic or another individual belonging to his political family presents himself as a candidate for any election, be it presidential or legislative, the impugned law would place him in a much more advantageous situation in relation to the other candidates.

151. The Court therefore holds that, by not placing all the potential candidates on the same footing, the impugned law violates the right to equal protection of the law as enshrined in the several international human rights instruments mentioned above, ratified by the Respondent State, especially Article 10(3) of the African Charter on Democracy and Article 3(2) of the Charter on Human Rights.

15 *Dictionary of Human Rights* under the direction of Joël Andriantsimbazovina, Hélène Gaudin, Jean-Pierre Maguenaud, Stéphane Rials and Frédéric Sudre, French University Press, 2008, p 284.

16 Jean Salmon (ed) *Dictionary of International Public Law*, under the direction of, Bruylant, Brussels, 2001, p 344.

17 Application 1022/03, Judgment of 8 July 2008, para 21.

VIII. Costs

152. The Court notes that the Parties did not make any submissions as to costs. In accordance with Rule 30 of the Rules, each Party shall bear its own costs.

153. For these reasons,

THE COURT,

Unanimously:

- 1) Declares that it has jurisdiction to hear this case;
- 2) Dismisses the objection to the admissibility of the Application on the grounds of the nature of the language used by the Applicant;
- 3) Dismisses the objection to the admissibility of the Application on the grounds of failure to exhaust local remedies;
- 4) Declares the Application admissible;

By a majority of nine (9) votes for and one (1) against, Judge El Hadji GUISSÉ dissenting:

- 5) Rules that the Respondent State has violated its obligation to establish an independent and impartial electoral body as provided under Article 17 of the African Charter on Democracy and Article 3 of the ECOWAS Democracy Protocol, and consequently, also violated its obligation to protect the right of the citizens to participate freely in the management of the public affairs of their country guaranteed by Article 13(1) and (2)) of the African Charter on Human and Peoples' Rights;
- 6) Rules that the Respondent State has violated its obligation to protect the right to equal protection of the law guaranteed by Article 10(3) of the African Charter on Democracy, Article 3(2) of the African Charter on Human and Peoples' Rights and Article 26 of the International Covenant on Civil and Political Rights;
- 7) Orders the Respondent State to amend Law No 2014-335 of 18 June 2014 on the Independent Electoral Commission to make it compliant with the aforementioned instruments to which it is a Party;
- 8) Orders the Respondent State to submit to it a report on the implementation of this decision within a reasonable time which, in any case, should not exceed one year from the date of publication of this Judgment;

Unanimously,

- 9) Rules that each Party shall bear its own costs.

Separate opinion: OUGUERGOUZ

1. I subscribe to the Court's decisions as regards its jurisdiction to hear the Application and as regards the Application's admissibility. As for the merits of the case, I consider inadequate the reasoning behind the judgment as to the lack of independence and impartiality of the

Independent Electoral Commission. I also have reservations on the legal consequences that the Court draws from this lack of impartiality and independence (the *Ne eat iudex ultra petita partium* principle).

2. Before expressing my position on the last two points, I would like to point out that in examining its material jurisdiction, namely, the question as to whether or not the legal instruments allegedly violated, are “relevant human rights instruments”, the Court could have fleshed out its reasoning by highlighting the dialectical link between democracy, and respect for human rights and fundamental freedoms,¹ and by making reference, for example, to the substantial observations presented by the African Institute for International Law and, to a lesser extent, by the African Union Commission.² At the request of the Court, these two institutions submitted observations on the question as to “whether the African Charter on Democracy is a human rights instrument within the meaning of Article 3 of the Protocol” (paragraphs 28 and 29 of the judgment). However, the Court limited itself to reproducing some of the observations (see paragraphs 51-55) and “takes note of the observations” (paragraph 56), without taking the same on board in its reasoning (see paragraphs 57-65).

3. I would also like to point out that the inadmissibility objection based on the Applicant’s non-exhaustion of local remedies was filed very much out of time by the Respondent State. The said objection was raised in the Additional Observations filed by the Respondent State on 8 February 2016 (see paragraph 31 of the judgment),³ in response to the Additional Observations dated 4 November 2015 filed by the Applicant on 5 November 2015. In terms of Rule 52(2) of the Rules,

1 On this question, see for example, the Universal Declaration on Democracy adopted by the Inter-Parliamentary Council on 16 September 1997 at its 161st Session held in Cairo. Paragraph 6 thereof stipulates that: “Democracy is inseparable from the rights set forth in the international instruments recalled in the preamble” (notably the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights); paragraph 12 for its part provides that: “the key element in the exercise of democracy is the holding of free and fair elections at regular intervals enabling the people’s will to be expressed. These elections must be held on the basis of universal, equal and secret suffrage so that all voters can choose their representatives in conditions of equality, openness and transparency that stimulate political competition. To that end, civil and political rights are essential, and more particularly among them, the rights to vote and to be elected, the rights to freedom of expression and assembly, access to information and the right to organise political parties and carry out political activities” - text in *Union Interparlementaire, La démocratie: Principes et réalisations*, Genève, 1998, pp. III-VIII. See also Article 7 of the Inter-American Democratic Charter adopted by the General Assembly of the Organization of American States on 11 September 2011: “Democracy is indispensable for the effective exercise of fundamental freedoms and human rights in their universality, indivisibility and interdependence, embodied in the respective constitutions of states and in inter-American and international human rights instruments.”

2 The Brief of the African Institute for International Law consists of 25 pages; while that of the Legal Counsel of the African Union Commission contains 3 pages.

3 The Respondent State had been invited to file this pleading before 1 January 2016; on 8 February 2016, it actually filed two documents dated 3 and 5 February 2016 respectively, titled “Government’s Opinion on the Additional Submission of the APDH to the African Court”; it was in the document dated 5 February 2016 that it raised the objection to the admissibility of the Application on grounds of non-exhaustion of local remedies.

however, that objection should have been raised 'at the latest before the date fixed by the Court for the filing of the first set of pleadings to be submitted by the party who intends to raise such objections', that is, at the latest during the month of December 2014 (see paragraph 22 of the judgment; and yet, this first pleading to be submitted by the Respondent State, i.e. its Brief in Response filed on 19 May 2015 (without any Application for extension of time) contained no preliminary objection. Although that brief was filed out of time, the Court decided to accept the same "in the interest of justice" (see paragraphs 24, 25 and 26 of the judgment). The plea of inadmissibility on grounds of non-exhaustion of local remedies contained in the afore-mentioned Additional Observations was therefore raised outside the time limit prescribed by Rule 52(2) and, indeed, subsequent to the closure of the written procedure. The Court also decided to accept Respondent State's additional observations still "in the interest of justice" (see paragraph 31 of the judgment).

4. In my opinion, the Court should have explained the term "interest of justice" which it invokes in this case, more so because the preliminary objection in question was raised after the closure of the written procedure on 8 January 2016 (see paragraph 30) and because the Applicant formally opposed the filing⁴ of the said observations. Proper administration of justice requires that the time limits prescribed by the Court must be scrupulously respected by the parties, especially where such time limits concern a procedural aspect as crucial as the Court's jurisdiction or an Application's admissibility. This does not mean that the Court cannot show flexibility in certain circumstances; it must however ensure that cases are properly managed and that it keeps control of the procedure. In the instant case, the Court could have indicated that exhaustion of local remedies is a cardinal condition for admissibility of an Application and that it therefore behoves the Court to examine this condition even in the absence of an objection by the Respondent State in this regard (see Rule 39 of the Rules of Court).⁵ In view of its fundamental nature, this condition of admissibility could indeed be likened to a condition in respect of public order.

5. I would now address the two key questions which led me to write this separate opinion.

I. The Independent Electoral Commission's lack of independence and impartiality

6. Article 17(1) of the African Charter on Democracy, Elections and Governance, violation of which is alleged, provides that; "State Parties shall establish and strengthen independent and impartial national electoral bodies responsible for the management of elections". Since this instrument does not contain a definition of the concepts of

4 See his *Pleadings Paper* dated 3 March 2016, pp. 6-7 and *the Record of Proceedings of the Public Hearing of Thursday 3 March 2016*, pp 5-6 (Mr Guizot Takoré's pleadings).

5 Paragraph 1 of this Article provides that "the Court shall conduct a preliminary examination of its jurisdiction and the admissibility of the Application..."

“independence” and “impartiality”, it lay with the Court to define the concepts and identify the criteria enabling it to ascertain the existence or otherwise of these two requirements.

7. The Court thus began by quoting the definition of these two concepts as given by doctrine, as follows:

“According to the Dictionary of International Public Law, “independence” is the fact of a person or an entity not depending on any other authority than its own or at least, not depending on the State in which he exercises his functions. As for “impartiality”, this is the absence of bias, prejudice and conflict of interest”⁶ (see paragraph 117 of the judgment).

8. In the following paragraph however, the Court gave a purely formalist and tautological definition of *independence*. According to the Court,

“An electoral body is independent when it has administrative and financial autonomy; and offers sufficient guarantees of its members’ independence and impartiality” (paragraph 118).

9. After referring to Article 1(2) of the Law challenged by the Applicant, which provides that “... the IEC is an independent administrative authority endowed with legal personality and financial autonomy” (paragraph 121), the Court concludes that “... the legal framework governing the Ivorian electoral body leaves room for assumption that the latter is institutionally independent” (paragraph 122).

10. However, the Court does not spell out the content of the said “institutional independence” of the Commission and how this independence differs from “independence” in the proper sense of the term, i.e. independence defined as the Commission’s non-dependence “on any other authority than its own”. The Court merely notes that this “institutional independence” on its own is not enough to guarantee the holding of transparent, free and fair elections as advocated by the African Charter on Democracy and the ECOWAS Democracy Protocol”, and that “the electoral body in place should, in addition, be constituted according to law in a way that guarantees its independence and impartiality, and should be perceived as such” (paragraph 123).

11. After a brief examination of the composition of the Electoral Commission, (paragraphs 124-132), the Court concludes that “the Ivorian electoral body does not meet the conditions of independence and impartiality and cannot be perceived as such”.

12. It is my opinion that the Court’s treatment of this issue of independence and impartiality is inadequate, and that greater clarity would have been achieved, had the treatment been conducted more systematically. I believe, in particular, that it was necessary to make a clear distinction between the independence of the Electoral Commission and its impartiality. I also believe that it was not possible to draw conclusions as to the “institutional independence” of the Electoral Commission solely on the basis of its description under Article

6 The Dictionary of International Public Law defines *impartiality* more precisely as follows: “Absence of bias, prejudice and conflict of interest in a judge, arbitrator, expert or person in a similar position with respect to the parties before him or in relation to the question he must settle”, Jean Salmon (Dir.), *Dictionary of International Public Law*, Bruylant/AUF, Brussels, 2001, p. 562.

1(2) of the impugned law, and without examination of the composition of this Commission. Only such an examination could enable the Court to ascertain the Commission's institutional independence and, hence, its impartiality.

13. In the instant case, it behoved the Court to clearly distinguish between the independence of the Commission and its impartiality. The Applicant itself had taken care to make such a distinction in its submissions and pleadings. In its Additional Observations of 14 April 2015,⁷ its Additional Brief of 4 November 2015⁸ and in its oral pleadings documents of 3 March 2016,⁹ it devotes two separate sections to the lack of independence and impartiality of the Independent Electoral Commission. In particular, the Applicant pointed out the close link between the two concepts in these terms: "the one who depends on another is hardly independent of his superior from whom he receives the directives required to discharge his mandate".¹⁰

14. There is, it is true, a dialectic relation between the impartiality of any person and the latter's independence. As has been rightly pointed out, the impartiality of a person is indeed "a function of his independence, that is, the absence of restriction, influence, pressure, incitement or interference direct or indirect,¹¹ that may be exercised on (this person) by anyone and for any reason". The Electoral Commission's impartiality could thus have been measured with the yardstick of its independence.

15. Although closely linked, the concepts of *independence* and *impartiality* must, however, be distinguished from each other (see, for example, the distinction made in paragraph 117 of the judgment).

16. Depending on its composition, any organ (judicial, arbitral or electoral) can be both independent and impartial, just as it can be independent and yet partial. Thus, for example, the Protocol establishing the present Court sets out a number of incompatibilities, absolute¹² and relative,¹³ designed to ensure both the independence and impartiality of Members of the Court.¹⁴ A judge must be absolutely independent, that is, "depend on no other authority than his own", reason for which Rule 5 of the Rules prohibits him from performing

7 See pp. 10-12.

8 See pp. 8-10.

9 *Oral pleadings document*, pp. 21-22.

10 *Additional claims*, p. 11.

11 *Dictionary of International Public Law, op. cit.*, p. 562

12 The incompatibilities in question are absolute where they apply to all members of the Court; they are generally aimed at ensuring the independence of the judge.

13 The incompatibilities in question are relative where they apply individually to a member of the Court and in relation to a specific case; they seek rather to ensure the impartiality of a judge in a particular case and to render him unfit to sit in such case.

14 See Articles 16, 17, 18 and 22 of the Protocol and Rules 4, 5 and 8 of the Rules of Court. Similar provisions are contained in the constituent instruments of other international judicial bodies such as the European Convention on Human Rights (Articles 21 and 23(4)), the Statute of the Inter-American Court of Human Rights (Articles 11, 18, 19, 20 and 21) or the Statute of the International Court of Justice (Articles 16, 17 and 24).

functions incompatible with this independence, such as “holding political, diplomatic or administrative positions or function as government legal adviser at the national level”. The independence of Members of the Court is, however, a necessary but not sufficient condition. Every judge must also be impartial, that is, not biased, prejudiced or with conflict of interest; reason for which Rule 8(4) of the Rules prohibits him from sitting in cases where there may be a conflict of interest of a personal, material or other nature.¹⁵

17. As regards the independence of a body in general, the European Court of Human Rights as far back as 1984 synthesized its case-law on the subject in the following terms:

“In determining whether a body can be considered to be “independent” - notably of the executive and of the parties...the Court has had regard to the manner of appointment of its members and the duration of their term of office ...the existence of guarantees against outside pressures... and the question whether the body presents an appearance of independence...”¹⁶

18. In its judgment of 25 February 1997 in the case of *Findlay v the United Kingdom*, the European Court recalled the foregoing criteria in its assessment of the independence of a judicial body. On that occasion, it made a clear distinction between this notion of independence and that of impartiality:

“The Court recalls that in order to establish whether a tribunal can be considered as ‘independent’, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence. As to the question of ‘impartiality’, there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.”¹⁷

19. In the judicial field, the distinction between the two concepts of independence and impartiality was further emphasized by the Bangalore Principles of Judicial Conduct (2002).¹⁸ In the quasi-judicial realm, the same distinction has been made by the Guiding Principles on the Independence and Impartiality of UN Human Rights Treaty Body Members (2012).¹⁹ In the area of arbitration, the distinction between

15 For example, no member of the Court may participate in the examination of a case “if he has a personal interest in the case”, in particular because of conjugal or parental relationship with one of the parties, or “if he has expressed in public, through the media, in writing, by public actions or by any other means, opinions which are objectively of such a nature as to impair his impartiality”.

16 *Case of Campbell and Fell v the United Kingdom*, Application No.7819/77; 7878/77, Judgment of 28 June 1984, paragraph 78.

17 *Case of Campbell and Fell v the United Kingdom*, Application No 7819/77; 7878/77, Opinion of 28 June 1984, paragraph 73.

18 Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity and revised at the Roundtable Meeting of Chief Justices held at the Peace Palace, The Hague, on 25 and 26 November 2002.

19 The said Guiding Principles were adopted in 2012 by the Chairs of the United Nations treaty bodies, who recommended their adoption by the various treaty bodies, including by incorporating them into their rules of procedure.

independence and impartiality has also been made and clarified in a manner similar to that of the European Court.²⁰

20. In addition to the clear distinction between the conditions of independence and impartiality, the aforementioned judicial and arbitral practice has laid down precise standards for assessing the existence of such conditions. Since none of the legal instruments invoked by the Applicant in this case provides a definition or criteria for assessing the independence and impartiality of an independent electoral commission, the Court could have applied the said standards *mutatis mutandis* to determine the independence and impartiality of the Ivorian Electoral Commission.

21. The standards laid down by the European Court in its afore-cited judgment in the case of *Findlay v the United Kingdom* (*supra*, paragraph 18) suggest that the independence of a body is assessed in a purely objective manner, on the basis of the links between its members and external entities;²¹ whereas impartiality has both subjective and objective aspects.²² The European Court had already, as far back as 1982, developed specific criteria for determining a court's impartiality.²³

22. In the instant case, the Court's assessment could be limited to that of independence of the Electoral Commission; which was a purely objective and relatively easy test, since it consisted in examining the composition of that body. It could then, if necessary, examine the question of impartiality of the Commission using, for example, the standards developed by its European counterpart.

23. In view of the composition of the Independent Electoral Commission, the Court could not but conclude that the Commission was not independent, and this conclusion would have enabled the Court to establish that the Commission did not present the appearance

20 Thus, according to an Arbitral Tribunal: "The concepts of independence and impartiality, although linked, are often regarded as distinct, even though the precise nature of the distinction is not always easy to grasp. Generally, independence is linked to the absence of relations with a party that could influence the decision of an arbitrator. Impartiality, for its part, concerns the absence of bias or predisposition towards one of the parties" (original text in English) *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. Argentina Republic*, (ICSID Case No. ARB / 03/19) and *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. The Argentine Republic* (ICSID Case No. ARB/03/17), and *AWG Group Limited v The Argentine Republic (UNCITRAL)*, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, 12 May 2008, paragraph 28

21 "... to establish whether a court may be considered 'independent', it is necessary to take into account, in particular, the mode of appointment and term of office of its members, the existence of protection against external pressure and whether or not there is an appearance of independence", Application 22107/93, paragraph 73 of the judgment.

22 As for the "impartiality" condition, it has two aspects. First, the court must not subjectively manifest bias or personal prejudice. Secondly, the court must be objectively impartial, that is, offer sufficient guarantees to exclude any legitimate doubt in this respect.

23 See, for example, the case of *Piersack v Belgium*, Application No. 8692/79, Judgment of 1 October 1982, paragraph 30; and the case of *Hauschildt v Denmark*, Application No 10486/83, Judgment of 24 May 1989, paragraphs 46-48.

of an impartial body. This link between the Electoral Commission's lack of independence and its impartiality had, besides, been highlighted by the Applicant in the following terms:

"As agents of the President of the Republic, or members of his government or institutions supporters of which control the senior management, the 13 members of the Central Commission cannot be considered impartial in any way whatsoever".²⁴

24. As the question of independence and impartiality of the Independent Electoral Commission is of crucial importance in the case before the Court, it deserves to be examined in a more methodical and in-depth manner.²⁵

II. The Court made a ruling beyond the bounds of the Applicant's pleadings

25. It seems to me important to indicate that the Applicant invoked only the violation of the right to "equality before the law" and Articles 10(3) and 17(1) of the African Charter on Democracy, Elections and Governance. Contrary to what is stated in the judgment, the Applicant never invoked a violation of the African Charter on Human and Peoples' Rights, the ECOWAS Protocol on Democracy and Good Governance or the International Covenant on Civil and Political Rights. The Applicant did not also invoke a violation of the right to "equal protection of the law".

26. In paragraphs 20 and 107 of the judgment, however, it is stated under "Alleged Violations" that:

"The Applicant alleges that the Respondent State violated its commitment to establish an independent and impartial electoral body as well as its commitment to protect the right to equality before the law **and to equal protection by the law**, as prescribed by **Articles 3 and 13(1) and (2) of the Charter on Human Rights**, Articles 10(3) and 17(1) of the African Charter on Democracy, **Article 3 of the ECOWAS Democracy Protocol**, **Article 1 of the Universal Declaration of Human Rights and Article 26 of the International Covenant on Civil and Political Rights** (hereinafter referred to as "the Covenant") - **emphases are mine**).

27. And yet, it is on the basis of all the allegations contained in that paragraph that the Court made its ruling. It is therefore my opinion that the Court has ruled beyond the bounds of the Applicant's submissions.

28. In both its written pleadings and oral proceedings, the Applicant actually invoked violation of only one of the afore-cited legal instruments, namely, the African Charter on Democracy, Elections and Governance. In its original Application dated 9 July 2014, the Applicant

24 *Additional Application*, p. 12

25 In this respect, a comparative approach could have been useful - see for example, *Electoral Commissions in West Africa - Comparative Study*, Book edited by Friedrich-Ebert-Stiftung (Abuja Regional Office) with ECOWAS Electoral Assistance Unit, February 2011. To ensure the autonomy of an electoral commission, this study suggests, in particular, that "the interest of the members of the Commission do not conflict with that of the organization of quality elections. This may be the case, for example, where the representatives of the candidates (parties or individuals) have a casting vote in the Commission's decision-making process" p. 102.

alleges violation of only the African Charter on Democracy, Elections and Governance;²⁶ it made a similar allegation in its additional Application dated 14 April 2015,²⁷ its additional brief dated 4 November 2015,²⁸ and at the public hearing held on Thursday 3 March 2016.²⁹ The content of paragraphs 37³⁰ and 38³¹ of the judgment is therefore more faithful to the reality (see to a lesser extent paragraph 3).

29. It is true that the Applicant mentions the African Charter on Human and Peoples' Rights, the ECOWAS Protocol on Democracy and Good Governance and the International Covenant on Civil and Political Rights in the reasoning of its additional submissions.³² The Applicant merely states, however, that these three instruments also guarantee the "right to equality of all before the law" without expressly invoking their violation. In any event, it makes no mention of these three instruments in relation to the core issue under discussion, namely, the independence and impartiality of the Independent Electoral Commission. The same is true with regard to its pleadings.³³

26 See pp 2, 3, 5 and 6; see also the letter of 7 July 2014 by which the Applicant filed its Application.

27 See pp 1, 8, 12, 13, 14 and 15.

28 "Declare and rule that the [impugned] law violates: 1) the right to equality of all before the law as provided in particular under Article 10.3 of the African Charter on Democracy, Elections and Governance; 2) the right to have independent and impartial national electoral bodies responsible for elections, as provided in particular under Article 17 paragraph 1 of the African Charter on Democracy, Elections and Governance", p. 11.

29 "Mr President, in light of all that we have argued and all the Pleadings that we have sent to the Court, APDH respectfully asks that its Application be declared admissible and that therefore it should be declared that the Ivorian Law governing the Electoral Commission violates Human Rights in its Article 17 of the African Charter on Democracy, Elections and Governance and therefore condemn Cote D'Ivoire to amend its Electoral Law to the provisions of Article 17 of the Charter so that Côte D'Ivoire can truly become a Democratic State as has been stated in the Charter" Mr Guizot Takoré's Pleadings, *Record of Proceedings of the Public Hearing of Thursday 3 March 2016*, pp. 1 and 12; see also the Pleadings Documents dated 3 March 2016, p. 23.

30 "In its Application, APDH prays the Court to rule that the afore-mentioned Law No. 2014-335, is not in conformity with the African Charter on Democracy and, consequently, order the State of Côte d'Ivoire to review the said law in light of its international commitments".

31 "In its additional pleadings, the Applicant prays the Court to ... declare and rule that the Ivorian law No. 2014-335 of 5 June 2014 (*sic*) on the Independent Electoral Commission, especially the new Articles 5, 15, 16 and 17 thereof, violates the right to equality of everyone before the law as well as the right to an independent and impartial national electoral body with responsibility for management of elections provided under Articles 10(3) and 17(1) of the Charter on Democracy".

32 *Additional brief* pp. 2, 3 and 4.

33 See *Pleadings document* dated 3 March 2016, pp. 16-17. At the hearing, the Applicant, in its reasoning, however indicated that "the established violations of this law, relate to rights such as the right to equality of all before the law, the right to independent and impartial electoral bodies for management of elections, the right to participate in public affairs, the right to self-determination which are guaranteed both by the African Charter on Human and Peoples' Rights, the African Charter on Democracy, Elections and Governance "as well as the ECOWAS Protocol on Democracy and Good Governance and the International Covenant on Civil and Political Rights, *Record of Proceedings of the Public Hearing of Thursday 3 March 2016*, p. 4.

30. By stating in paragraphs 5 and 6 of the operative part of the judgment that “the Respondent State has violated its obligation to establish an independent and impartial electoral body provided under Article 17 of the African Charter on Democracy and Article 3 of ECOWAS Democracy Protocol and, consequently, also violated its obligation to protect the right of the citizens to participate freely in the management of the public affairs of their country guaranteed by the Article 13(1) and (2) of the African Charter on Human and Peoples’ Rights” and that “the Respondent State has violated its obligation to protect the right to equal protection of the law, guaranteed by the Article 10(3) of the African Charter on Democracy, Article 3(2) of the African Charter on Human and Peoples’ Rights and Article 26 of the International Covenant on Civil and Political Rights”, the Court has, in my opinion, ruled beyond the bounds of the Applicant’s prayers, i.e. *ultra petita*.

31. The Court has, in effect, not complied with the *Ne eat iudex ultra petita partium* principle which means that the judge must not “accord the Applicant more than is contained in the claims or adjudicate on subjects not included in the respective pleadings of the parties”.³⁴ Claims consist of “precise and direct statement of the subject-matter of the Application that a party to a proceeding before an international jurisdiction invites this jurisdiction to declare and judge”³⁵ and “are essential in determining what the jurisdictional body must decide”.³⁶ Consequently, the parties to a proceeding must “respect the distinction between claims and “the reasons”, given that the jurisdictional body must make a formal ruling only in regard to the claims”.³⁷

32. The International Court of Justice has, for example, held that it has a duty to respond to the requests of the parties as expressed in their final submissions, but also to refrain from ruling on points that are not included in the requests thus expressed.³⁸ It also indicated that it cannot rule beyond a request made by a party.³⁹

34 “Latin phrase meaning “beyond what was asked”. The phrase is usually used in the sense that a judge should not rule “*ultra petita*”, that is, accord to the Applicant more than is contained in the Application or rule on objects not included in the respective submissions of the parties”, *Dictionary of International Public Law*, op. cit., p. 1112.

35 *Dictionary of International Public Law*, op. cit. p. 225.

36 *Id.*

37 *Id.*

38 *Request for interpretation of the Judgment of 20 November 1950 in the asylum case (Colombia v Peru)*, *Judgment of 27 November 1950*, *ICJ Reports 1950*, p. 402; see also the *Advisory Opinion on the Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, *ICJ Reports 1973*, pp. 207-208 (paragraph 87). For a more recent reference to the principle by the Hague Court, see its *Judgment in the case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua intervener)*, *ICJ Reports 1992*, p. 437 (paragraph 126).

39 The Court having noted in the Application as well as in the reply given by counsel on 8 July 1969, that the Belgian Government did not found its claim on an infringement of the shareholders’ rights, it could not go beyond the claims as formulated by the Belgian Government and will not examine the matter further, *Barcelona Traction Light and Power Company Limited (Spain v Belgium)*, *ICJ Reports 1970*, p. 37 (paragraph 49).

33. In the instant case, the Court could not make a ruling regarding the violation of ECOWAS Protocol on Democracy and Good Governance, the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights in the absence of the Applicant's claims regarding the violation of these three instruments.

34. In any event, the Court's decision on the violation by the Respondent State of ECOWAS Protocol on Democracy and Good Governance, the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights was not necessary. The Court having in effect held that the African Charter on Democracy, Elections and Governance is "a relevant human rights legal instrument", it could interpret and apply only that instrument. Having held in conclusion that the instrument had been breached, such a conclusion was sufficient to meet the Applicant's request.

35. The requirement that a court should not exceed its jurisdiction by refraining from ruling *ultra petita* must be as imperative in the field of human rights as it is in strictly interstate litigation. In my view, it is a public order and legal security related requirement that must prevail over all other considerations. Any exception to this principle of *ultra petita* fundamental procedure runs the risk of undermining the principle of equality of the parties, the imperatives of proper administration of justice and, hence, the confidence reposed by the parties in the judicial institution.

36. In a trial before a human rights court, the judge may, of course, show flexibility with respect to an Applicant who is an individual or a non-governmental organization. The judge may, for example, "adjust" or "interpret" an Applicant's request for the purpose of identifying a right allegedly infringed. That is what the Court did in the present case by finding that the Respondent State violated the right "to equal protection of the law" (see paragraphs 146-151 of the judgment and point 6 of the operational part), whereas the Applicant only alleged the violation of the right to "equality before the law" (see its Additional Submission dated 4 November 2015⁴⁰ and its pleadings of Thursday 3 March 2016).⁴¹

37. There is indeed a difference of nature between the two rights, reason for which the said two rights are enshrined separately by the African Charter⁴² or the International Covenant on Civil and Political Rights,⁴³ for example. In the instant case, it is not the right to equality of all before the law or the equal Application of the law that was at issue, but rather the right of everyone to equal protection of the law. It was therefore up to the Court to rigorously distinguish between the two

40 *Additional Brief*, pp. 1-7 and 11 (see *supra* note 28).

41 Mr Guizot Takoré's Pleadings, *Record of Proceedings of the Public Hearing of Thursday 3 March 2016*, pp. 4, 11 and 12; see also the *Pleadings document* dated 3 March 2016, pp. 15-17 and 23.

42 Article 3: "1. Every individual shall be equal before the law. 2 Every individual shall be entitled to equal protection of the law".

43 Article 26: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law ...".

rights and indicate, for example, that considerations of proper administration of justice required it to interpret the Applicant's Application in a way that gives it a meaning; and in so doing, the Court would have dispelled the appearance of having also ruled *ultra petita* with respect to the Applicant's second claim.

Dominick Damian v Tanzania (2016) 1 AfCLR 699

Dominick Damian v The United Republic of Tanzania

Order (provisional measures), 18 November 2016. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSÉ, BEN ACHOUR, BOSSA, MATUSSE, MENGUE and MUKAMULISA

The Applicant alleged violation of fair trial rights in proceedings that led to the imposition of the death penalty. The Court held that provisional measures were necessary to avoid irreparable harm despite the moratorium adopted by the Respondent State and the fact that no execution had been carried out in a long time.

Provisional measures (death penalty, 17-19)

I. Subject of the Application

1. The Court received, on 1 September 2016, an Application from Dominick Damian (hereinafter referred to as “the Applicant”), instituting proceedings against the United Republic of Tanzania (hereinafter referred to as “the Respondent”), for alleged violations of his fundamental rights.
2. The Applicant, who is currently detained at Butimba Central Prison, was sentenced to death by the High Court of Tanzania at Bukoba on 6 December 2012. That death sentence was confirmed by the Court of Appeal, which is the highest Court in Tanzania, on 17 March 2014.
3. The Applicant states that, not being satisfied with the Court of Appeal decision, he filed a notice of motion before the latter for review of its decision. He states that since then his Application for review has not been considered
4. The Applicant alleges, *inter alia*, that:
 - a) The delay in considering his Application for review or the fact that it has not been heard to this day contravenes Articles 13(1), (2), (3), (4), (5), and (6)(a), 107, and 107A(1)(2)(a) & (b) of the Constitution of Tanzania, and therefore violates his fundamental rights.
 - b) The trial Court violated his right to a fair trial.
 - c) The trial Court and the Court of Appeal erred in law and in fact when they failed to find to his advantage when doubts were cast on the prosecution evidence on which they had relied.
 - d) The trial Court contravened Article 13 of the Constitution of Tanzania for failing to consider evidence in aggravation and/or in mitigation.

II. Procedure before the Court

4. The Application was received at the Registry of the Court on 1 September 2016.

5. Pursuant to Rule 35 of the Rules of Court, on 15 November 2016, the Registry served the Application on the Respondent.

III. Jurisdiction

6. In dealing with an Application, the Court has to ascertain that it has jurisdiction on the merits of the case under Articles 3 and 5 of the Protocol.

7. However, in ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction.¹

8. Article 3(1) of the Protocol provides that “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”.

9. The Respondent ratified the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 9 March 1984 and the Protocol on 10 February 2006, and is a Party to both instruments; it equally deposited, on 29 March 2010, a declaration accepting the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organizations, within the meaning of Article 34(6) of the Protocol, read together with Article 5(3) of the Protocol.

10. The alleged violations the Applicant is complaining about are guaranteed under Articles 3(2), 4 and 7(1)(a) and (c) of the Charter and the Court therefore has jurisdiction *ratione materiae* over the Application.

11. In light of the foregoing, the Court has satisfied itself that, *prima facie*, it has jurisdiction to deal with the Application.

IV. On the Provisional Measures

12. In his Application, the Applicant did not request the Court to order Provisional Measures.

13. Under Article 27(2) of the Protocol and Rule 51(1) of the Rules, the Court is empowered to order provisional measures *proprio motu* “in cases of extreme gravity and when necessary to avoid irreparable harm to persons” and “which it deems necessary to adopt in the interest of the parties or of justice”.

1 See Application 002/2013 *African Commission on Human and Peoples’ Rights v Libya* (Order for Provisional Measures dated 15 March 2013) and Application 006/2012 *African Commission on Human and Peoples’ Rights v Kenya* (Order for Provisional Measures dated 15 March 2013); Application 004/2011 *African Commission on Human and Peoples’ Rights v Libya* (Order for Provisional Measures dated 25 March 2011).

14. It is for the Court to decide in each situation if, in light of the particular circumstances, it should make use of the power provided for by the aforementioned provisions.

15. The Applicant is on death row and it appears from this Application that there exists a situation of extreme gravity, as well as a risk of irreparable harm to him.

16. Given the particular circumstances of the case, where the risk of execution of the death penalty will jeopardize the enjoyment of the rights guaranteed under Articles 3(2) and 7(1)(a) and (c) of the Charter, the Court has decided to invoke its powers under Article 27(2) of the Protocol.

17. The Court finds that the situation raised in the present Application is of extreme gravity and represents a risk of irreparable harm to the rights of the Applicant as protected by Articles 3(2) and 7(1)(a) and (c) of the Charter, if the death sentence were to be carried out.

18. Consequently, the Court holds that the circumstances require an Order for provisional measures, in accordance with Article 27(2) of the Protocol and Rule 51 of its Rules, to preserve the *status quo*, pending the determination of the main Application.

19. For the avoidance of doubt, this Order shall not in any way prejudice any findings the Court shall make regarding its jurisdiction, the admissibility and the merits of the Application.

For these reasons,

20. The Court, unanimously, orders the Respondent to:

- a) refrain from executing the death penalty against the Applicant.
- b) report to the Court within sixty (60) days from the date of notice of this Order on the measures taken to implement the Order.

Chrizant John v Tanzania (2016) 1 AfCLR 702

Chrizant John v The United Republic of Tanzania

Order (provisional measures), 18 November 2016. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSÉ, BEN ACHOUR, BOSSA, MATUSSE, MENGUE and MUKAMULISA

The Applicant alleged violation of fair trial rights in proceedings that led to the imposition of the death penalty. The Court held that provisional measures were necessary to avoid irreparable harm despite the moratorium adopted by the Respondent State and the fact that no execution had been carried out in a long time.

Provisional measures (death penalty, 16-18)

I. Subject of the Application

1. The Court received, on 1 September 2016, an Application from Chrizant John (hereinafter referred to as “the Applicant”), instituting proceedings against the United Republic of Tanzania (hereinafter referred to as “the Respondent”), for alleged violations of human rights.

2. The Applicant, who is currently detained at Butimba Central Prison, was sentenced to death by the High Court of Tanzania at Bukoba on 26 June 2015. That death sentence was confirmed by the Court of Appeal, which is the highest Court in Tanzania, on 23 February 2016.

3. The Applicant alleges, *inter alia*, that:

- a) The trial Court and the Court of Appeal erred in law and in fact when they relied on Exhibit 1 and Exhibit 2, which is a postmortem report of the deceased and a sketch map of the crime scene as evidence to convict him.
- b) The High Court and the Court of Appeal erred when they failed to consider the inconsistencies and contradictions in the testimonies of the prosecution witnesses and visual identification evidence of Veronica John (PW1), thereby resulting in a miscarriage of justice and a violation of his rights.
- c) Both Courts erred in law and in fact when they discarded the evidence of the Applicant and did not give any reason as to why they reached this decision.
- d) Being subjected to the death penalty violates his right to life which is enshrined in the Universal Declaration of Human Rights as well as Articles 13 and 14 of the Constitution of Tanzania.

II. Procedure before the Court

4. The Application was received at the Registry of the Court on 1 September 2016.

5. Pursuant to Rule 35 of the Rules of Court, on 26 September 2016, the Registry served the Application on the Respondent.

III. Jurisdiction

6. In dealing with an Application, the Court has to ascertain that it has jurisdiction on the merits of the case under Articles 3 and 5 of the Protocol.

7. However, in ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction.¹

8. Article 3(1) of the Protocol provides that “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”.

9. The Respondent ratified the Charter on 9 March 1984 and the Protocol on 10 February 2006, and is party to both instruments; it equally deposited, on 29 March 2010, a declaration accepting the competence of the Court to receive cases from individuals and Non-Governmental Organisations, within the meaning of Article 34(6) of the Protocol, read together with Article 5(3) of the Protocol.

10. The alleged violations the Applicant is complaining about are guaranteed under Articles 3(2), 4 and 7(1)(c) of the Charter, and the Court therefore has jurisdiction *ratione materiae* over the Application.

11. In light of the foregoing, the Court has satisfied itself that, *prima facie*, it has jurisdiction to deal with the Application.

IV. On the Provisional Measures

12. The Applicant did not request the Court to order Provisional Measures.

13. Under Article 27(2) of the Protocol and Rule 51(1) of the Rules, the Court is empowered to order provisional measures *proprio motu* “in cases of extreme gravity and when necessary to avoid irreparable harm to persons” and “which it deems necessary to adopt in the interest of the parties or of justice”.

1 See Application 002/2013 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures dated 15 March 2013) and Application 006/2012 *African Commission on Human and Peoples' Rights v Kenya* (Order for Provisional Measures dated 15 March 2013); Application 004/2011 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures dated 25 March 2011).

14. It is for the Court to decide in each situation if, in the light of the particular circumstances, it should make use of the power provided for by the aforementioned provisions.

15. The Applicant is on death row and it appears from this Application that there exists a situation of extreme gravity, as well as a risk of irreparable harm to the Applicant.

16. Given the particular circumstances of the case, where the risk of execution of the death penalty will jeopardize the enjoyment of the rights guaranteed under Articles 3(2), 4 and 7(1)(c) of the Charter, the Court has decided to invoke its powers under Article 27(2) of the Protocol.

17. The Court finds that the situation raised in the present Application is of extreme gravity and represents a risk of irreparable harm to the rights of the Applicant as protected by Articles 3(2), 4 and 7(1)(c) of the Charter, if the death sentence were to be carried out.

18. Consequently, the Court holds that the circumstances require an Order for provisional measures, in accordance with Article 27(2) of the Protocol and Rule 51 of its Rules, to preserve the *status quo*, pending the determination of the main Application.

19. For the avoidance of doubt, this Order shall not in any way prejudice any findings the Court shall make regarding its jurisdiction, the admissibility and the merits of the Application.

For these reasons,

20. The Court, unanimously, orders the Respondent to:

a) refrain from executing the death penalty against the Applicant pending the determination of the Application.

b) report to the Court within sixty (60) days from the date of receipt of this Order, on the measures taken to implement the Order.

Crospery Gabriel and Ernest Mutakyawa v Tanzania (2016) 1 AfCLR 705

Crospery Gabriel and Ernest Mutakyawa v The United Republic of Tanzania

Order (provisional measures), 18 November 2016. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSÉ, BEN ACHOUR, BOSSA, MATUSSE, MENGUE and MUKAMULISA

The Applicant alleged violation of fair trial rights in proceedings that led to the imposition of the death penalty. The Court held that provisional measures were necessary to avoid irreparable harm despite the moratorium adopted by the Respondent State and the fact that no execution had been carried out in a long time.

Provisional measures (death penalty, 16-18)

I. Subject of the Application

1. The Court received, on 1 September 2016, an Application from Crospery Gabriel and Ernest Mutakyawa (hereinafter referred to as “the Applicants”), instituting proceedings against the United Republic of Tanzania (hereinafter referred to as “the Respondent”), for alleged violations of human rights.

2. The Applicants, who are currently detained at Butimba Central Prison, were sentenced to death by the High Court of Tanzania at Bukoba on 3 July 2014. That death sentence was confirmed by the Court of Appeal, which is the highest Court in Tanzania, on 20 February 2015.

3. The Applicants allege, *inter alia*, that:

- a) The Trial Court and the Court of Appeal did not take into consideration the Applicants’ evidence and neither did the Courts give reasons for this.
- b) Both Courts were in contravention of Section 240 of the Criminal Procedure Act, Cap 20 Revised Edition 2002, as the postmortem of the deceased was improperly admitted as evidence.
- c) The High Court and the Court of Appeal erred when they convicted the Applicants based on inconsistent and contradictory testimonies of Abdallah Twaha (PW3) and Safina Twaha (PW4) who were witnesses whose credibility was in question.
- d) The Prosecution failed to prove its case beyond reasonable doubt.
- e) The sentence they have been subjected to violates their right to life which is enshrined in the Universal Declaration of Human Rights, as well as Articles 13(6)(d) and 14 of the Constitution of Tanzania.

II. Procedure before the Court

4. The Application was received at the Registry of the Court on 1 September 2016.

5. Pursuant to Rule 35 of the Rules of Court, by a notice dated 15 November 2016, the Registry served the Application on the Respondent.

III. Jurisdiction

6. In dealing with an Application, the Court has to ascertain that it has jurisdiction on the merits of the case under Articles 3 and 5 of the Protocol.

7. However, in ordering Provisional Measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction.¹

8. Article 3(1) of the Protocol provides that “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”.

9. The Respondent ratified the Charter on 9 March 1984 and the Protocol on 10 February 2006, and is party to both instruments; it equally deposited, on 29 March 2010, a declaration accepting the competence of the Court to receive cases from individuals and Non-Governmental Organisations, within the meaning of Article 34(6) of the Protocol read together with Article 5(3) of the Protocol.

10. The alleged violations the Applicants are complaining about are guaranteed under Articles 3(2), 4 and 7(1)(c) of the Charter, and the Court therefore has jurisdiction *ratione materiae* over the Application.

11. In light of the foregoing, the Court has satisfied itself that, *prima facie*, it has jurisdiction to deal with the Application.

IV. On the Provisional Measures

12. In their Application, the Applicants did not request the Court to order Provisional Measures.

13. Under Article 27(2) of the Protocol and Rule 51(1) of the Rules, the Court is empowered to order provisional measures *proprio motu* “in cases of extreme gravity and when necessary to avoid irreparable harm to persons” and “which it deems necessary to adopt in the interest of the parties or of justice”.

¹ See Application 002/2013 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures dated 15 March 2013) and Application 006/2012 *African Commission on Human and Peoples' Rights v Kenya* (Order for Provisional Measures dated 15 March 2013); Application 004/2011 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures dated 25 March 2011).

14. It is for the Court to decide in each situation if, in the light of the particular circumstances, it should make use of the power provided for by the aforementioned provisions.

15. The Applicants are on death row and it appears from this Application that there exists a situation of extreme gravity, as well as a risk of irreparable harm to the Applicants.

16. Given the particular circumstances of the case, where the risk of execution of the death penalty will jeopardise the enjoyment of the rights guaranteed under Articles 3(2), 4 and 7(1)(c) of the Charter, the Court has decided to invoke its powers under Article 27(2) of the Protocol.

17. The Court finds that the situation raised in the present Application is of extreme gravity and represents a risk of irreparable harm to the rights of the Applicants as protected by Articles 3(2), 4 and 7(1)(c) of the Charter, if the death sentence were to be carried out.

18. Consequently, the Court holds that the circumstances require an Order for provisional measures, in accordance with Article 27(2) of the Protocol and Rule 51 of its Rules, to preserve the *status quo*, pending the determination of the main Application.

19. For the avoidance of doubt, this Order shall not in any way prejudice any findings the Court shall make regarding its jurisdiction, the admissibility and the merits of the Application.

For these reasons,

20. The Court, unanimously, orders the Respondent to:

a) refrain from executing the death penalty against the Applicants pending the determination of the Application.

b) report to the Court within sixty (60) days from the date of receipt of this Order, on the measures taken to implement the Order.

Nzigiyimana Zabron v Tanzania (2016) 1 AfCLR 708

Nzigiyimana Zabron v The United Republic of Tanzania

Order (provisional measures), 18 November 2016. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSÉ, BEN ACHOUR, BOSSA, MATUSSE, MENGUE and MUKAMULISA

The Applicant alleged violation of fair trial rights in proceedings that led to the imposition of the death penalty. The Court held that provisional measures were necessary to avoid irreparable harm despite the moratorium adopted by the Respondent State and the fact that no execution had been carried out in a long time.

Provisional measures (death penalty, 16-18)

I. Subject of the Application

1. The Court received, on 1 September 2016, an Application from Nzigiyimana Zabron (hereinafter referred to as “the Applicant”), instituting proceedings against the United Republic of Tanzania (hereinafter referred to as “the Respondent”), for alleged violations of human rights.

2. The Applicant, who is currently detained at Butimba Central Prison, was sentenced to death by the High Court of Tanzania at Tabora on 25 June 2012. The death sentence was confirmed by the Court of Appeal, which is the highest Court in Tanzania, on 25 September 2013.

3. The Applicant alleges, *inter alia*, that:

- a) During the trial at the High Court in Tabora his fundamental rights were violated when his evidence was not taken into consideration and reasons for rejection therefore were not given.
- b) His right to a fair trial was violated as he was denied the right to an interpreter and could not understand the language used at the Court.
- c) The Trial Court and the Court of Appeal made an improper and discriminatory evaluation of evidence when it relied on evidence given by Prosecution witnesses who lacked credibility.
- d) The Prosecution did not prove its case beyond reasonable doubt, particularly the doctrine of recent possession with regards to the ownership of a bicycle.

II. Procedure before the Court

4. The Application was received at the Registry of the Court on 1 September 2016.

5. Pursuant to Rule 35 of the Rules of Court, by a notice dated 16 November 2016, the Registry served the Application on the Respondent.

III. Jurisdiction

6. In dealing with an Application, the Court has to ascertain that it has jurisdiction on the merits of the case under Articles 3 and 5 of the Protocol.

7. However, in ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction.¹

8. Article 3(1) of the Protocol provides that “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”.

9. The Respondent ratified the Charter on 9 March 1984 and the Protocol on 10 February 2006, and is party to both instruments; it equally deposited, on 29 March 2010, a declaration accepting the competence of the Court to receive cases from individuals and Non-Governmental Organisations, within the meaning of Article 34(6) of the Protocol read together with Article 5(3) of the Protocol.

10. The alleged violations the Applicant is complaining about are guaranteed under Articles 3(2) and 7(1)(c) of the Charter, and the Court therefore has jurisdiction *ratione materiae* over the Application.

11. In light of the foregoing, the Court has satisfied itself that, *prima facie*, it has jurisdiction to deal with the Application.

IV. On the Provisional Measures

12. In his Application, the Applicant did not request the Court to order Provisional Measures.

13. Under Article 27(2) of the Protocol and Rule 51(1) of the Rules, the Court is empowered to order provisional measures *proprio motu* “in cases of extreme gravity and when necessary to avoid irreparable harm to persons” and “which it deems necessary to adopt in the interest of the parties or of justice”.

14. It is for the Court to decide in each situation if, in the light of the particular circumstances, it should make use of the power provided for by the aforementioned provisions.

¹ See Application 002/2013 *African Commission on Human and Peoples’ Rights v Libya* (Order for Provisional Measures dated 15 March 2013) and Application 006/2012 *African Commission on Human and Peoples’ Rights v Kenya* (Order for Provisional Measures dated 15 March 2013); Application 004/2011 *African Commission on Human and Peoples’ Rights v Libya* (Order for Provisional Measures dated 25 March 2011).

15. The Applicant is on death row and it appears from this Application that there exists a situation of extreme gravity, as well as a risk of irreparable harm to the Applicant.

16. Given the particular circumstances of the case, where the risk of execution of the death penalty will jeopardize the enjoyment of the rights guaranteed under Articles 3(2) and 7(1)(c) of the Charter, the Court has decided to invoke its powers under Article 27(2) of the Protocol.

17. The Court finds that the situation raised in the present Application is of extreme gravity and represents a risk of irreparable harm to the rights of the Applicant as protected by Articles 3(2) and 7(1)(c) of the Charter, if the death sentence were to be carried out.

18. Consequently, the Court holds that the circumstances require an Order for provisional measures, in accordance with Article 27(2) of the Protocol and Rule 51 of its Rules, to preserve the *status quo*, pending the determination of the main Application.

19. For the avoidance of doubt, this Order shall not in any way prejudice any findings the Court shall make regarding its jurisdiction, the admissibility and the merits of the Application.

For these reasons,

20. The Court, unanimously, orders the Respondent to:

a) refrain from executing the death penalty against the Applicant pending the determination of the Application.

b) report to the Court within sixty (60) days from the date of receipt of this Order, on the measures taken to implement the Order.

**Martine Christian Msuguri v Tanzania (provisional measures)
(2016) 1 AfCLR 711**

Marthine Christain Msuguri v The United Republic of Tanzania

Order (provisional measures), 18 November 2016. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSÉ, BEN ACHOUR, BOSSA, MATUSSE, MENGUE and MUKAMULISA

The Applicant alleged violation of fair trial rights in proceedings that led to the imposition of the death penalty. The Court held that provisional measures were necessary to avoid irreparable harm despite the moratorium adopted by the Respondent State and the fact that no execution had been carried out in a long time.

Provisional measures (death penalty, 17-19)

I. Subject of the Application

1. The Court received, on 9 September 2016, an Application from Marthine Christian Msuguri (hereinafter referred to as “the Applicant”), instituting proceedings against the United Republic of Tanzania (hereinafter referred to as “the Respondent”), for alleged violations of human rights.

2. The Applicant, who is currently detained at Butimba Central Prison, was sentenced to death by the High Court of Tanzania at Bukoba on 30 July 2010. That death sentence was confirmed by the Court of Appeal, which is the highest Court in Tanzania, on 11 March 2013.

3. The Applicant states that, dissatisfied with the Court of Appeal decision, he filed Application No.7 of 2013 to the Court of Appeal to review its decision. Since then his Application for review has not been considered.

4. The Applicant alleges, *inter alia*, that:

- a) The delay and failure of the Court of Appeal of Tanzania in considering his Application for Review contravenes Article 13(6) of the Constitution of Tanzania and other relevant laws, hence violates his right to a fair trial.
- b) Both Courts erred in law and in fact when they dispensed with the defense of insanity due to intoxication, this being in contravention of Section 14(2) of the Penal Code, CAP16.

II. Procedure before the Court

5. The Application was received at the Registry of the Court on 9 September 2016.

6. Pursuant to Rule 35 of the Rules of Court, on 16 November 2016, the Registry served the Application on the Respondent.

III. Jurisdiction

7. In dealing with an Application, the Court has to ascertain that it has jurisdiction on the merits of the case under Articles 3 and 5 of the Protocol.

8. However, in ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction.¹

9. Article 3(1) of the Protocol provides that “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”.

10. The Respondent ratified the Charter on 9 March 1984 and the Protocol on 10 February 2006, and is party to both instruments; it equally deposited, on 29 March 2010, a declaration accepting the competence of the Court to receive cases from individuals and Non-Governmental Organisations, within the meaning of Article 34(6) of the Protocol read together with Article 5(3) of the Protocol.

11. The alleged violations the Applicant is complaining about are guaranteed under Articles 3(2) and 7(1)(a) and (c) of the Charter, and the Court therefore has jurisdiction *ratione materiae* over the Application.

12. In light of the foregoing, the Court has satisfied itself that, *prima facie*, it has jurisdiction to deal with the Application.

IV. On the Provisional Measures

13. In his Application, the Applicant did not request the Court to order Provisional Measures.

14. Under Article 27(2) of the Protocol and Rule 51(1) of the Rules, the Court is empowered to order provisional measures *proprio motu* “in cases of extreme gravity and when necessary to avoid irreparable harm to persons” and “which it deems necessary to adopt in the interest of the parties or of justice”.

15. It is for the Court to decide in each situation if, in the light of the particular circumstances, it should make use of the power provided for by the aforementioned provisions.

1 See Application 002/2013 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures dated 15 March 2013) and Application 006/2012 *African Commission on Human and Peoples' Rights v Kenya* (Order for Provisional Measures dated 15 March 2013); Application 004/2011 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures dated 25 March 2011).

16. The Applicant is on death row and it appears from this Application that there exists a situation of extreme gravity, as well as a risk of irreparable harm to the Applicant.

17. Given the particular circumstances of the case, where the risk of execution of the death penalty will jeopardise the enjoyment of the rights guaranteed under Articles 3(2) and 7(1)(a) and (c) of the Charter, the Court has decided to invoke its powers under Article 27(2) of the Protocol.

18. The Court finds that the situation raised in the present Application is of extreme gravity and represents a risk of irreparable harm to the rights of the Applicant as protected by Articles 3(2) and 7(1)(a) and (c) of the Charter, if the death sentence were to be carried out.

19. Consequently, the Court holds that the circumstances require an Order for provisional measures, in accordance with Article 27(2) of the Protocol and Rule 51 of its Rules, to preserve the *status quo*, pending the determination of the main Application.

20. For the avoidance of doubt, this Order shall not in any way prejudice any findings the Court shall make regarding its jurisdiction, the admissibility and the merits of the Application.

For these reasons,

21. The Court, unanimously, orders the Respondent to:

a) refrain from executing the death penalty against the Applicant pending the determination of the Application.

b) report to the Court within sixty (60) days from the date of receipt of this Order, on the measures taken to implement the Order.

Gozbert Henerico v Tanzania (provisional measures) (2016) 1 AfCLR 714

Gozbert Henerico v The United Republic of Tanzania

Order (provisional measures), 18 November 2016. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSÉ, BEN ACHOUR, BOSSA, MATUSSE, MENGUE and MUKAMULISA

The Applicant alleged violation of fair trial rights in proceedings that led to the imposition of the death penalty. The Court held that provisional measures were necessary to avoid irreparable harm despite the moratorium adopted by the Respondent State and the fact that no execution had been carried out in a long time.

Provisional measures (death penalty, 16-18)

I. Subject of the Application

1. The Court received, on 15 September 2016, an Application from Gozbert Henerico (hereinafter referred to as “the Applicant”), instituting proceedings against the United Republic of Tanzania (hereinafter referred to as “the Respondent”), for alleged violation of human rights.

2. The Applicant, who is currently detained at Butimba Central Prison, was sentenced to death by the High Court of Tanzania at Bukoba on 22 April 2015. That death sentence was confirmed by the Court of Appeal, which is the highest Court in Tanzania, on 26 February 2016.

3. The Applicant alleges, *inter alia*, that:

- a) The High Court and the Court of Appeal erred in law and in fact to convict him on the charge of murder and sentence him to death by hanging despite the prosecution not having proved the case beyond reasonable doubt.
- b) Both Courts erred in law and in fact to convict him based on the evidence of voice and visual identification of PW1, PW2, PW3, PW4, and PW5 whose evidence was unreliable.
- c) Both Courts erred in law and in fact when they failed to corroborate the evidence of PW4 and PW5.
- d) The expunged evidence of exhibit P.4 was the only evidence that could have convicted him.
- e) Both Courts erred in law and in fact when they convicted him based on inconsistent and contradictory testimonies of Theonestina Grasian (PW1) and A/INSP Christopher Kapera (PW7) who were witnesses whose credibility was in question.
- f) The High Court and the Court of Appeal violated his right to a fair trial.

- g) Both Courts erred in law when they sentenced him to capital punishment which violates the right to life as enshrined in the Universal Declaration for Human Rights, and Article 13(6)(d), 14 of the Constitution of Tanzania.
- h) The High Court and Court of Appeal are in violation of Articles 1, 3, 5, 6, 7 (1) and 9(1) of the African Charter.

II. Procedure before the Court

4. The Application was received at the Registry of the Court on 15 September 2016.

5. Pursuant to Rule 35 of the Rules of Court, by a notice dated 15 November 2016, the Registry served the Application on the Respondent.

III. Jurisdiction

6. In dealing with an Application, the Court has to ascertain that it has jurisdiction on the merits of the case under Articles 3 and 5 of the Protocol.

7. However, in ordering Provisional Measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction.¹

8. Article 3(1) of the Protocol provides that “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”.

9. The Respondent ratified the Charter on 9 March 1984 and the Protocol on 10 February 2006, and is party to both instruments; it equally deposited, on 29 March 2010, a declaration accepting the competence of the Court to receive cases from individuals and Non-Governmental Organisations, within the meaning of Article 34(6) of the Protocol read together with Article 5(3) of the Protocol.

10. The alleged violations the Applicant is complaining about are guaranteed under Articles 3(2), 4 and 7(1) of the Charter, and the Court therefore has jurisdiction *ratione materiae* over the Application.

11. In light of the foregoing, the Court has satisfied itself that, *prima facie*, it has jurisdiction to deal with the Application.

IV. On the Provisional Measures

12. In his Application, the Applicant did not request the Court to order Provisional Measures.

¹ See Application 002/2013 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures dated 15 March 2013) and Application 006/2012 *African Commission on Human and Peoples' Rights v Kenya* (Order for Provisional Measures dated 15 March 2013); Application 004/2011 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures dated 25 March 2011).

13. Under Article 27(2) of the Protocol and Rule 51(1) of the Rules, the Court is empowered to order provisional measures *proprio motu* “in cases of extreme gravity and when necessary to avoid irreparable harm to persons” and “which it deems necessary to adopt in the interest of the parties or of justice”.

14. It is for the Court to decide in each situation if, in the light of the particular circumstances, it should make use of the power provided for by the aforementioned provisions.

15. The Applicant is on death row and it appears from this Application that there exists a situation of extreme gravity, as well as a risk of irreparable harm to the Applicant.

16. Given the particular circumstances of the case, where the risk of execution of the death penalty will jeopardise the enjoyment of the rights guaranteed under Articles 3(2), 4 and 7(1) of the Charter, the Court has decided to invoke its powers under Article 27(2) of the Protocol.

17. The Court finds that the situation raised in the present Application is of extreme gravity and represents a risk of irreparable harm to the rights of the Applicant as protected by Articles 3(2), 4 and 7(1) of the Charter, if the death sentence was to be carried out.

18. Consequently, the Court holds that the circumstances require an Order for provisional measures, in accordance with Article 27(2) of the Protocol and Rule 51 of its Rules, to preserve the *status quo*, pending the determination of the main Application.

19. For the avoidance of doubt, this Order shall not in any way prejudice any findings the Court shall make regarding its jurisdiction, the admissibility and the merits of the Application.

For these reasons,

20. The Court, unanimously, orders the Respondent to:

- a) refrain from executing the death penalty against the Applicant pending the determination of the Application.
- b) report to the Court within sixty (60) days from the date of receipt of this Order, on the measures taken to implement the Order.

Mulokozi Anatory v Tanzania (provisional measures) (2016) 1 AfCLR 717

Mulokozi Anatory v The United Republic of Tanzania

Order (provisional measures), 18 November 2016. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSSE, BEN ACHOUR, BOSSA, MATUSSE, MENGUE and MUKAMULISA

The Applicant alleged violation of fair trial rights in proceedings that led to the imposition of the death penalty. The Court held that provisional measures were necessary to avoid irreparable harm despite the moratorium adopted by the Respondent State and the fact that no execution had been carried out in a long time.

Provisional measures (death penalty, 16-18)

I. Subject of the Application

1. The Court received, on 15 September 2016, an Application from Mulokozi Anatory (hereinafter referred to as “the Applicant”), instituting proceedings against the United Republic of Tanzania (hereinafter referred to as “the Respondent”), for alleged violation of human rights.
2. The Applicant, who is currently detained at Butimba Central Prison, was sentenced to death by the High Court of Tanzania at Bukoba on 6 March 2014. That death sentence was confirmed by the Court of Appeal, which is the highest Court in Tanzania, on 23 February 2015.
3. The Applicant alleges, *inter alia*, that:
 - a) The caution statement as evidence which the prosecution relied on was weak since it was taken when he was in hospital receiving treatment, placing him in a position not to be a free agent to give such a caution statement.
 - b) The High Court and the Court of Appeal erred in law when they disregarded his defense of *alibi*.
 - c) The High Court and the Court of Appeal violated his rights to a fair trial.
 - d) The Prosecution failed to prove its case beyond reasonable doubt.

II. Procedure before the Court

4. The Application was received at the Registry of the Court on 15 September 2016.

5. Pursuant to Rule 35 of the Rules of Court, by a notice dated 15 November 2016 2016, the Registry served the Application on the Respondent.

III. Jurisdiction

6. In dealing with an Application, the Court has to ascertain that it has jurisdiction on the merits of the case under Articles 3 and 5 of the Protocol.

7. However, in ordering Provisional Measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction.¹

8. Article 3(1) of the Protocol provides that “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”.

9. The Respondent ratified the Charter on 9 March 1984 and the Protocol on 10 February 2006, and is party to both instruments; it equally deposited, on 29 March 2010, a declaration accepting the competence of the Court to receive cases from individuals and Non-Governmental Organisations, within the meaning of Article 34(6) of the Protocol read together with Article 5(3) of the Protocol.

10. The alleged violations the Applicant is complaining about are guaranteed under Article 7(1) of the Charter, and the Court therefore has jurisdiction *ratione materiae* over the Application.

11. In light of the foregoing, the Court has satisfied itself that, *prima facie*, it has jurisdiction to deal with the Application.

IV. On the Applicant’s Request for Provisional Measures

12. In his Application, the Applicant requested the Court to order Provisional Measures.

13. Under Article 27(2) of the Protocol and Rule 51(1) of the Rules, the Court is empowered to order provisional measures “in cases of extreme gravity and when necessary to avoid irreparable harm to persons” and “which it deems necessary to adopt in the interest of the parties or of justice”.

14. It is for the Court to decide in each situation if, in the light of the particular circumstances, it should make use of the power provided for by the aforementioned provisions.

1 See Application 002/2013 *African Commission on Human and Peoples’ Rights v Libya* (Order for Provisional Measures dated 15 March 2013) and Application 006/2012 *African Commission on Human and Peoples’ Rights v Kenya* (Order for Provisional Measures dated 15 March 2013); Application 004/2011 *African Commission on Human and Peoples’ Rights v Libya* (Order for Provisional Measures dated 25 March 2011).

15. The Applicant is on death row and it appears from this Application that there exists a situation of extreme gravity, as well as a risk of irreparable harm to the Applicant.

16. Given the particular circumstances of the case, where the risk of execution of the death penalty will jeopardise the enjoyment of the rights guaranteed under Article 7(1) of the Charter, the Court has decided to invoke its powers under Article 27(2) of the Protocol.

17. The Court finds that the situation raised in the present Application is of extreme gravity and represents a risk of irreparable harm to the rights of the Applicant as protected by Article 7(1) of the Charter, if the death sentence was to be carried out.

18. Consequently, the Court holds that the circumstances require an Order for provisional measures, in accordance with Article 27(2) of the Protocol and Rule 51 of its Rules, to preserve the *status quo*, pending the determination of the main Application.

19. For the avoidance of doubt, this Order shall not in any way prejudice any findings the Court shall make regarding its jurisdiction, the admissibility and the merits of the Application.

For these reasons,

20. The Court, unanimously, orders the Respondent to:

a) refrain from executing the death penalty against the Applicant pending the determination of the Application.

b) report to the Court within sixty (60) days from the date of receipt of this Order, on the measures taken to implement the Order.

Request for Advisory Opinion by Libya (striking out) (2012) 1 AfCLR 720

Request for advisory opinion by advocate Marcel Ceccaldi on behalf of the Great Socialist People's Libyan Arab Jamahiriya

Order, 30 March 2012. Done in English and French, the French text being authoritative.

Judges: NIYUNGEKO, AKUFFO, NGOEPE, GUINDO, OUGUERGOUZ, RAMADHANI, TAMBALA, THOMPSON and ORE

The author did not provide evidence that he represented Libya and the request was therefore removed from the list of cases.

Procedure (evidence of representation, 5, 6)

1. By a letter dated 22 August 2011 and received at the Registry of the Court on 23 August 2011, Advocate Marcel Ceccaldi, requested for an advisory opinion from the Court, on behalf of The Great Socialist People's Libyan Arab Jamahiriya.

2. At its 22nd Ordinary Session held from 12 to 23 September, 2011 in Arusha, the Court instructed the Registrar to ask the author of the Request to show proof that he was acting on behalf of Libya.

3. By letter of 17 October, 2011, the Registrar of the Court requested the author to produce the proof within thirty (30) days of receipt of the letter.

4. As at the time of this Order, the author had not responded to the Registrar's letter inviting him to produce proof that he represents Libya.

5. The attitude of the author of the request for advisory opinion shows either his inability to produce the proof, or his unwillingness to pursue the matter further;

6. For these reasons,

THE COURT,

Unanimously

Orders that the request be removed from the general list of the Court.

Request for advisory opinion by Socio-economic Rights & Accountability Project (2013) 1 AfCLR 721

Request for advisory opinion by Socio-economic Rights & Accountability Project

Order, 15 March 2013. Done in English and French, the English text being authoritative.

Judges: AKUFFO, OUGUERGOUZ, NGOEPE, NIYUNGEKO, RAMADHANI, TAMBALA, THOMPSON, ORE, GUISSSE, KIOKO and ABA

Request for advisory opinion from the Court on whether extreme poverty in Nigeria violates the African Charter. Struck out because of loss of contact with NGO which requested the advisory opinion.

Admissibility (Application struck out for lack of interest by Applicant, 10)

1. By a letter dated 1 March, 2012 and received at the Registry of the Court on the same day, the Socio-Economic Rights & Accountability Project (SERAP), requested the Court for an advisory opinion.
2. In its request, SERAP requested the court to give its opinion on “the legal and human rights consequences arising from the systematic and widespread extreme poverty in Nigeria”, and whether it “breaches certain provisions of the African Charter, in particular, Article 2 which prohibits discrimination, including on ‘any other status’, and whether systematic and widespread extreme poverty can be accommodated by the phrase ‘any other status’”.
3. By letter dated 9 March, 2012, the Registry acknowledged receipt of the request, and invited SERAP to forward to the Registry, the judicial authorities in support of its request. These were received at the registry on 1 June 2012.
4. By letter dated 2 May, 2012, the Registry enquired from the African Commission on Human and Peoples’ Rights (the Commission) whether or not the subject matter of the request is related to any matter pending before the Commission.
5. By letter of 7 June, 2012, the Commission informed the registry that the subject matter of the request is not related to any matter before it.
6. At its 26th ordinary session held from 17 to 28 September, 2012, the Court examined the request and decided that the request does not comply with the requirements of the Rules of the Court.
7. By letter dated 24 September, 2012, and received by SERAP on 4 October, 2012, the Registry communicated the decision of the Court to SERAP, that the request does not comply with the requirements under the Rules of Court, in particular, Rule 68(2).

8. At its 27th ordinary session held from 26 November to 7 December, 2012, the Court examined the matter once more and decided that it had not dismissed the same and that it remained seized of the same.

9. By letter dated 15 February, 2013, the Registry sent a letter to SERAP reminding the latter of its letter dated 24 September, 2012.

10. As at the date of this order SERAP had not responded to either the registry's letter of 24 September 2012 or to the reminder of 15 February, 2013.

Now therefore, the court having determined that

(i) The request by SERAP does not comply with Rule 68(2) of the Rules of Court;

(ii) SERAP has not responded to the court's letters and has demonstrated a lack of interest in pursuing the request.

Unanimously,

Orders that the request for advisory opinion herein be and the same is hereby struck out for the reason that SERAP lacks interest in pursuing the same.

Request for advisory opinion by the Pan African Lawyers' Union and Southern African Litigation Center (2013) 1 AfCLR 723

Request for advisory opinion by the Pan African Lawyers' Union and Southern African Litigation Center

Order, 15 March 2013. Done in English and French, the English text being authoritative.

Judges: AKUFFO, OUGUERGOUZ, NIYUNGEKO, NGOEPE, RAMADHANI, TAMBALA, THOMPSON, ORE, GUISSÉ, KIOKO and ABA

In this case, dealing with the suspension of the SADC Tribunal, the Court declined jurisdiction as the matter was pending before the African Commission on Human and Peoples' Rights.

Jurisdiction (advisory opinion, matter pending before African Commission on Human and Peoples' Rights, 8)

1. By letter dated 23 November 2012 and received at the Registry of the Court on the same day, the Pan African Lawyers' Union and the Southern African Litigation Center (hereinafter referred to as the Authors'), requested the Court for an advisory opinion.

2. In their request, the Authors requested the Court to give its opinion on: "(a) whether the decision of the Southern African Development Community (SADC) Summit of Heads of State to suspend the Tribunal and terminate the term of office of duly elected Judges is consistent with the African Charter on Human and Peoples' Rights (the Charter), the Protocol on the relations between the AU and RECs, the Treaty Establishing the African Economic Community, the SADC Treaty, the SADC Protocol and general principles on the rule of law; (b) whether the decision violates institutional independence of the SADC Tribunal and the personal independence of its Judges as provided for under Article 26 of the African Charter, the UN Principles on the Independence of the Judiciary and Value 1 of the Bangalore Principles of Judicial Conduct 2002, (c) whether the decision violates the right to access to justice and effective remedies for SADC citizens as guaranteed under Articles 3 and 7 of the African Charter, Articles 18 and 19 of the Tribunal Protocol and UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; and (d) whether the decision-making process undertaken in the review of the SADC Tribunal jurisdiction are in compliance with Article 23 of the SADC Treaty".

3. By letter dated 23 November 2012, the Registry acknowledged receipt of the request.

4. By email sent on 5 December 2012, the Registry inquired from the African Commission on Human and Peoples' Rights (hereinafter referred to as the Commission) whether the subject matter of the Request was related to any matter pending before the Commission. On the same day, the Commission confirmed that there was a matter pending before it "dealing with the suspension of the SADC Tribunal".

5. By letter dated 10 January 2013, the Registry transmitted the letter of the Commission to the Authors and drew their attention to Rule 68(3) of the Rules of Court which provides that "the subject matter of the request for advisory opinion shall not relate to an Application pending before the Commission".

6. As at the date of this Order the Authors have not responded or otherwise reacted to the Registry's letter of 10 January 2013, transmitting the letter of the Commission to them.

7. Now Therefore:

The Court finds that the request by the Pan African Lawyers' Union and the Southern African Litigation Center relates to a matter pending before the Commission. The Court also notes that the said Authors have not responded to its notification transmitting the letter of the Commission on the matter. The Court notes that under Article 4(1) of the Protocol and Rule 68(3) of the Rules of Court, the subject matter of a request for advisory opinion shall not relate to a matter being examined by the Commission.

THE COURT, unanimously:

Orders that the Request for Advisory Opinion, made by the Authors, be and the same is hereby declined as it relates to a matter pending before the African Commission on Human and Peoples' Rights.

Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child (2014) 1 AfCLR 725

Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights

Advisory Opinion, 5 December 2014, incorporating corrigendum of the same day.

Judges: RAMADHANI, THOMPSON, NIYUNGEKO, TAMBALA, ORE, GUISSÉ, KIOKO and BEN ACHOUR

The Court held that the African Committee on the Rights and Welfare of the Child had jurisdiction to submit a request for an advisory opinion but did not have jurisdiction to submit contentious cases to the Court as it was not included on the list of entities entitled to submit such cases under the Court Protocol.

Jurisdiction (personal jurisdiction to request advisory opinion to be considered along with substance, 37; African Children's Rights Committee is an AU organ and entitled to request an advisory opinion, 55-57; entities which may submit contentious cases to the Court, Children's Committee not included, 69; Children's Committee not an intergovernmental organization, 73, 74)

Interpretation (ordinary meaning, 61; purposive approach cannot override plain and ordinary meaning of the text, 98)

I. Nature of the request

1. The African Committee of Experts on the Rights & Welfare of the Child (hereinafter the "Committee") seized the African Court on Human and Peoples' Rights (hereinafter referred to as the "Court") with a Request for Advisory Opinion under Article 4 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 68 of the Rules of Court (hereinafter referred to as the "Rules").

2. The Committee submits that it is established under Article 32 of the African Charter on the Rights and Welfare of the Child (hereinafter referred to as the "Children's Charter"), within the African Union, to *inter alia*, promote and protect the rights enshrined in the Children's Charter, formulate and lay down rules and principles aimed at protecting the rights and welfare of children in Africa and, interpret provisions of the

Children's Charter.¹ The Committee further submits that it has been bestowed with quasi-judicial powers to receive communications and investigate any matter prescribed by the Children's Charter.² The Committee adds that the mandate of the Court will complement that of the Committee and thus, ensure effective protection of the rights and welfare of the child in Africa.³

3. On the substance of the request, the Committee submits that on the proper interpretation of Article 4(1) of the Court Protocol and Rule 68(1) of the Rules, the Court has jurisdiction to provide an advisory opinion upon the request of the African Union or any of its organs representing it in specific matters, such as the Committee.⁴

4. The Committee has also sought right of access before the Court in contentious matters pursuant to Article 5(1)(e) of the Court Protocol and Rule 33(1)(e) of the Rules and mainly based its request on the contention that the mandate of the Court will complement that of the Committee and thus, ensure effective protection of the rights and welfare of the child in Africa.⁵

5. With regard to the Applicable law, the Committee relies on certain provisions of the Protocol, namely, the fifth preambular paragraph as well as Article 3, which provides for the contentious jurisdiction of the Court. In addition, the Committee cites Article 5(1)(e) of the Protocol as well as Rule 33(1)(e) of the Rules, which provides for access to the Court by African Intergovernmental Organisations. With regard to advisory jurisdiction of the Court, the Committee cites Article 4 of the Protocol, which provides for the advisory jurisdiction of the Court; and; Rule 68(1), which sets out the entities that are entitled to bring a request for an advisory opinion before the Court.

6. To buttress its request, the Committee refers to Article 4(1) of the Children's Charter, which provides for the best interests of the child to be the primary consideration in all actions undertaken; Article 32, which establishes the Committee; and Article 42, which outlines the mandate of the Committee. The Committee also relies on Article 31(1) of the Vienna Convention on the Law of Treaties (hereinafter the "Vienna Convention"), which provides for the general rule of interpretation of treaties.

7. The Committee also cites three authorities in support of its request, namely:

- I. The International Court of Justice (hereinafter referred to as the "ICJ") in Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the United Nations; ICJ Reports (1950) 8.
- II. The Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (On behalf of children of Nubian

1 DSA/ACE/64/1697, 13, at para 1.

2 *Ibid.*

3 *Ibid.*, at para 2.

4 *Ibid.*, at para 3.

5 *Ibid.*, at para 2.

descent in Kenya)/the Government of Kenya decided upon by the Committee;⁶

- III. *ZH Tanzania v Secretary of State for the Home Department*, 2011 UK SC 4.

II. Issues for determination

8. Based on the above, the Committee submits to the Court the following issues for determination:

- a. Whether the Committee has standing to request an advisory opinion under Article 4(1) of the Protocol;
- b. Whether the Committee, as an 'African Intergovernmental Organization', is included within the meaning of Article 5(1)(e) of the Protocol;
- c. Whether Article 5(1)(e) should be interpreted in line with the mandates of the African Court and the Committee; and
- d. Whether the standing of the Committee before the Court under Article 5(1)(e) of the Protocol is in line with the object and purpose of this Protocol.

III. Procedure

9. The request dated 11 November 2013, was received at the Registry of the Court on 25 November 2013. The Registry acknowledged receipt by letter dated 26 November 2013.

10. During its 31st Ordinary Session, held between 25 November and 6 December 2013, the Court decided to transmit the request by the Committee to Member States of the African Union, the African Commission on Human and Peoples' Rights (hereinafter the "African Commission"), and other interested entities, pursuant to Rule 69 of the Rules and that, in accordance with Rule 70, they should be given a deadline of 90 days within which to submit their observations, if any.

11. In the instant Request, the court identified the interested entities as the following:

- Economic, Social and Cultural Council (ECOSSOC);
- African Union Commission on International Law (AUCIL);
- African Union Commission (AUC);
- African Commission on Human and Peoples' Rights (ACHPR);
- African Institute of International Law (AIIL);
- African Committee of Experts on the Rights of the Child;
- Gender & Women Development Directorate;
- Pan African Parliament;
- Citizens and Diaspora Organizations Directorate (CIDO).

12. By letter dated 2 January 2014, the Registry transmitted the same to all African Union Member States, requesting interested parties to submit their written submissions within 90 days of receipt of the letter.

6 Communication No Com/002/2009 (2011).

13. By email dated 30 January 2014, the Office of the Legal Counsel (OLC) advised that the request had not been attached to the Registry's letter dated 2 February 2014

14. By email of the same date, Registry forwarded the request and thereafter the OLC acknowledged receipt.

15. By letter dated 19 February 2014, the Republic of Kenya submitted its observations on the questions raised in the request.

16. During its 32nd Session, held from 10 to 28 March 2014, the Court decided to extend the time within which Member States could make observations on the subject of the request to 30 April 2014. Similarly, the Court decided to invite the specified African Union organs and institutions to make observations on the Request by the same time limit.

17. By letter dated 18 March 2014, the Registry requested the African Commission (the African Commission) to confirm whether or not the subject of the Request related to a matter pending before the African Commission, and by letter dated 19 March 2014, the African Commission confirmed that the subject matter of the Request was not related to any matter before it.

18. By letters and Notes verbal dated 26 March 2014, the Registry communicated the decision of the Court to the Members States and entities concerned.

19. By letter dated 7 April 2014, the African Commission sought an extension of time to 31 May 2014 to make its observations on the Request. By letter dated 15 April 2014, the Registry advised the African Commission that its request for extension of time had been granted.

20. By email dated 30 April 2014, Burkina-Faso requested more time to submit its opinion.

21. By its letter dated 16 May, the Registry informed Burkina-Faso that the Court had granted its request for extension of time and that it has to file the observations by 31 May 2014.

22. During the 33rd Session held from 26 May to 23 June 2014, the Court decided to grant a new deadline to all Member States and concerned entities until 30 June 2014, for them to submit their comments and observations on the Request. On 2 June 2014, the Registry notified all member States accordingly.

23. The Republic of Senegal submitted its observations on the Request by letter dated 5 May 2014.

24. By letter dated 29 May 2014, the African Commission submitted its observations on the Request, which was received at the Registry on 2 June 2014. The Registry acknowledged receipt on 3 June.

25. On 2 June 2014, the Registry received the submission of the Republic of Gabon dated 06 May 2014 and the Registry acknowledged receipt on 4th June.

IV. Observations received from States and other entities

26. Following the request for comments and observations, the Court

received responses from the Republic of Kenya,⁷ the Republic of Senegal,⁸ the Republic of Gabon,⁹ and the African Commission on Human and Peoples' Rights.¹⁰ The AU Commission did not submit any observations.

27. The Republic of Kenya proffered its affirmative opinion,¹¹ on all the questions raised by the Committee in its Request as set out in paragraph 8 above.

28. In this regard, the Republic of Kenya submits that: -

- 'in accordance with Article 4(1) of the Protocol, the Committee has standing to request for an opinion and the Court has jurisdiction to provide the opinion on a legal matter related to the Charter.
- The African Committee is an Intergovernmental Organization within the meaning of Article 5(1)(e) of the Protocol and is therefore entitled to submit cases to the Court.
- The Committee should be given access to the Court for cases concerning serious violations of children's rights in line with the object and purpose of the Court Protocol which is to strengthen the African Human Rights system'.

29. The Republic of Senegal expressed the view that "in accordance with Article 32 of the Children's Charter, the Committee is an organization recognized by the African Union and its request for Advisory Opinion is allowed under Article 4(1)¹²that the Committee's request is in accordance with Rule 68(1) of the Rules as it relates to an issue that is purely legal". For the Republic of Senegal, "The African Committee of Experts on the Rights and Welfare of the Child is indeed founded in seizing the African Court on any matter within the Court's jurisdiction; The African Committee of Experts on the Rights and Welfare of the Child is an inter-governmental organization; The Court should comply with the powers of interpretation conferred on it under Article 3 of the Protocol setting up the African Court on Human and Peoples' Rights; Referrals to the African Court on Human and Peoples by the African Committee on Experts on the Rights and Welfare of the Child are indeed consistent with the aims and objectives of the Protocol.

30. For the Republic of Gabon,

"After considering all the provisions referred to, in support of the request made by the Committee, the general principles governing contentious, jurisdictional and quasi jurisdictional procedure in the field of human rights, notably, the relevant African instruments in this area, the jurisdiction of the Court and that the Committee, the Ministry is of the view that the Committee is on the one hand, entitled to request for an advisory opinion from AfCHPR, such as the one currently under consideration", and that,

7 MFA, AU16/38.

8 No 02927/MJ/DDH/MMS.

9 No 001703/MAEFIR/SG/DGAJI/DATI/DTM.

10 Ref: AfCHPR/Reg./ADV./002/2013/018.

11 MF

12 No 02927/MJ/DDH/MMS, at p 2.

“the Committee is, on the other hand, entitled to seek redress for any alleged cases of violation of the rights of the Child.”

31. The African Commission submitted a comprehensive response to all the issues raised in the request for an Advisory Opinion. It expressed the view that the Committee could be considered as an African Organization within the meaning of Article 4(1) of the Protocol but not as an organ. Furthermore, the African Commission asserted that “the Committee should not be considered as an intergovernmental organization within the meaning of Article 5(1) of the protocol”. Nevertheless, the African Commission left all these issues to the appreciation of the Court.

32. As far as it is concerned, the African Commission concluded by asserting that the Committee was entitled to request for an Advisory Opinion as an “African Organization”, but not as an organ of the Union, within the meaning of Article 4(1) of the Protocol.¹³ With regard to Article 5(1) of the Protocol,¹⁴ the African Commission also asserted that the Committee should not be considered as “an intergovernmental organization”. Nevertheless, the African Commission left all these issues to the appreciation of the Court.

V. The Jurisdiction of the Court

33. Pursuant to the provisions of Article 4(1) of the Protocol, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.

34. Rule 68(1) of the Rules provides that

“Requests for Advisory opinion pursuant to Article 4 of the Protocol may be filed with the Court by a Member State, by the African Union, by any organ of the African, Union or by an African organization recognised by the African Union. The request shall be on legal matters and shall state with precision the specific questions on which the opinion of the Court is being sought.”

In addition, sub-paragraph 2 requires that

“any request for advisory opinion shall specify the provisions of the Charter or of any other international human rights instrument in respect of which the advisory opinion is being sought, the circumstances giving rise to the request as well as the names and addresses of the representatives of the entities making the request.”

35. In the instant Request, the authors have requested for an interpretation of the Protocol in order to determine whether the Committee is entitled to request for an advisory opinion and to submit cases to the Court under Articles 4 and 5 of the Protocol.

36. In view of the nature of the Request, and given the fact that one of the issues to be determined is precisely related to the personal

¹³ Ref: AfCHPR/Reg/ADV/002/2013/018, at p 3, para 3.1, p 13, at para 3, 30.

¹⁴ *Ibid*, at pp 4 to 9, paras 3.5, 3.8 to 3.18; p 11, para 3.23; pp 14 to 18, paras 3.34, 3.35 and 3.37 to 3.42.

jurisdiction of the Court, namely, whether the Committee is one of the entities envisaged under Article 4(2) of the Protocol and Rule 68(2) of the Rules, the Court does not have to consider it at this stage since it will be considered along with the substance.

37. With regard to material jurisdiction, the Court is required to consider whether the request is on legal matters relating to human rights and is satisfied that indeed that is the case.

38. The Court is of the view that given the nature of the Request, which does not involve determination of facts, there is no need to consider *jurisdiction ratione temporis* and *jurisdiction ratione loci*.

39. By virtue of Article 4(1) of the Protocol, the Court “may provide” an opinion and, therefore, has discretion on whether or not to provide an Advisory Opinion on the request submitted to it. Having considered this matter, the Court finds no compelling reason not to provide an opinion.

40. Although the Court has focused on jurisdiction in this section, it cannot lose sight of the fact that there are also other matters relating to contents of the request that must be considered.

41. Pursuant to the provisions of Article 4(2) of the Protocol and Rule 68(2) of the Rules, and as indicated above, the Court is required to determine, in terms of the contents of the Request the following additional conditions, which can be deciphered from these two provisions, namely, whether:

- i. The Request states with precision the specific questions on which the opinion of the Court is being sought;
- ii. The Request specifies the provisions of the Charter or of any other international human rights instrument in respect of which the advisory opinion is being sought;
- iii. The Request specifies the circumstances giving rise to the Request;
- iv. The request specifies the names and addresses of the representatives of the entities making the request.

42. Having considered the request in the light of the above conditions, the Court is of the view that all the conditions above have been satisfied.

VI. Admissibility

43. Before considering a request for Advisory Opinion, the Court is required to apply Rule 68(3) of the Rules relating to admissibility, which provides as follows: “the subject matter of the request for advisory opinion shall not relate to an Application pending before the African Commission”. The Court is of the view that given the nature of this request, there cannot be another similar matter pending before the African Commission. In any case, by letter of 19 March 2014, the Commission itself confirmed that the matter was not pending before it.

44. The Court will now proceed to consider the substance of the Request.

VII. Substance of the Request

A. 'Whether the Committee has a standing to request an advisory opinion under Article 4(1) of the Protocol'

45. On the first issue relating to a request for an advisory opinion, the Committee submits that it is one of the bodies entitled to request for an advisory opinion under Article 4(1) of the Protocol, and that it has locus standi before the Court as an organ established, recognised and operating within the framework of the AU.

46. The Committee further submits that the interpretation of a treaty in its ordinary meaning is an important element of international law. With regard to this, it cites the ICJ Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the United Nations in which the ICJ held that:

"[T]he first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context that is the end of the matter."¹⁵

47. The Committee goes on to refer to Article 32 of the Children's Charter, which provides that "An African Committee on the Rights and Welfare of the Child" shall be established within the Organization of African Unity to promote and protect the rights of children.

48. The Committee asserts that in its ordinary and natural meaning and within the context of the said Charter, the provisions of the Article clearly show that the Committee is an organ of the AU, established within the framework of the Union and that, this position, is cemented by the 2002 Resolution of the AU Assembly, which directed that the Children's Committee "shall henceforth operate within the framework of the African Union".¹⁶

49. The Committee therefore submits that as an organ of the AU, it has the locus standi to bring a request for an advisory opinion before the Court as provided under Article 4(1) of the Court Protocol, acting within the framework of the AU.

VIII. Observations submitted by States and other entities

50. As already indicated above, the Member States that responded to the Request, namely, Kenya, Senegal and Gabon, all of them supported the request by the Committee in all its aspects.

51. On its part, the Commission argued that the Committee was entitled to request for an Advisory Opinion as an "African Organization", but not as an organ of the Union, within the meaning of Article 4(1) of the Protocol.

¹⁵ ICJ Reports (1950) 8.

¹⁶ AU Docs ASS/AU/Dec. 1 (i) xi.

A. Consideration of the issue by the Court

52. Article 4(1) of the Protocol establishing the Court reads as follows:

“At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the African Commission.”

53. In the view of the Court, the provisions of Article 4(1) of the Protocol implies the need for the Court to determine whether the Committee is an organ of the Union or an African organization recognised by the AU.

54. The Court notes that in 2002, by decision AU/Ass/Dec.1(i)(xi), adopted at its First Ordinary Session, the Assembly of the Union decided that the Committee would henceforth operate within the framework of the Union. This decision should be taken into consideration when examining the specific mandate of the Committee and its nature, the actual practice of the Committee’s operations, its status and relationship with the policy organs of the AU. The Court further observes that the Children’s Charter, which has created the Committee, has been adopted under the aegis of the Pan African organization, the then OAU. It should be noted that all the States that submitted observations on the Request, expressed the view that the Committee is an organ of the Union.

55. The Court is mindful that the Committee is a specialised body of the AU in the area of child rights and has all the attributes of an organ of the Union in terms of reporting, its quasi-judicial nature, its budgeting processes, as well as the manner in which it reports to the policy organs. In this regard, the Court notes that the Committee is always treated in the same manner as other AU Organs and is listed in the Agendas of the Executive Council and the Assembly of the Union, which are formally adopted by those organs, among “organs of the Union” for purposes of submission and consideration of proposed budgets and annual reports. Decisions of the Policy organs on the annual reports of the Committee also appear next to those of the other organs, which are listed under Article 5 of the Constitutive Act.

56. Taking all these factors into account, the Court is satisfied that even though there has not been any formal decision of the Union to the effect that the Committee shall be an organ of the Union, the policy organs of the AU have treated the Committee as an organ of the Union. It would appear that the Assembly of the Union has interpreted and implemented its 2002 decision as assimilating the Committee as an organ of the Union.

57. The Court is therefore satisfied that the Committee is an organ of the Union; and in view of this finding, it logically follows, that the Committee has locus standi to request for an advisory opinion from the Court pursuant to Article 4(1) of the Protocol in its capacity as an organ of the Union.

B. “Whether the Committee, as an ‘African Intergovernmental Organization’, is included within the meaning of Article 5(1)(e) of the Protocol”

58. The Court will now consider the second aspect of the request, relating to access by the Committee to the Court under Article 5(1)(e) of the Court Protocol to submit cases in contentious matters.

59. The Court is of the view that this second aspect of the request by the Committee rests entirely on whether the Committee is an African intergovernmental organization within the meaning of sub paragraph (e) of Article 5(1) of the Protocol, which provides as follows:

The following entities are entitled to submit cases to the Court:

The Commission;

The State Party which has lodged a complaint to the Commission;

The State Party against which the complaint has been lodged at the Commission;

The State Party whose citizen is a victim of human rights violation;

African Intergovernmental Organizations.

60. According to the Committee, in determining the meaning of “African intergovernmental organisation”, recourse should be made to Article 31(1) of the Vienna Convention, which stipulates that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

61. The Committee also asserts that in determining the ordinary meaning of a treaty provision, the Court may resort to the use of dictionaries, as the African Commission has done in the past.¹⁷ The Committee also relies on the definition of “African” in the Oxford dictionary as “relating to Africa or connected to Africa”,¹⁸ and underlines that the Committee forms part of the monitoring body of the African human rights system within the African Union and thus qualifies as “African”. In its view, this is further supported by the “African nature” of the Committee in that 41 African States have ratified the Children’s Charter, which is its founding instrument.¹⁹ The Committee submits that these elements and others are sufficient to qualify it as “African”.

¹⁷ See *Interights et al (on behalf of Mariette Sorijaleen Bosch) v Botswana* 240/01 (2003); *Michael Majuru v Zimbabwe* 308/05 (2008); *Ilesanmi v Nigeria* 268/03 (2005); *Anuak Justice Council v Ethiopia* 299/05 (2006); and *Zimbabwe Layers for Human Rights & Associated Newspaper of Zimbabwe v Zimbabwe* 284/03 (2009) amongst other where the African Commission used the *Black’s Law Dictionary*, the *Oxford Advanced Dictionary* and the *Longman Synonym Dictionary* as interpretative tools.

¹⁸ *Concise Oxford Dictionary*, 10th edition, 1989.

¹⁹ <http://www.achrp.ordinstruments/childi> (accessed 29 March 2013).

62. With regard to the concept of “intergovernmental organization”, the Committee submits that it has the attributes of such an organization as defined by Pevehouse,²⁰ namely:

“(1) is a formal entity, (2) has (three or more) ‘sovereign’ states as members, and (3) possesses a permanent secretariat or other indication of institutionalisation such as headquarters and/or permanent staff.”

63. According to the Committee, the first component of this definition requires that intergovernmental organisations must be formed by an internationally recognised treaty,²¹ which the Committee fits, because it is established by an internationally recognized treaty: the Children’s Charter, ratified by 41 African Union Member States.

64. The Committee submits that it manifestly meets the second requirement, as it has more than two member states in that it is composed of eleven members from eleven different countries and has a permanent secretariat based in Ethiopia.

65. From the forgoing argument, the Committee submits that it qualifies as an African intergovernmental organization, entitled to submit cases to the Court.²²

66. In its observations on the Request, the Republic of Kenya argued, as indicated above, that the Committee should be given access to the Court for cases concerning serious violations of children’s rights in line with the object and purpose of the Court Protocol which is to strengthen the African human rights system. For its part, Senegal submitted that the Committee is an intergovernmental organization. On the other hand, Gabon asserted that the “the Committee is... entitled to seek redress for any alleged cases of violation of the rights of the Child”.

67. According to the Commission, the plain and ordinary meaning of the term “intergovernmental organization” is an entity created by treaty, involving two or more “international governmental organisation”, or “as between or among governments”. It added that the term “intergovernmental” is thus definitive of entities whose membership is exclusively or primarily for States and that such organizations would also ordinarily have State representatives directing the affairs of the organization.

68. The Court notes that Article 5(1) of the Protocol sets out a list of the entities that have right of access to the Court for purposes of submitting “cases”, to the Court. Notably, not all entities entitled to request the Court for an opinion are also entitled to bring cases to the Court. Thus, for example, whereas the AU organs are entitled to request for an advisory opinion under Article 4(1), they are not entitled to submit cases under Article 5 of the Court Protocol; only the African Commission is specifically mentioned among the entities that can bring cases under Article 5 of the Protocol.

20 Pevehouse *et al Intergovernmental organisations* 1815-2000 (2003) 2.

21 As above.

22 Scholarly support for this position includes F Viljoen *International Human Rights Law in Africa* (2012) 434.

69. The Court notes further that the Committee is not listed under Article 5(1) of the Protocol, even though the Children’s Charter had already been adopted when the Protocol was being adopted in 1998.²³ Although the Charter came into force in 1999, a year after adoption of the Court Protocol, the Committee is taken to have been established by its founding instrument of 1990,²⁴ and therefore could have been included along with the African commission among the entities with direct access to the Court under Article 5(1).

70. Having not been listed under Article 5(1) of the Court Protocol, the only avenue open for the Committee to submit cases to the Court is if it is determined by the Court to be an intergovernmental organization within the meaning of subparagraph 5(1)(e). Thus, this question turns on the meaning of “African Intergovernmental Organisation” as used in Article 5(1)(e) of the Protocol. As noted above, the Committee is an “organ of the Union and therefore is “African”. The only word that remains to be interpreted is whether it is an “intergovernmental organization.

71. The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations adopted at Vienna on 21 March 1986, does not define the term “intergovernmental” nor does it set out the attributes or characteristics of an intergovernmental organization. Nevertheless, it defines the term “international organization” as meaning an “intergovernmental organization”.²⁵

72. According to the *Encyclopedia of Public International Law*, an Intergovernmental Organization is defined as an “association of States established by and based upon a treaty, which pursues common aims and which has its own special organs to fulfil particular functions within the organization.”²⁶

73. Pursuant to the provisions of Articles 32 and 33 of the Children’s Charter, the Committee is composed of eleven expert members, nominated and elected by States as individuals, and who after their election serve in their personal capacity. Thus, the members of the Committee cannot be described as representatives of states, which seems to the Court to be an important element in determining whether an entity is an “intergovernmental” body or not. Indisputably, States have no representatives directing the affairs of the Committee. In any event, even if it was so composed, that would still not make it be considered as an intergovernmental organisation.

74. The Committee would have to be expressly added to the list of entities entitled to bring cases under Article 5 of the Protocol, or be

23 The Children’s Charter was adopted on 11 July 1990, while the Protocol was adopted on 9 June 1998. 24 Protocol, Art 5(1)(a).

24 Protocol, Art 5(1)(a).

25 Article 2(1)(l).

26 This definition implies that the IGO establishes other organs or institutions to ensure the realization of its objectives. For example the AU has established several institutions/organs, including the Committee to ensure the objectives of the Union are realized.

determined to be an intergovernmental organisation in order to bring cases to the Court under that Article in its current form. Thus, even though the Children's Charter under which it is established has States as "parties", the Committee as a body or organisation is not "intergovernmental" in the sense that it is not composed of government representatives. In addition, the Court is of the view that an organ cannot at the same time be an international organisation as the former would ordinarily be part of an organization whilst the latter legally stands on its own. Accordingly, the Committee cannot bring cases to the Court alleging violations of human or children's rights under Article 5(1)(e) of the Protocol in the capacity of an "intergovernmental organisation".²⁷

75. In the Court's view, however, it is in the interests of protection of rights on the continent that the Committee's mandate should be reinforced just as the African Commission's protective mandate is enhanced under the complementary relationship with the Court. Indeed, there does not appear to be a conceivable reason why the Committee was not included among the organs that can bring cases before the Court under Article 5(1) of the Protocol, in order to give it the same reinforcement that the African Commission has under the complementary relationship with the Court. It should be noted that this apparent omission was subsequently addressed and included in Article 30(c) of the Protocol on the Statute of the African Court of Justice and Human Rights adopted in 2008 by the Assembly of the Union at Sharm el Sheikh, which grants the Committee direct access to the Court.

76. The Court notes that the mandate of the Committee and the African Commission under their respective constituent treaties are broadly similar, except that the former specialises in children's rights and welfare. Nevertheless, the Court finds that its hands are tied by the protocol and therefore cannot grant the Committee standing to access the Court that has not been accorded to it under the constituent instrument and the Protocol.

77. Considering that the third and fourth limb of the request of the Committee are interrelated in that they rest on the contention that the best tool for construction of a legal instrument is purposive interpretation, the Court will deal with the two limbs together, namely:

- c) 'Whether Article 5(1)(e) should be interpreted in line with the mandates of the African Court and the Committee;
- d) 'Whether the standing of the Committee before the Court under Article 5(1)(e) of the Protocol is in line with the object and purpose of the Court Protocol'.

78. Pursuant to Article 3 of the Court Protocol, the jurisdiction of the Court extends 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".

27 M Hansungule 'African courts and the African Commission on Human and Peoples' Rights', 251. Available at <http://www.kas.de/upload/auslandshomepagesinantibia/Human Rights in Africa/8 Hansungule.pdf> (accessed on 28 March 2013).

79. According to the Committee, the Children's Charter as an instrument adopted within the African human rights system falls under the provision of "any other relevant human rights instrument ratified by the States concerned," and therefore falls within the jurisdiction of the Court. It argues that by extension, as the Committee is the primary monitoring body of the Children's Charter under which the Court has jurisdiction, it would defeat the purpose of the Protocol to exclude it from having a standing before the Court. Further, the Committee urges that in order to exercise its mandate effectively, it should be given access to the Court for cases concerning serious violations of children's rights.

80. The Committee also draws the Court's attention to Article 42 of the Children's Charter, which empowers it to promote and protect the rights enshrined in the Children's Charter, thus establishing the protective mandate of the Committee and enabling it to assume a quasi-judicial role by, *inter alia*, considering individual communications. It expresses the view that the Court's mandate is to reinforce the protective mandate of the African Commission and by extension the African human rights framework as a whole, which includes the Committee.

81. Making reference to the rationale for the creation of the Court as stipulated in the Preamble of the Court Protocol, as to enhance the efficiency of the African Commission, the Committee recalls that it has been facing the same major challenges that the African Commission's protective mandate has encountered over the years,²⁸ namely, non-compliance because of non-binding findings, absence of effective remedies, institutional weaknesses and lack of human and financial resources.²⁹ It thus argues that the Court can play a complementary and reinforcing role with regard to adjudication, both in relation to the African Commission and the Committee,³⁰ and as a remedy to the shortcomings of these bodies.³¹

82. In light of these considerations, the Committee concludes that an overarching goal of the Protocol establishing the Court is to create an institutional framework for complementarity between the Court, the African Commission and the Committee,³² and that, in line with the respective mandates, the Committee should have standing before the

28 M Hansungule, "African courts and the African Commission on Human and Peoples' Rights", 251 available at http://www.kas.de/upload/auslandshomepagesinantibla/Human_Rights_in_Africa/8_Hansungule.pdf (accessed on 28 March 2013).

29 F Viljoen (n 14 above), 416 African Union. Information note of the first meeting of African Court of Human and Peoples' Rights available at www.africanunion.org/background_document_on_the_african_court (accessed on 4 April 2013).

30 ST Ebobrah, "Towards a positive Application of complementarity in the African Human Rights System: Issues of functions and relations" (2011) 22 *The European Journal of International Law* 672; DM Chirwa "The merits and demerits of the African Charter on the Rights and Welfare of the Child" (2002) 10 *The International Journal on Children's Rights* 170.

31 Ebobrah (n 15 above) 672.

32 D Juma 'Access to the African Court on Human and Peoples' Rights: A Case of the Poacher turned gamekeeper', http://papers.ssrn.com/so13/papers.cfm?abstract_id=1391482 (accessed 6 March 2013).

African Court, as a quasi-judicial body making non-binding recommendations.

83. According to the Commission's view,

"Article 5 of the Protocol aims to do nothing more than prescribe who may approach the Court. In particular, Article 5(1)(e) of the Court's Protocol aims to grant 'African intergovernmental organisations' access to the Court. There may be many entities which if allowed to approach the Court it would enhance or further the broader objects and purpose of protection of human and peoples' rights. However the broader objects and purpose of protecting human and peoples' rights does not define who is granted access to the Court. Rather which entities are eventually granted access to the Court is prescribed under the relevant law. In this regard Article 5 of the Court's Protocol prescribes who may access the Court. The Committee is neither listed under Article 5(1)(a)-(d), nor in the Commission's view an 'African intergovernmental organisation' as under Article 5(1)(e) thereof".

84. In support of the second limb (d) of the request, the Committee argues that with respect to the interpretation of treaties, the ICJ in the *Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the United Nations*,³³ held the view that treaties should be interpreted in accordance with their object and purpose. According to the Committee, this position is further strengthened by Article 31 of the Vienna Convention, which provides specifically that treaties are to be interpreted in the light of their objects and purpose, adding that one of the overriding objectives of the Protocol, as reflected in its Preamble, is the promotion and protection of human rights in Africa.³⁴

85. The Committee goes on to refer to Article 4(1) of the Children's Charter which underlines that in all actions undertaken concerning the child, the best interests of the child shall be the primary consideration, as well as the United Nations Committee on the Rights of the Child in the General Comment No 5 (2003)³⁵ to the following effect:

"Courts of law [...] every legislative, administrative and judicial body or Institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions."

86. The Committee also suggests that the Court also consider the Committee's own decision in *The Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (On behalf of children of Nubian descent in Kenya) /the Government of Kenya*,³⁶ in which it held that the best interests of the child, should in some instances, trump technical requirements that could hinder accessibility to courts of justice for children. This is because it is not in the best interests of [children] to leave them in a legal limbo.³⁷ The Committee also refers to the Supreme Court of England, which held in

33 ICJ Reports (1950) 8.

34 Paras 3 and 7 of the Protocol to the African Court.

35 General measures of implementation of the Convention on the Rights of the Child 9arts. 4, 42 and 44, para. 6).

36 *Supra* No 8 above.

37 See paragraph 29 of the above communication.

the case of *ZH Tanzania v Secretary of State for the Home Department*,³⁸ that “where the best interests of the child clearly favour a certain course, that course should be followed”

87. The Committee invites the Court to be persuaded by the reasoning above and to arrive at the most favourable ruling to the best interests of the child and to include the Committee as one of the bodies having standing before the Court, thus promoting and protecting the rights and welfare of the child. The Committee believes that this interpretation supports the objective of the Court Protocol to supplement existing quasi-judicial human rights protective mechanisms such as the Committee.³⁹

88. The Committee submits that the object and purpose of human rights treaties and the requirement of effectiveness suggest that treaties should be broadly construed in order to arrive at an alternative that is most favourable to the protection of the rights enshrined in the treaty.⁴⁰ Further, a teleological interpretation of Article 5 of the Protocol should therefore be construed to give the widest possible access to the Court. This interpretation fulfils the primary *raison d'être* of international human rights law, in general, and the African Human Rights Court specifically, which is to protect and promote human rights.⁴¹ It adds that a holistic interpretation in line with the object and purpose of the Court Protocol is also supportive of efforts to internationalise human rights and develop the regional human rights system as a complementary layer.⁴²

89. According to the Committee, Article 5(1)(e) of the Court Protocol should therefore be interpreted holistically to include it as having standing before the Court. It submits that the intention to grant it standing before the Court is demonstrated by Article 30(c) of the Protocol on the Statute of the African Court of Justice and Human Rights adopted on 1 July 2008, which grants the Committee direct access to the Court. There is, therefore, the need to interpret the provisions of this Protocol in the spirit of this evolving context.

90. The Committee submits that a purposive reading of Article 5(1)(e) of the Court Protocol in line with Article 4(1) of the Children's Charter leads to the conclusion that the Committee qualifies to submit cases to the African Court. This approach, the Committee adds, would mirror the object and purpose of the Court Protocol, which is to strengthen the African human rights system.⁴³

91. Making its observations on this limb of the Request, the Commission observes, first, that the framing of this question by the

38 2011 UK SC 4.

39 F Viljoen (n 13 above) 407.

40 M Killander “Interpreting regional Human Rights Treaties” file:///C:/Users/OWNER/Desktop/clinicals/getArtigo13.phphtm (accessed 9 March 2013).

41 D Juma ‘Access to the African Court on Human and Peoples’ Rights: A Case of the Poacher turned gamekeeper’ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1391482 (accessed 9 March 2013).

42 Juma (n 26 above).

43 Viljoen (n 13 above) 407.

Committee “presupposes that the Committee is ‘an African Intergovernmental Organisation’.” It goes on to argue that “whereas the Committee is an African organisation, the Commission opines that it is not an ‘intergovernmental’ one”. The Commission goes on to assert that “even though the Committee it is an African treaty organisation, it is not an ‘intergovernmental’ organisation”.⁴⁴ It is as suggested above simply an autonomous specialised treaty body similar to the Commission which had to be expressly mentioned because it is equally not an “intergovernmental” organisation,

92. The Court accepts that the purposive theory or presumption is one of the tools, if not the most important, of interpreting or construing a legal instrument in order to determine whether a statute applies to a particular circumstance, and if yes, what are the consequences. The Court is also aware that there has been a global movement towards the use of the purposive approach over the other approaches which suggested that one start with the literal meaning, then go on to the golden approach (still according to the plain meaning, but with a slight modification to avoid the absurdity), and if a sensible result is still not reached, then it would use the purposive approach - interpret according to what interpretation would best achieve the purpose of the act.⁴⁵

93. The Court would like to recall, at the outset, that while the Committee has not been mentioned among institutions that can bring cases to the Court under Article 5(1) of the Protocol, it has been specifically authorised to do so in the subsequent 2008 Protocol on the merger of the current Court with the Court of Justice of the African Union to create the African Court of Justice and Human Rights.

94. The Court notes that this action by the policy organs confirms firstly, the view of the Court that it is highly desirable that the Committee should have access to the Court, and; secondly, that the initial omission of the Committee in the Court Protocol may very well have been attributable to unintended consequences.

95. The Court is persuaded that the arguments that the best interests of the child should be paramount are well founded. It is also persuaded, as the Committee held, in the Nubian Children case referred to earlier, that the best interest of the child, should in some instances, trump technical requirements that could hinder accessibility to courts of justice for children.

96. In the view of the Court, these are well-founded arguments but pertaining largely to specific and substantive matters before the Court relating to the rights of the child. Indeed, this has been the approach of

44 For example, the ASEAN Intergovernmental Commission on Human Rights (AICHR) provided for under Art 14 of the Charter of the Association of South-East Asian Nations (ASEAN Charter). AICHR is, as, the name indicates an “intergovernmental organisation. Its composition (membership) as prescribed under Article 5.1 of the Terms of Reference of the ASEAN Intergovernmental Commission for Human Rights is “member states of ASEAN”.

45 Aharon Barak, *Purposive interpretation in Law*, Princeton University Press, 2005. See also John F Manning ‘Competing Presumptions About Statutory Coherence’ 74 *Fordham Law Review* 2009 (2006). Available at <http://in.lawnet.fordham.edu/fir/v0174/1ss4/15>.

the Court all along in ensuring that all its decisions are based on the overriding objective of promoting access in order to ensure protection of human rights,

97. The Court is conscious that the Children's Charter falls under the provision "any other relevant human rights instrument ratified by the states concerned". It also notes that the Committee is the primary monitoring body of the Children's Charter under which the Court has jurisdiction, and that the Committee having access to the Court would facilitate more effective exercise of its mandate concerning serious violations of children's rights.

98. Nevertheless, the Court is not convinced that the use of the purposive approach can override the clear and unambiguous intention of the legislature, which can be discerned from the plain and ordinary meaning of the text in question. In the instant Request, the Court notes that the meaning of the text is clear and unambiguous on who can access the Court under Article 5 of the Protocol. Indeed, it is a well-known principle of law that where a treaty sets out an exhaustive list, this cannot be interpreted to include an entity that is not listed, even if it has the same attributes.

99. In the instant Request, however, the Court cannot substitute itself and assume the functions of the legislature, where the latter's intention is clear and unequivocal.

100. For these reasons, the Court

Unanimously,

- (1) Finds that it has jurisdiction to give the advisory opinion requested;
- (2) Decides that the Request for an advisory opinion is admissible;
- (3) Replies in the following manner to the questions put by the Committee:
 - i. That the Committee is an organ of the Union and has standing to request for an advisory opinion under Article 4(1) of the Court Protocol;
 - ii. That the Committee is not an 'African Intergovernmental Organization', within the meaning of Article 5(1)(e) of the Court Protocol;
 - iii. The Court is of the view that it is highly desirable that the Committee is given direct access to the Court under Article 5(1) of the Protocol.
- (4) There shall be no order as to costs.

Request for Advisory Opinion by the Coalition for the International Criminal Court, the Legal Defence & Assistance Project (LEDAP), the Civil Resource Development & Documentation Center (CIRDDOC) and the Women Advocates Documentation Center (WARDC) (jurisdiction) (2015) 1 AfCLR 744

Request for Advisory Opinion by the Coalition for the International Criminal Court, the Legal Defence & Assistance Project (LEDAP), the Civil Resource Development & Documentation Center (CIRDDOC) and the Women Advocates Documentation Center (WARDC)

Order, 5 June 2015. Done in English and French, the English text being authoritative.

Judges: RAMADHANI, THOMPSON, NIYUNGEKO, OUGUERGOUZ, TAMBALA, ORE, GUISSÉ, KIOKO, BEN ACHOUR, BOSSA and MATUSSE

Request for advisory opinion on whether obligations arising from AU decisions take precedence over obligations under the Statute of the International Criminal Court. Struck off because of loss of contact with complainant and that the case did not deal with human rights.

Jurisdiction (human rights law, 13)

I. Nature of the Request

1. The Authors of the Request state that they are Non-governmental organizations (NGOs) based and registered in Nigeria and undertake the promotion and protection of human rights and the fight against impunity across Africa, especially in West Africa.

2. The Authors submit that they have justiciable interest in the issues raised in this Request, noting that Nigeria is a State Party to the Rome Statute of the International Criminal Court (ICC) and a member of the African Union (AU), and therefore bound by treaty obligations under the Rome Statute by virtue of Article 86 thereof and the Resolutions of the AU, by virtue of Article 23 of the Constitutive Act of the African Union.

3. The Authors argue that being a coalition and NGOs working to end impunity in Nigeria and across West Africa, and engaging with these governments on ICC as well as on AU issues, they are deeply interested in the questions presented to the Court for Advisory Opinion. The Authors submit that their particular interest in the Request arises from the following:

- i. In engaging with Government officials on ICC and AU issues, as well as broader international justice issues, they need advice on which of the treaty obligations are superior when they conflict. According to the

Authors, there is such a conflict because the AU, by various Resolutions, has demanded that its members should not cooperate with the ICC with respect to the arrest and surrender of President Omar Al-Bashir of Sudan who has been indicted for crimes under the Rome Statute of the ICC, while at the same time the Statute creates treaty obligations on its State parties, such as Nigeria, Ghana and other countries in West Africa, to cooperate with the ICC, especially in the arrest and surrender of any person indicted by the ICC against whom a warrant of arrest has been issued as in the case of President Omar Al-Bashir.

- ii. The Applicants work on projects aimed at tackling impunity in Nigeria and in West Africa, and they rely on the treaty obligations of these countries under the Rome Statute as well as domestic laws, including the African Charter of Human and Peoples' Rights (Ratification and Enforcement) Act of Nigeria, and other international and regional instruments.
- iii. In various summits of Heads of State and Government of the AU, between 2011 and 2013, the Union adopted various resolutions calling on its members not to cooperate with the Office of the Prosecutor of the ICC with respect to the arrest and surrender of President Omar Al Bashir of Sudan.

4. The Authors submit that since 2009 when President Al Bashir was indicted by the ICC and international warrants for his arrest issued and forwarded to the Nigerian government, the said President Al Bashir has entered the territory of Nigeria twice, in 2009 and in 2013. On both occasions, the Nigerian government had obligation under the Rome Statute to arrest and surrender him to the ICC. At the same time, the Nigerian government was faced with various resolutions of the African Union referred to in paragraph 3 above, demanding that it refrained from cooperating with the ICC in that respect. They aver that as civil society organizations working to tackle impunity, including demanding the arrest and surrender of persons indicted by the ICC, they demanded the Nigeria government to arrest and surrender President Al Bashir on both occasions, noting that in his 2013 visit, one of them sought a court order from the domestic court to compel the government to fulfill its treaty obligation in this regard but the case was not heard before President Al Bashir left the territory of Nigeria,

II. Issues for determination by the Court

5. The Authors request the Court to give its opinion on the following issues:

Whether the Treaty obligation of an African state party to the Rome Statute of the ICC to cooperate with the Court is superior to the obligation of that state to comply with AV resolution calling for non-cooperation of its members with the ICC?

If the answer to question (i) above is in the affirmative, whether all African State Parties to the ICC have overriding legal obligation above all other legal or diplomatic obligation arising from resolutions or decisions of the African Union to arrest and surrender President Omar Al Bashir any time he enters into the territory of any of the African State Parties to the ICC?

III. Procedure

6. The Request was received at the Registry of the Court on 28 March 2014.

7. On 8 April 2014, the Registrar wrote to the Executive Secretary of the African Commission on Human and Peoples' Rights seeking confirmation whether the subject matter of the Request was not related to a matter being examined by the Commission.

8. By letter dated 17 April 2014, the Executive Secretary of the African Commission on

Human and Peoples' Rights confirmed that the subject matter of the Request was not related to any matter before the Commission.

9. At its 33rd Ordinary Session, held from 28 May to 13 June, 2014, the Court examined the present Request and noted that it did not comply with the requirements under Rule 68 of the Rules of Court, and instructed the Registrar to notify the Authors accordingly,

10. By letter dated 30 June 2014, the Registrar notified the Authors of the Court's decision, that is, to establish that the said Request meets the requirements under Rule 68 of the Rules of Court, in particular, Rule 68(2) thereof which provides that:

“Any request for advisory opinion shall specify the provisions of the Charter or of any other international human rights instrument in respect of which the advisory opinion is being sought, the circumstances giving rise to the request as well as the names and addresses of the representatives of the entities making the request.”

11. At its 34th Ordinary Session, held from 8 to 19 September, 2014, the Court noted that the Authors had not responded to the Registrar's letter of 30 June 2014.

12. At its 36th Ordinary Session, held from 9 to 27 March 2015, the Court noted that the Authors had still not responded to the Court's letter of 30 June 2014.

13. As of the date of this Order, the Court notes further that the Authors have still not responded to the Registrar's letter of 30 June 2014. Now therefore, having determined that: i The Request, as it stands, does not comply with Rule 68(2) of the Rules of Court, in that it raises issues of general Public International Law and not human rights law, and does not specify any provisions of the Charter; ii. The Authors have not responded to the Registrar's letter of 30 June 2014 and this has demonstrated a lack of interest to pursue the Request.

The Court, Unanimously:

Orders that this Request for Advisory Opinion BE and the same is HEREBY struck out for the reason that the Request does not comply with Rule 68(2) of the Rules of Court.

Request for Advisory Opinion by the Coalition for the International Criminal Court, the Legal Defence & Assistance Project (LEDAP), the Civil Resource Development & Documentation Center (CIRDDOC) and the Women Advocates Documentation Center (WARDC) (2015) 1 AfCLR 746

Request for Advisory Opinion by the Coalition for the International Criminal Court, the Legal Defence & Assistance Project (LEDAP), the Civil Resource Development & Documentation Center (CIRDDOC) and the Women Advocates Documentation Center (WARDC)

Order 29 November 2015. Done in English and French, the English text being authoritative.

Judges: RAMADHANI, NIYUNGEKO, OUGUERGOUZ, TAMBALA, ORÉ, GUISSSE, KIOKO, BEN ACHOUR, BOSSA and MATUSSE

Request for advisory opinion on whether obligations arising from AU decisions take precedence over obligations under the Statute of the International Criminal Court. Rejected because did not deal with human rights.

Jurisdiction (human rights law; request for advisory opinion should specify the provisions of the African Charter on Human and Peoples' Rights on which the request is based, 17-18)

Separate opinion: OUGUERGOUZ

Jurisdiction (only requests for advisory opinion that include all the requirements to determine the jurisdiction of the Court should be considered by it, 7; Court should first consider personal jurisdiction, 24)

I. Nature of the Request

1. The Authors of the Request state that they are Non-governmental organizations (NGOs) based and registered in Nigeria and they undertake the promotion and protection of human rights and the fight against impunity across Africa, especially in West Africa.

2. The Authors submit that they "have justiciable interest in the issues raised in this Request", noting that Nigeria is a State Party to the Rome Statute of the International Criminal Court (ICC) and a member of the African Union (AU), and therefore bound by treaty obligations under the Rome Statute by virtue of Article 86 thereof and the Resolutions of the AU, by virtue of Article 23 of the Constitutive Act of the African Union.

3. The Authors argue that being a coalition of NGOs working to end impunity in Nigeria and across West Africa, "and engaging with these governments on ICC, as well as on AU issues", they are deeply interested in the questions presented to the Court for Advisory Opinion.

The Authors submit that their particular interest in the Request arises from the following:

- i. In engaging with Government officials on ICC and AU issues, as well as broader international justice issues, they need advice on which of the treaty obligations [under the ICC and the AU] are superior when they conflict. According to the Authors,

“there is such a conflict because the AU, by various Resolutions, has demanded that its members should not cooperate with the ICC with respect to the arrest and surrender of President Omar Al-Bashir of Sudan who has been indicted for crimes under the Rome Statute of the ICC, while at the same time the Statute creates treaty obligations on its States parties, such as Nigeria, Ghana and other countries in West Africa, to cooperate with the ICC, especially in the arrest and surrender of any person indicted by the ICC against whom a warrant of arrest has been issued, as in the case of President Omar Al-Bashir.”
- ii. The Authors work on projects aimed at tackling impunity in Nigeria and in West Africa, and they rely on the treaty obligations of these countries under the Rome Statute as well as domestic laws, including the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act of Nigeria, and other international and regional instruments.
- iii. In various summits of Heads of State and Government of the AU, between 2011 and 2013, the Union adopted various resolutions calling on its members not to cooperate with the Office of the Prosecutor of the ICC with respect to the arrest and surrender of President Omar Al-Bashir of Sudan.

4. The Authors submit that since 2009, when President Al-Bashir was indicted by the ICC and international warrants for his arrest were issued and forwarded to the Nigerian Government, the said President Al-Bashir has entered the territory of Nigeria twice, in 2009 and in 2013. On both occasions, the Nigerian Government had obligation under the Rome Statute to arrest and surrender him to the ICC. At the same time, the Nigerian Government was faced with various resolutions of the African Union referred to in paragraph 3 above, demanding that it refrained from cooperating with the ICC in that respect. They aver that as civil society organizations working to tackle impunity, including demanding the arrest and surrender of persons indicted by the ICC, they demanded that the Nigerian Government arrest and surrender President Al-Bashir on both occasions, noting that in his 2013 visit, one of them sought a court order from the domestic court to compel the Government to fulfil its treaty obligation in this regard, but the case was not heard before President Al-Bashir left the territory of Nigeria.

II. Issues for determination by the Court

5. The Authors request the Court to give its opinion on the following issues:

- i. Whether the treaty obligation of an African State Party to the Rome Statute of the ICC to cooperate with the Court is superior to the obligation of that state to comply with AU resolutions calling for non-cooperation of its members with the ICC.
- ii. If the answer to question (i) above is in the affirmative, whether all African States Parties to the ICC have overriding legal obligation above all other legal or diplomatic obligations arising from resolutions

or decisions of the African Union to arrest and surrender President Omar Al-Bashir any time he enters the territory of any of the African States Parties to the ICC.

III. Procedure

6. The Request was received at the Registry of the Court on 28 March 2014.

7. On 8 April 2014, the Registrar wrote to the Executive Secretary of the African Commission on Human and Peoples' Rights (the Commission) seeking confirmation whether the subject matter of the Request was related to a matter being examined by the Commission.

8. By letter dated 17 April 2014, the Executive Secretary of the Commission confirmed that the subject matter of the Request was not related to any matter before the Commission.

9. At its 33rd Ordinary Session held from 28 May to 13 June, 2014, the Court examined the Request and noted that it did not comply with the requirements under Rule 68 of the Rules of Court, and instructed the Registrar to notify the Authors accordingly.

10. By letter dated 30 June 2014, the Registrar notified the Authors of the Court's decision, that is, that the said Request does not meet the requirements under Rule 68 of the Rules of Court, in particular, Rule 68(2).

11. At its 34th Ordinary Session held from 8 to 19 September, 2014, the Court noted that the Authors had not responded to the Registrar's letter of 30 June 2014.

12. At its 36th Ordinary Session held from 9 to 27 March 2015, the Court noted that the Authors had still not responded to the Registrar's letter of 30 June 2014.

13. At its 37th Ordinary Session held from 18 May to 5 June, 2015, the Court, by an Order, struck out the Request on the grounds that it does not satisfy the requirements under Rule 68 of the Rules of Court and for lack of interest on the part of the Authors.

14. By letter of 30 June 2015, the Registrar served the Court Order on the Authors.

15. By email dated 1 July 2015, the Authors transmitted to the Court a document dated 14 November, 2014, by which they claimed they had sent the same to the Registry in response to the Registrar's letter of 30 June, 2014, and requested leave of Court to relist the Request for consideration.

IV. Decision of the Court

16. At its 38th Ordinary Session held from 31 August to 18 September 2015, the Court considered the Authors' request for the matter to be relisted and noted that the Authors did not supply any evidence to show that they had transmitted their response to the Registrar's letter of 30 June, 2014, to justify a relisting.

17. Be that as it may, the Court decided to examine the new request and noted that it still did not comply with the requirements under Rule 68(2) of the Rules of Court, which provides that:

“Any request for advisory opinion shall specify the provisions of the Charter or of any other international human rights instrument in respect of which the advisory opinion is being sought, the circumstances giving rise to the request as well as the names and addresses of the representatives of the entities making the request.”

18. The Court notes in this regard that the Authors have not specified the provisions of the Charter or any other international human rights instrument in respect of which the advisory opinion is being sought. The issues raised by the Authors are rather of general public international law and not of human rights. Indeed, the issues raised have to do with the hierarchy of norms in Public International Law.

Now therefore, having determined that:

The Authors have not supplied any evidence to show that they responded to the Registrar’s letter of 30 June, 2014, and that the new Request does not comply with the requirements under Rule 68 of the Rules of Court;

The Court, by a majority of nine (9) to one (1), Judge Fatsah Ouguergouz dissenting,

Rejects the Authors’ request to relist this Request for Advisory Opinion and Orders that the same be and is hereby struck out.

Dissenting Opinion: OUGUERGOUZ

1. I consider that this request for re-listing in the general list of the Court of the request for advisory opinion N° 001/2014 is “formally” admissible as it stood, and that there was thus no reason to dismiss it. I therefore wish to express my dissenting opinion on the Court’s response to this request, and on the procedure followed in treating it.

I. Procedure followed in the treatment of this request

2. I would recall that this request was received at the Registry on 1 July 2015 and was registered in the Court’s general list under N° 001/2015. This request sought the restoration in the list, of the request for advisory opinion received at the Registry on 28 March 2014, listed under N° 001/2014 and struck off this same general list by an Order of the Court dated 5 June 2015.

3. In this respect, it is my view that the Court should have observed greater procedural orthodoxy in the treatment of the current request (N° 001/2015) as well as of the previous request (N° 001/2014). Two hypotheses could be envisaged in the instant case.

4. Either that this request was not “in due and proper form” because it did not meet the conditions set forth in Rule 68(2) of the Rules of Court, in which case it lies with the Registrar to notify the Authors accordingly

and invite them to comply with the requirements laid down in the Rule. The request should therefore not have been registered in the general list since the aforesaid requirements had not been met, and it is by a letter from the Registrar that the Authors of the request should have been notified.

5. Or that the request was “in due and proper form”, *i.e.*, that it fulfilled the conditions prescribed by Rule 68(2), in which case it should have been registered in the Court’s general list, been transmitted to all the entities mentioned in Rule 69 of the Rules, and gone through a thorough judicial process pursuant to Rules 70 to 73 of the Rules.

6. In my opinion, there is no middle way. If, as the Court observed in its Order, the request “did not comply with the requirements under Rule 68 of the Rules of Court”, the said request should have been given a purely administrative treatment and rejected by a simple letter from the Registrar.

7. I therefore recommend that, in future, only requests for advisory opinion that fulfill the conditions of formal validity set forth in the Protocol and in the Rules of Court should be registered on the general list. Only the requests that contain all the information required to determine the jurisdiction of the Court to entertain them, shall be deemed to fulfill the said conditions.

8. Under Article 4(1) of the Protocol and Rule 68 of the Rules of Court, the advisory jurisdiction of the Court is subject to four conditions: 1) the request for advisory opinion shall emanate from an entity entitled to do so, 2) it shall be on a legal matter, 3) it shall relate to the African Charter or any other international human rights instrument, and 4) its subject matter shall not relate to an Application pending before the African Commission.

II. Response to the request

9. The request for advisory opinion registered in the general list under No 001/2014 was struck off by Order of the Court dated 5 June 2015 on the dual reason that it did not meet the conditions laid down in Rule 68(2) of the Rules and that the Authors had not shown interest in continuing with the procedure.

10. On 1 July 2015, the four concerned Non-Governmental Organizations requested a re-listing of the request on the general list, providing copy of the correspondence that they had addressed to the Court on 15 November 2014 but which clearly never reached the Registry.

11. In the present Order, the Court justified its refusal to re-list the request with two reasons: to wit, that:

“The Authors have not supplied any evidence to show that they responded to the Court’s letter of 30 June, 2014, and that the new Request does not comply with the requirements under Rule 68 of the Rules of Court.”

12. With regard to the first reason, I believe that the Court should have offered the Authors of the request the opportunity to adduce evidence that they have indeed responded to the letter of 30 June 2014. The Court should therefore have instructed the Registry to write to the

Authors of the request asking them, for example, to produce a receipt for dispatch of their response.

13. It is however, in my opinion, the second reason that is more substantial and more probative in the instant case, to wit, that “the new Request does not comply with the requirements under Rule 68 of the Rules of Court”. In this regard, a reading of the first sentence of paragraph 17 of the Order shows that reference is being made more specifically to the conditions laid down in paragraph 2 of Rule 68.

14. In the opinion of the Court, the Authors of the request “have not specified the provisions of the Charter or any other international human rights instrument in respect of which the advisory opinion is being sought” and “the issues raised by the Authors are of general public international law and not of human rights”,¹

the Court then specifies that “the issues raised have to do with the hierarchy of norms in Public International Law”.

15. I do not share the position of my colleagues on these points.

16. With respect to the first point, I would like to underline that both in their new request dated 1 July 2015, and in the request received at the Registry on 28 March 2014, and registered under N° 001/2014, the Authors indicated their reliance in particular on Articles 1, 4, 5, 12, 13 and 86 of the Rome Statute of the International Criminal Court; they also specified the circumstances giving rise to their request.

17. The question was therefore to know whether or not the Rome Statute could be considered “a human rights instrument” under Article 4 of the Protocol; the Court should have clearly pronounced itself on this question.

18. Regarding the second point, i.e. that “the issues raised by the Authors are of general public international law and not of human rights” and “have to do with the hierarchy of norms in Public international Law”, it is an assertion which the Court should have elaborated. For my part, I believe that the fact that the issues raised relate to “general public international law” and “hierarchy of norms in Public international Law”, in particular does not necessarily mean that the said issues are alien to “human rights”.

19. Indeed, the protection of human rights for which the Court is responsible under the Protocol is based on international law and is by definition irrigated by that law. In more general terms, the whole issue of “human rights” is more and more imbued by international law, in terms of subjects, sources, international responsibility and peaceful settlement of disputes. The question of human rights, like any other matter governed by international law, is therefore likely to raise issues relating to the law of treaties in general and the hierarchy of international norms in particular.

20. Should the Court, for example, refrain from entertaining a request for Advisory opinion relating to the African Charter on Human and

¹ These are the very reasons given in the Court’s Order of 5 June 2015 to reject the request for advisory opinion No. 001/2014.

Peoples' Rights, a reference instrument *par excellence* for the Court, on the grounds that such request raises questions of "general public international law" and "hierarchy of international norms" in particular? This question of course calls for a negative response.

21. It is therefore my view that the two main reasons advanced by the Court to dismiss that request (see *supra*, paragraph 14), and the previous request, are insufficient and should have been further elaborated.

22. The four concerned NGOs are as a matter of fact entitled to know for what specific reasons their request failed to meet the requirements set forth in Rule 68 of the Rules.² In addition to the right of the Authors of the request to be informed of the reasons for the dismissal of their request, there is also the question of the pedagogical virtues of the Court's pronouncements and the need for the Court to inform potential authors of requests for advisory opinions of what exactly is expected of them.

23. In any event, the two reasons advanced by the Court (see *supra*, paragraph 14), in particular that "the issues raised by the Authors are of general public international law [hierarchy of international norms] and not of human rights", indeed touch up on the material jurisdiction of the Court. In dismissing the request on this basis, the Court implicitly ruled on its material jurisdiction and this is a question that it should have addressed in the context of the procedure laid down in Rules 69-73 of the Rules. It would have been desirable for the Court to rule on this request by way of an "advisory opinion"³ or at the least by way of a "decision"⁴, rather than a simple Order signed only by the President of the Court.

24. I would observe, in substance, that when seized of a request for advisory opinion, the Court should ensure that it has both the personal and material jurisdiction to deal with the request. It follows, from a reading of the present Order, that the Court is concerned only with its material jurisdiction and, thus, seems to have taken its personal jurisdiction for granted. As the Court did not in this case pronounce itself on the *locus standi* of the four non-governmental organizations seeking an advisory opinion on the basis of Article 4(1) of the Protocol, it does not seem to me appropriate to express my opinion on this issue.

2 See for example the reasons developed by the International Court of Justice and the European Court of Human Rights for declining their jurisdiction to provide the opinion requested: Advisory opinion of ICJ of 8 July 1996 on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* and the decision of the European Court of 2 June 2004 on the *Competence of the Court to give an advisory opinion*.

3 See for example the afore-mentioned advisory opinion of 8 July 1996 on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, by which the International Court of Justice declares that it does not have jurisdiction to give the opinion requested.

4 See for example the afore-mentioned decision of 2 June 2004 on the *Competence of the Court to give an advisory opinion*, by which the European Court declares that it does not have jurisdiction to give the opinion requested.